[2023] AACR 2

(GM v Secretary of State for Work and Pensions (RP)
[2022] UKUT 85 (AAC)

Judge Wikeley
23 March 2022 **UA-2021-001262-RP**

Category B retirement pensions; Entitlement; Indirect discrimination; Pre-2008 Married women; Time limits; Social Security (Claims and Payments) Amendment Regulations 2008

The appellant was born in 1938 and reached the then state pension age for a woman (60) in 1998. She applied for and received her own Category A pension from January 1998. This was paid at a reduced rate as she did not have a full national insurance record. The appellant's husband was born in 1935 and attained the then state pension age for a man (65) in 2000. He claimed and received his Category A pension in August 2000, a little over 18 months after the appellant.

The appellant qualified for receipt of a Category B pension, based on her husband's national insurance record, to top up her Category A pension. She was one of the group of Pre-2008 Married Women and was required to make a claim for the Category B pension, under the Social Security Administration Act 1992 section1(1), to obtain that additional pension. She did not make such a claim until December 2017. She was awarded the Category B pension backdated to 12 months, the maximum period allowable under the Social Security (Claims and Payments) Regulations 1987.

The appellant argued that the requirement for a beneficiary to make two claims for their state pension indirectly discriminated against women in breach of ECHR Article 14 read with Article 1 Protocol 1 because more women than men sought to take advantage of their spouse's contribution record and therefore the obligation to make a second claim for a state pension fell disproportionately on women. Accordingly, she claimed that on human rights grounds, her entitlement should be backdated to 8 August 2000, the date she qualified for receipt of a Category B pension. On the statutory construction ground, she contended that her entitlement to a Category B pension should be backdated to 17 March 2008 (being the date from which the need to make a separate claim was removed for Post-2008 Married Women by virtue of a 2008 amendment).

Held, dismissing the appeal, that:

1. the words "becomes entitled" in regulation 3(1)(cb) of the Social Security (Claims and Payments) Regulations 1987 (and as amended in 2008) referred, on their natural meaning, to something occurring after the regulation came into force, namely, the spouse or civil partner gaining entitlement to a category A pension. Accordingly, on a proper construction of regulation 3(1)(cb), the exception to the requirement to make a claim for Category B pension applied only to those whose spouses became entitled to a Category A pension on or after 17 March 2008. That interpretation was supported by the legislative and policy context and was also consistent with the presumption against retrospectivity (paragraphs 68–72, 75, 79).

2. in so far as the claimant's allegation of discrimination on grounds of sex, contrary to article 14 of the Human Rights Convention, was based on a failure to make an adjustment or an accommodation for women applying for a Category B pension by removing the obstacle of making a second application for benefits, that amounted to a claim that she ought to be treated differently from others whose situations were different, namely those who had not already made a first claim for benefit. However, that claim had to fail because the claimant had not been placed at a disadvantage by the application of the rule about which she complained and/or there had not been relevant similarity of treatment. If anything, as the claimant already had a Category A pension, she was at an advantage compared to those claiming such a pension for the first time and it followed that there was no cause to treat her differently from such persons (95–99, 102). *Thlimmenos v Greece* (2000) 31 EHRR 15, ECtHR (GC) and *R (Drexler) v Leicestershire County Council* [2019] ELR 412 applied.

3. even assuming that the claimant's position as a member of the cohort of pre-2008 married women gave her a "status" for Article 14 purposes, she was still unable to establish direct discrimination on the basis of the difference in treatment between that cohort and the cohort of post-2008 married women because the "other status"

that had been identified was inextricably tied into the introduction of a new legal regime. Since the two cohorts were subject to different legal regimes they were not in a relevantly similar situation to each other for the purposes of the Article 14 comparison. In any event, the difference in treatment was justified given that (i) the 2008 amendments represented a highly technical change to the rules governing the making of claims to retirement pensions, (ii) they were made in circumstances where, under the existing system, the onus was on the individual to make a claim for benefit and the department's IT systems had previously lacked the functionality to identify potentially eligible cases, whereas the new more automated systems provided such a capability, so improving administrative efficiency, but (iii) to embark on a manual process retrospectively to bring other claimants within the scope of the change would not have been consistent with efficient administration (paragraphs 105, 108, 109, 131–133).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr H. Mercer QC and Ms J. Russell, acting pro bono appeared for the appellant

Mr J. Mitford QC and Ms N. Ling, instructed by the Government Legal Department appeared for the respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 27 May 2020 under file number SC180/18/00215 does not involve any error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The decision of the First-tier Tribunal accordingly stands.

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal

1. The appellant's appeal to the Upper Tribunal is dismissed.

2. This decision follows a conventional oral hearing held on 22 February 2022. Mr Hugh Mercer QC and Ms Jane Russell of counsel appeared for the appellant (the claimant). Mr Julian Milford QC and Ms Naomi Ling of counsel appeared for the respondent (the Secretary of State). I am grateful to all counsel for their careful written and oral submissions. I am especially indebted to those acting *pro bono*. I am also grateful to all those who have worked behind the scenes to enable this appeal to be brought on for hearing in what is, for the Upper Tribunal at least, a relatively short time.

The legal issue at the heart of this appeal

3. The issue at the heart of this appeal is how the law treats two groups of women in terms of their access to Category B state retirement pensions. For convenience, the two groups have been described in shorthand by the parties in this case as the "Pre-2008 Married Women" and the "Post-2008 Married Women". However, those labels, while convenient, are potentially misleading, as the date of marriage is not the real point of distinction.

4. The Pre-2008 Married Women are women who (a) retired before their husband; (b) are in receipt of their own Category A retirement pension; and (c) whose husbands received their Category A retirement pension before 17 March 2008.

5. The Post-2008 Married Women are women who (a) retired before their husband; (b) are in receipt of their own Category A retirement pension; and (c) whose husbands received their Category A retirement pension on or after 17 March 2008.

6. It will be evident that the only point of distinction between the two groups of women is criterion (c). Not for the first time, a woman's status is thereby defined by reference to some characteristic of her husband, in this instance being the date he first received his Category A retirement pension. The significance of 17 March 2008 is that this was the date that the Social Security (Claims and Payments) Amendment Regulations 2008 (SI 2008/441) came into force, amending the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) ('the 1987 Regulations'). For convenience in this decision I describe the amendment of 17 March 2008 as 'the 2008 amendment'.

7. How then are the two groups of women treated differently? In short, the Pre-2008 Married Women, if they wish to claim a Category B retirement pension, based on their husband's contributions, to top up their own Category A pension, have to (and have always had to) make a claim for that Category B pension. The Post-2008 Married Women do not need to make a claim for the latter benefit – the husband's own post-2008 Category A pension claim will itself trigger an award of the wife's Category B pension where appropriate.

An outline of the facts of this case and the appellant's grounds of appeal

8. The facts of this case vividly illustrate what these rules can mean. I recognise that although in theory this case concerns only one elderly lady, in practice it affects tens of thousands of other married women in the same position (see paragraph 129 below).

9. The appellant herself was born in 1938 and so reached the then state pension age for a woman (60) in 1998. She applied for and received her own Category A pension from her 60th birthday in January 1998. In common with many other married women, this was paid at a reduced rate as she did not have a full national insurance record. The appellant's husband was born in 1935 and so he attained the then state pension age for a man (65) in 2000. He claimed and received his Category A pension from his 65th birthday in August 2000, a little over 18 months after the appellant.

10. It is not in dispute that in August 2000 the appellant qualified for receipt of a Category B pension, based on her husband's national insurance record, to top up her Category A pension, subject to one condition. That one condition was that she was required to make a claim for the Category B pension. She did not make such a claim at the time or indeed for quite some time thereafter. She is, accordingly, one of the cohort of Pre-2008 Married Women.

11. Indeed, the appellant did not make a claim for a Category B pension until December 2017. In that same month she was awarded a Category B pension, backdated 12 months to 19 December 2016. The one year backdating was the maximum period allowable under regulation 19 of, and paragraph 13 of Schedule 4 to, the 1987 Regulations.

12. The appellant has two grounds of appeal before the Upper Tribunal: a statutory construction point and a human rights argument. On the statutory construction ground, she contends that her entitlement to a Category B pension should be backdated to 17 March 2008 (being the date from which the need to make a separate claim was removed for Post-2008 Married Women by virtue of the 2008 amendment). On the human rights ground, she argues that her entitlement to a Category B pension should be backdated to 8 August 2000 (the date her husband qualified for his Category A pension).

The legislative framework for entitlement to state retirement pensions

13. As a result of the Pensions Act 2014, a 'new' state pension scheme has been in operation for people retiring on or after 6 April 2016. However, this case is concerned with the 'old' Beveridge-based system of state retirement pensions that has been in place since 1948 (as frequently amended).

14. Sections 43 to 55C of the Social Security Contributions and Benefits Act (SSCBA) 1992 make extensive provision for Category A and Category B retirement pensions under the old system. In particular, section 44 provides that a Category A pension is payable based on the claimant's own national insurance record. There are various circumstances in which a Category B pension is payable. For present purposes the relevant provision is section 48A of SSCBA 1992, which goes under the heading 'Category B retirement pension for married person or civil partner'. The Department refers to this category of retirement pension as a Category BL pension, to distinguish it from other types of Category B pension (e.g. for widows and widowers). However, the terminology of Category BL is not known to the statute book, so in this decision the label of Category B is used (unless the term Category BL is used in the original text of a quote).

15. Section 48A(1) (as substituted by paragraph 60 of Schedule 12 to the Pensions Act 2014) provides as follows:

> (1) A married person is entitled to a Category B retirement pension by virtue of the contributions of his or her spouse if—
>
> (a) the person attained pensionable age before 6 April 2016, and
>
> (b) the spouse—
>
> (i) has attained pensionable age, and
>
> (ii) satisfies the relevant contribution condition.

16. It is noteworthy that historically only women were eligible for Category B pensions. Men only became entitled to Category B pensions in respect of wives born on or after 6 April 1950, ie women who reached state pension age on or after 6 April 2010. It follows that both at the date that the appellant's husband qualified for his retirement pension (in August 2000) and the date from which the Post-2008 Married Women did not have to make a claim for a Category B pension (17 March 2008) only women could qualify for the latter benefit.

17. In the current financial year (2021/22) the maximum rate for a full Category A pension is £137.60 a week (SSCBA 1992, section 44(4)), whereas a spouse's Category B pension is £82.45 a week (SSCBA 1992, section 48A(4) and paragraph 5 of Part 1 of Schedule 4).

18. The general rule is that a person is not entitled to more than one retirement pension at a time for the same period (SSCBA 1992, section 43(1)). One of the exceptions to that general principle is where a person has entitlement to both a Category A and a Category B pension (SSCBA 1992, section 43(2)(a)). The typical case will be where a woman is entitled to a reduced rate Category A pension based on her own national insurance record and to a Category B pension calculated on her husband's contributions. Section 51A (as inserted by section 126 of, and paragraph 21(6) of Schedule 4 to, the Pensions Act 1995 and as further amended) then provides as follows:

> **51A.— Special provision for married people**
>
> (1) This section has effect where, apart from section 43(1) above, a married person or civil partner would be entitled both—
>
> > (a) to a Category A retirement pension, and
> >
> > (b) to a Category B retirement pension by virtue of the contributions of the other party to the marriage or civil partnership.
>
> (2) If by reason of a deficiency of contributions the basic pension in the Category A retirement pension falls short of the weekly rate specified in Schedule 4, Part I, paragraph 5, that basic pension shall be increased by the lesser of—
>
> > (a) the amount of the shortfall, or
> >
> > (b) the amount of the weekly rate of the Category B retirement pension.
>
> (3) This section does not apply in any case where both parties to the marriage attained pensionable age before 6th April 1979.

19. The purport of these provisions is explained in the standard (if now rather dated) textbook as follows (N.J. Wikeley and A.I. Ogus, *The Law of Social Security* (Butterworths 2002, 5th edn) at pp.604-605, omitting footnotes):

> A married woman who has reached pensionable age may be entitled to a Category A pension on the basis of her own contributions in the same way as a man, Alternatively, she may be entitled to a Category B pension on her husband's contributions. She cannot claim both but she may be able to use her Category B entitlement to enhance the value of her Category A pension. In such a case the Category A pension entitlement can be increased by either the whole of the Category B pension derived from the husband's contributions or as much of it as is necessary to raise the Category A basic pension to the level of the lower-rate Category B pension, whichever is less. The resulting 'composite' pension is the claimant's Category A pension, even if most of it is payable by virtue of the husband's contributions.

The legislative framework for claiming state retirement pensions

20. The starting point for understanding the claims process is section 1 of the Social Security Administration Act (SSAA) 1992 (headed 'Entitlement to benefit dependent on claim'). This lays down the general rule that making a claim is a condition of entitlement to a social security benefit in the same way as any one of the substantive qualifying criteria is. Section 1(1) of SSAA 1992 accordingly provides as follows:

> (1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—
>
> > (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or
> >
> > (b) he is treated by virtue of such regulations as making a claim for it.

21. As noted above, "the time, prescribed in relation to that benefit by regulations" for the purposes of sub-paragraph (a) is, "as regards any day on which apart from satisfying the condition of making a claim, the claimant is entitled to the pension, that day and the period of 12 months immediately following it" (regulation 19 of, and paragraph 13 of Schedule 4 to, the 1987 Regulations). As a result, late claims for a retirement pension are routinely backdated for up to 12 months.

22. The issue in this appeal is whether the Appellant falls within the opening category, as specified in section 1(1), of being "except in such cases as may be prescribed". Regulation 3(1) of the 1987 Regulations (which is headed 'Claims not required for entitlement to benefit in certain cases') sets out the various exceptional categories of cases. As it *currently* stands, regulation 3(1) provides in its entirety as follows (regulation 3(2) is a definition provision, which is not material here):

> **3. Claims not required for entitlement to benefit in certain cases**
>
> (1) It shall not be a condition of entitlement to benefit that a claim be made for it in the following cases:–
>
> > (za) in the case of a Category A or B retirement pension, where the beneficiary is a person to whom regulation 3A applies;
> >
> > (a) in the case of a Category C retirement pension where the beneficiary is in receipt of–
> >
> > > (i) another retirement pension under the Social Security Act 1975; or
> > >
> > > (ii) widow's benefit under Chapter 1 of Part II of that Act; or
> > >
> > > (iii) benefit by virtue of section 39(4) of that Act corresponding to a widow's pension or a widowed mother's allowance; or
> > >
> > > (iv) widowed parent's allowance;
> >
> > (b) in the case of a Category D retirement pension where the beneficiary–
> >
> > > (i) was ordinarily resident in Great Britain on the day on which he attained 80 years of age; and
> > >
> > > (ii) is in receipt of another retirement pension under the Social Security Act 1975;
> >
> > (c) age addition in any case;
> >
> > (ca) in the case of a Category A retirement pension where the beneficiary—
> >
> > > (i) is entitled to any category of retirement pension other than a Category A retirement pension; and

(ii) becomes divorced or the beneficiary's civil partnership is dissolved;

(cb) in the case of a Category B retirement pension where the beneficiary is entitled to either a Category A retirement pension or to a graduated retirement benefit or to both and

(i) the spouse or civil partner of the beneficiary becomes entitled to a Category A retirement pension or a state pension under section 4 of the Pensions Act 2014; or
(ii) the beneficiary marries or enters into a civil partnership with a person who is entitled to a Category A retirement pension or a state pension under section 4 of the Pensions Act 2014; or

(iii) the spouse or civil partner of the beneficiary dies having been entitled to a Category A retirement pension or a state pension under section 4 of the Pensions Act 2014 at the date of death;

(d) in the case of a Category A or B retirement pension or a state pension under Part 1 of the Pensions Act 2014 –

(i) where the beneficiary is a woman who has reached pensionable age and is entitled to a widowed mother's allowance, on her ceasing to be so entitled;
…
(e) in the case of retirement allowance;
…
(g) in the case of a jobseeker's allowance where–

(i) payment of benefit has been suspended in the circumstance prescribed in regulation 16(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999; and

(ii) the claimant whose benefit has been suspended satisfies the conditions of entitlement (apart from the requirement to claim) to that benefit immediately before the suspension ends;

(h) in the case of income support where the beneficiary—

(i) is a person to whom regulation 6(5) of the Income Support (General) Regulations 1987 (persons not treated as engaged in remunerative work) applies;

(ii) was in receipt of an income-based jobseeker's allowance or an income-related employment and support allowance on the day before the day on which he was first engaged in the work referred to in sub-paragraph (a) of those paragraphs; and

(iii) would satisfy the conditions of entitlement to income support (apart from the condition of making a claim which would apply in the absence of this paragraph) only by virtue of regulation 6(6) of those Regulations;

(i) in the case of a shared additional pension where the beneficiary is in receipt of a retirement pension of any category;

> (j) in the case of an employment and support allowance where—
>
> > (i) the beneficiary has made and is pursuing an appeal against a relevant decision of the Secretary of State, and
> >
> > (ii) that appeal relates to a decision to terminate or not to award a benefit for which a claim was made ;
>
> (ja) in the case of a state pension under any section of Part 1 of the Pensions Act 2014 where the beneficiary is entitled to—
>
> > (ii) a state pension under a different section of Part 1 of that Act; or
> >
> > (ii) another state pension under the same section of Part 1 of that Act.

23. The present appeal turns on the proper construction of regulation 3(1)(cb). Since 2008 the only amendments made to regulation 3(1)(cb) have been consequential upon the reforms instituted by the Pensions Act 2014, but they are not material for present purposes. It is therefore simplest to consider the 2008 amendment in its original form. This analysis requires a certain amount of legislative archaeology.

24. Regulation 3(1)(cb) was first inserted with effect from 24 September 2007, when it was added by regulation 2(2)(a) of the Social Security (Miscellaneous Amendments) (No.4) Regulations 2007 (SI 2007/2470). It then read as follows (including the opening rubric of regulation 3(1) as a whole):

> It shall not be a condition of entitlement to benefit that a claim be made for it in the following cases:–
>
> …
>
> (cb) in the case of a Category B retirement pension where the beneficiary—
>
> > (i) is entitled to either a Category A retirement pension or to a graduated retirement benefit or to both; and
> >
> > (ii) marries or enters into a civil partnership.

25. Regulation 3(1)(cb) accordingly provided that a person who was already entitled to a Category A pension would be automatically awarded a category B pension should they marry or enter a civil partnership. This was one of three new exceptions that were inserted in regulation 3 with effect from 24 September 2007, the others being regulation 3(1)(ca) and 3(1)(da). Regulation 3(1)(ca) provided that a person already entitled to a pension other than Category A would be awarded a Category A pension in the event of divorce or dissolution of a civil partnership. Regulation 3(1)(da) provided for an automatic award of a bereavement payment in certain circumstances.

26. However, a new regulation 3(1)(cb), both clarifying and extending the original regulation, was then substituted with effect from 17 March 2008 by regulation 2(2) of the Social Security (Claims and Payments) Amendment Regulations 2008 (SI 2008/441):

> It shall not be a condition of entitlement to benefit that a claim be made for it in the following cases:–
>
> …

> (cb) in the case of a Category B retirement pension where the beneficiary is entitled to either a Category A retirement pension or to a graduated retirement benefit or to both and
>
> > (i) the spouse or civil partner of the beneficiary becomes entitled to a Category A retirement pension; or
> >
> > (ii) the beneficiary marries or enters into a civil partnership with a person who is entitled to a Category A retirement pension.

27. The extension to the original regulation 3(1)(cb) was the addition of the phrase "the spouse or civil partner of the beneficiary becomes entitled to a Category A retirement pension" as a trigger event for the automatic award of a Category B pension. It had apparently been intended also to make this change in September 2007 but it had been overlooked at the time and so had to wait until March 2008 to be implemented (see paragraph 49 below). Since 2008 the meaning of regulation 3(1)(cb) has been the subject of some limited Upper Tribunal case law.

The Upper Tribunal case law

28. There are two existing Upper Tribunal authorities in point on the construction of regulation 3(1)(cb), which go under the old-style Upper Tribunal case references *CP/345/2011* and *CSP/5/2013*. By happenstance both are decisions of Deputy Upper Tribunal Judge Sir Crispin Agnew of Lochnaw Bt QC.

29. The report of *CP/345/2011* ('the 2011 case'), an appeal decided 'on the papers' and so without the benefit of oral argument, contains only a very brief explanation of the facts. However, the First-tier Tribunal in that case had clearly found that regulation 3(1)(cb) of the 1987 Regulations applied retrospectively. Accordingly, the tribunal had concluded that the claimant was entitled to her Category B pension from a date in 2003, some five years before the relevant amendment to the secondary legislation. The Secretary of State appealed to the Upper Tribunal. Sir Crispin Agnew allowed the Secretary of State's appeal, in part at least, holding that the tribunal had been wrong to backdate entitlement to 2003, but that it should have been backdated to 17 March 2008, being the effective date of the amendment. The Judge reasoned as follows (at paragraph 3):

> The general principal [*sic*] is that legislation does not apply retrospectively, unless the legislation makes clear that it is to act retrospectively. There is nothing in the amendment in Regulation 3(cb) [*sic*] to suggest that the intention was that it should act retrospectively. However, from the date the amendment came into force [17 March 2008] it was no longer "a condition of entitlement to benefit that a claim be made". Accordingly the claimant became entitled to the Category B pension from that date even though she had not made a claim for it and it was not a condition of her entitlement "that a claim be made", When the claimant notified the department of her claim, I consider that the department ought to have backdated the claim to 17 March 2008 and not applied the rule that a claim could only be backdated by one year.

30. In *CSP/5/2013* ('the 2013 case'), decided following an oral hearing, the material facts were undoubtedly on all fours with those in the present appeal. The claimant had been awarded her own Category A pension from 1998 and her husband received his Category A pension from 2003. However, the claimant did not make a claim for a Category B pension until 2012, with entitlement only backdated for one year in the normal way under regulation 19 of, and Schedule

4 to, the 1987 Regulations. The First-tier Tribunal ruled that the claimant was entitled to her Category B pension with effect from 17 March 2008. Allowing the Secretary of State's appeal in full this time, the Judge gave his reasons as follows (at paragraph 9):

> I agree with the argument for Secretary of State and therefore that the tribunal erred. It is a generally accepted proposition that a statutory provision or amendment to a statutory provision takes effect from the date it comes into force and does not have retrospective effect unless retrospectively is provided for in the statute. [The claimant] accepted that the claimant's Category B pension could not be backdated beyond the date the new regulation 3(cb) came into effect. If the new regulation has effect from the date it came into force then what is the meaning of "becomes" in the phrase "the beneficiary becomes entitled to a Category A retirement pension". In my opinion "becomes" has a future meaning so that it is only where a person "becomes" entitled to the pension on or after the regulation came into force that is covered by the amendment. I agree with [counsel for the Secretary of State] that if the intention had been to include persons who had become entitled to a Category A pension before the amendment came into force then I would have expected the amendment to include "became" to cover past entitlement and "becomes" to cover future entitlement or "is or becomes" could have been used.

31. The Judge also dealt with the apparent conflict between the instant decision and his own earlier decision in the 2011 case (at paragraph 11):

> I was referred to my decision in *CP/345/2011*, which on the face of it does support the argument for the claimant. However, the argument that has been put to me in this appeal does not appear to have been addressed in that case. The issues seems to have been whether or not the pension could be backdated beyond 17 March 2008 and no argument seems to have been presented that a claim still required to be made by persons who had become entitled to a Category B pension prior to 17 March 2008. Had the present argument been made in *CP/345/2011* my decision might have been different. I therefore do not attach much weight to that decision.

32. As a matter of principle in the Upper Tribunal, "a single judge in the interests of comity and to avoid confusion on questions of legal principle normally follows the decisions of other single judges. It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so" (*Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at paragraph 37(iii)). So where does this leave the Upper Tribunal in the present appeal, with the 2011 and 2013 cases pointing in different directions? I consider that the District Tribunal Judge was right to regard himself as bound by the decision in the 2013 case, for the reasons he gave (see below). However, I am not so bound as a strict matter of precedent. I have had the advantage of far more detailed written and oral argument than Sir Crispin Agnew had in either case and so can approach the issue from considerations of first principle.

The Secretary of State's decision under appeal to the First-tier Tribunal

33. The Secretary of State's decision of 20 December 2017 in the instant appeal was expressed as follows in the Department's written response to the appeal to the First-tier Tribunal:

> I have superseded the decision dated 22 October 1997 awarding State retirement Pension Category A to [the Appellant] from 16 January 1998. This is because there has been a relevant change of circumstances since that decision was given. This was that on 19 December 2017 [the Appellant] submitted a claim for State retirement pension (Category B) as a married woman by virtue of her husband's contributions. My superseding decision is as follows:
>
> [The Appellant] is not entitled to the increased amount of State retirement Pension (Category B) from 8 August 2000 to 18 December 2016. This is because the claim for that period, received on 19 December 2017, was not made within the time limits for claiming State Retirement Pension.

34. The Secretary of State's decision of 20 December 2017 was confirmed on mandatory reconsideration. The appellant then lodged an appeal to the First-tier Tribunal. Both parties put in detailed written submissions.

35. The appellant's written submission to the tribunal argued that, properly interpreted, regulation 3(1)(cb) of the 1987 Regulations provided for her Category B pension to be backdated to 17 March 2008. It was further argued that the legislative purpose supported the claim for backdating, and that a human rights compliant reading of regulation 3(1)(cb) was required. It was additionally submitted that the Upper Tribunal's decision in *CP/345/2011* should be preferred over *CSP/5/2013*.

36. In reply, the Department's additional written response concluded as follows:

> "In my submission, there is no reason to depart from *CSP/5/2013*. The regulations were amended on 17 March 2008 so as to introduce a new waiver of the requirement to claim for a person whose spouse becomes entitled to a Category A pension. This waiver is available to anyone who thereafter 'becomes' entitled to a Category A pension and thereby falls within its ambit. There is, I submit, no purposive or other consideration that requires the word 'becomes' to be given anything other than its ordinary everyday meaning of 'begin to be'. Accordingly, only a person with a spouse who begins to be entitled to a Category A pension after 17 March 2008 is exempt from the requirement to make a claim. The claimant is not such a person".

The First-tier Tribunal's decision

37. On 27 May 2020 the First-tier Tribunal confirmed the Secretary of State's decision of 20 December 2017 and so dismissed the Appellant's appeal. Its detailed decision notice, which stood as its statement of reasons, carefully rehearsed the facts and summarised the parties' arguments. The facts were described as being "virtually identical" (as indeed they were in all material respects) to those in *CSP/5/2013*. As to the arguments, District Tribunal Judge Ennals concluded as follows:

> 7. [The Appellant's] arguments are attractive in many respects, not least since there is no obvious policy reason for distinguishing between people whose spouses claim their Cat A pension before or after March 2008, and only removing the requirement for a separate claim from the latter group. However, in my view the 2013 decision of UTJ Agnew is indistinguishable from the facts in this present case. In that case the judge addresses the inconsistency with his previous decision, and notes that this particular argument of construction was not before him in the 2011 case and, had it been, his decision may have been different. I consider that I am bound by the 2013 decision.

38. The First-tier Tribunal subsequently granted permission to appeal to the Upper Tribunal. To anticipate what follows, and for reasons that will become evident, there was in fact a good "policy reason for distinguishing between people whose spouses claim their Category A pension before or after March 2008", even if it were very understandably not obvious to the First-tier Tribunal on the limited material before it.

The appeal to the Upper Tribunal

39. The two grounds of appeal to the Upper Tribunal were advanced in the following terms in the Appellant's notice of appeal:

> 1. In failing to hold that, in interpreting Regulations 3, 9 and 15 of the Social Security (Claims and Payments) Regulations 1987 ("the Regulations") so as to require persons in the position of the Appellant to make two claims for their state retirement pension, the DWP [Department for Work and Pensions] indirectly discriminated against women (in that many more women than men seek to take advantage of their spouse's contribution record and therefore the obligation to make a second claim for a state pension falls disproportionately on women) in breach of sections 19 and/or 149 Equality Act 2010 and/or Article 14 taken in conjunction with Article 1 Protocol 1 ECHR and/or EU law of sex discrimination including Directives 2006/54/EC and 79/7 /EC.
>
> 2. In interpreting Regulation 3(1)(cb) of the Regulations as being limited to removing the requirement to make a claim for a retirement pension [by] those persons seeking a Category B pension whose spouse became entitled to a Category A pension after 17 March 2008 (date of amendment to include Regulation 3(1)(cb)) and not including those persons whose spouse had become entitled to a Category A pension prior to 17 March 2008.

40. It is both convenient and logical to take those grounds in reverse order, as counsel did at the Upper Tribunal oral hearing. This is because if the appellant gets home on the (relatively narrow) statutory construction ground, there may be no need to address the (much broader) human rights ground (subject to any issue as to the date from which any entitlement takes effect).

The Upper Tribunal's analysis: the statutory construction ground

Regulation 3(1)(cb) of the 1987 Regulations: a reminder

41. By way of reminder, at the material time regulation 3(1)(cb) provided as follows (with the key wording italicised):

> It shall not be a condition of entitlement to benefit that a claim be made for it in the following cases:–
>
> …
>
> *(cb) in the case of a Category B retirement pension where the beneficiary is entitled to either a Category A retirement pension or to a graduated retirement benefit or to both and*
>
> > *(i) the spouse or civil partner of the beneficiary becomes entitled to a Category A retirement pension*; or

> (ii) the beneficiary marries or enters into a civil partnership with a person who is entitled to a Category A retirement pension.

42. The appellant happened to be entitled to both a reduced rate Category A pension and a modest amount of graduated retirement benefit (GRB). As the issue was her right to a Category B pension, to top up that aggregated entitlement, the opening rubric of regulation 3(1)(cb) was plainly satisfied. The question then was whether her spouse "*becomes entitled to a Category A retirement pension*" within the meaning of regulation 3(1)(cb)(i). If so, it was not a condition of entitlement to the Category B pension that a claim for that benefit be made. However, the Secretary of State's submission was that by using the expression "becomes entitled" the legislative intention was signalled such that regulation 3(1)(cb)(i) should apply only to claimants whose spouses became entitled to a Category A pension *on or after* 17 March 2008.

The proper approach to statutory interpretation

43. The essential principles governing the proper approach to statutory construction, as reaffirmed by the House of Lords and latterly the Supreme Court, were re-stated in the recent decision of the Upper Tribunal three-judge panel in *Foreign, Commonwealth and Development Office v Information Commissioner, Williams and Others (Sections 23 and 24)* [2021] UKUT 248 (AAC); [2022] WLR 1132:

> 26. Lord Bingham described the proper approach to the task of statutory interpretation in the following terms in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] AC 687:
>
>> 8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.
>
> 27. The principles in *Quintavalle* are well-established and received recent endorsement by the Supreme Court in *R (Fylde Coast Farms Ltd) v Fylde BC* [2021] UKSC 18, [2021] 1 WLR 2794. Relying on Lord Bingham's remarks, Lord Briggs and Lord Sales JJSC said the following at paragraph 6:
>
>> Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made and, to the extent that

its purpose can be identified (which may require examination of admissible travaux preparatoires), to arrive at an interpretation which serves, rather than frustrates, that purpose.

44. *R (Quintavalle)* and *R (Fylde Coast Farms Ltd)* were both authorities concerned with the proper construction of primary legislation, but the emphasis on context is equally (and arguably if not more) important when construing secondary legislation. The context may include the incremental status of the secondary legislation – so the effect of an amending instrument must be considered without reading it as if the change had been present in the statutory text from the date of original enactment (*R (on the application of Brown (Jamaica)) v Secretary of State for the Home Department* [2015] UKSC 8; [2015] 1 WLR 1060 at [24] *per* Lord Toulson and *L'Office Chérifien des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd* [1994] 1 AC 486 at 523G *per* Lord Mustill). Furthermore, and self-evidently, delegated legislation should always be interpreted in the light of the enabling statute (*Macfisheries (Wholesale and Retail) v Coventry Corporation* [1957] 1 WLR 1066 at 1071 *per* Lord Goddard CJ).

<u>Regulation 3(1)(cb) – the context</u>

45. Mr Mercer QC (for the appellant) and Mr Milford QC (for the Secretary of State) were at one in emphasising, as a matter of general principle, the importance of the context to a proper understanding and interpretation of regulation 3(1)(cb) of the 1987 Regulations. Where they diverged was on what each meant by that context in the particular circumstances of this case. At the risk of a somewhat gross over-simplification, the main thrust of the competing arguments can be summarised (albeit in very short order) as follows.

46. Mr Mercer's starting point was the structural disadvantage experienced by women, and especially married women, in the national insurance scheme. This was demonstrated in various ways. Married women had the option of paying reduced contributions at the married women's rate, resulting in less entitlement to benefit. Time out of paid work bringing up children was not recognised by the national insurance scheme until the advent of home responsibilities protection in 1978. As a result, married women typically had poor contribution records. This was part of the backdrop to the introduction of Category B pensions for married women. Yet despite some DWP publicity initiatives, many wives did not claim the Category B pensions to which they were otherwise entitled. Moreover, the requirement for a wife to make a second claim for a Category B pension when she had already made a claim for a Category A pension was exceptional and only applied to women in 2008. There was no good reason, as the First-tier Tribunal had acknowledged, to limit the amendment to the Post-2008 Married Women. On the contrary, its purpose was to protect the right of all wives to receive their full pension entitlement, including not just their Category A pension but also their Category B top up entitlement.

47. In support of his submissions on the context of the 2008 amendment, Mr Mercer relied on a witness statement provided by the Right Hon. Sir Steve Webb, who was Minister of State for Pensions at the DWP between 2010 and 2015 and is an acknowledged expert on pensions policy. I refer to this witness statement as the 'Webb W/S'. It covers the requirement to make a second claim, the content of that claim, the number of women who may have missed out on entitlement, the 2008 amendment and the DWP's stance on Pre-2008 Married Women, whether the Appellant's Category B claim could be treated as a deferred claim, why women are more likely to be the first to make a retirement pension claim and why women need the Category B system more than men. For the record I should add that Sir Steve had earlier made an application

to intervene in the appeal, which I refused by order dated 22 September 2021, making the point that his arguments could be readily placed before the Upper Tribunal by way of an annex in support of the appellant's case – as indeed has been helpfully done.

48. Mr Milford's starting point was the general rule that in the absence of a valid claim there is no entitlement to benefit (see section 1 of SSAA 1992). Regulation 3 of the 1987 Regulations provided for a series of exceptions to that general principle, built up incrementally over time. When the 1987 Regulations were first enacted, there had been just four categories of exceptions, reflecting what are now regulation 3(1)(a), (b), (c) and (d). There are now 13 such categories. It was telling, he submitted, that the exceptions were not introduced at the same time as the benefits with which they were concerned. Rather, there were two common features shared by the various exceptions. The first was that each exception had been introduced at a point when the Department's IT systems were capable of accommodating the making of an award of a related benefit without the need for a separate claim. The second was that in each case the Department could be confident that the beneficiary would wish to receive the benefit in question (eg because they were already in receipt of another benefit of the same type).

49. In support of his submissions on the context of the 2008 amendment, Mr Milford relied on a witness statement provided by Mr Lyndon Walters, a policy advisor to the DWP's Decision Making and Appeals Team. Mr Walters has policy maintenance responsibility for the 1987 Regulations and indeed was involved in both the 2007 and 2008 amendments discussed above (at paragraphs 24-27). I refer to this as the 'Walters W/S'. It covers the legislative requirements for Category A and B pensions and for claims for these benefits before 2008, the 2008 changes in the context of the DWP's evolving IT systems, the current state pension LEAP exercise and the 2008 amendment. Mr Walters' detailed acquaintance with and knowledge of these matters is confirmed by his frank admission that the "additional change automating the claims for Category BL pensions in certain circumstances was ready to be implemented in September 2007, but the legislation was not in place to allow it to happen until 17 March 2008, as it was overlooked at that time and was subsequently introduced at the next available opportunity" (Walters W/S at §72).

50. I have found both the Webb W/S and the Walters W/S of great assistance in helping to understand the context to the 2008 amendment. In particular, both witness statements have been invaluable in understanding the wider operational and policy issues associated with that change. I am therefore indebted to both Sir Steve Webb and Mr Walters for the time and trouble they have taken in preparing their witness statements. Their efforts mean that, unlike the learned Deputy Upper Tribunal Judge in the 2011 and 2013 cases, I have a far better understanding of the context to the 2008 amendment.

51. So what is that context? Is it Mr Mercer's broader if not panoramic sweep, or is it Mr Milford's narrower and more focussed framework?

52. I do not doubt the force of Mr Mercer's submissions relating to the structural disadvantages facing women, and especially married women, in the national insurance scheme, premised as it is on Beveridge's assumption of a working male head of household financially supporting his non-employed wife and children (see further eg Pat Thane, 'The "Scandal" of Women's Pensions in Britain: How Did It Come About?" in H. Pemberton, P. Thane & N. Whiteside (eds), *Britain's Pensions Crisis; History and Policy* (The British Academy, 2006), ch.5). The legacy of Beveridge has led to litigation about women's pension rights in which

discrimination arguments have been run (albeit unsuccessfully most recently in *R (on the application of Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; [2021] ICR 236). Even so, although Mr Mercer did not employ such terminology, the label of institutional sexism may not be out of place in describing the national insurance scheme. This is, undoubtedly, the context for the gradual amelioration of the position of women, and especially married women, in relation to contributory benefits, including provision for their access to Category B pensions.

53. However, I attach considerably less weight to Mr Mercer's arguments that the requirement for a wife in the cohort of Pre-2008 Married Women to make a second claim for a Category B pension when she had already made a claim for a Category A pension was 'exceptional' and only applied to women in 2008. As to the exceptionality argument, this fails to recognise that the Pre-2008 Married Women were applying for a different type of retirement pension, based on their husbands' national insurance contributions rather than their own. Category A and Category B pensions are not sub-categories of the same benefit (as, for example, are the daily living component and the mobility component of personal independence payment), but different benefits with different qualifying criteria. As such, the default position is that a separate claim for benefit is required – see section 1 of SSAA 1992. As to the discrimination argument, the fact of the matter is that only women could qualify for a Category B pension in 2008; men only became eligible from 2010, assuming that is their spouse was born on or after 6 April 1950 – see paragraph 16 above.

54. The primary context of the 2008 amendment is not the overall legislative architecture of provision for entitlement to retirement pensions. That may be part of the backdrop but it is not part of the immediate context. Rather, the primary context is the statutory scheme for making a claim for one of these retirement pensions. The 2008 amendment must be recognised for what it was – a further incremental change to the carefully and narrowly-defined list of exceptions in regulation 3 of the 1987 Regulations to the general principle enshrined in section 1 of SSAA 1992. This perspective is reinforced by two features identified by Mr Milford.

55. The first feature was that, as with other changes to regulation 3, the 2008 amendment had been introduced at a point when the Department's IT systems were capable of accommodating the making of an award of a related benefit without the need for a separate claim from one of the Post-2008 Married Women. I am satisfied on the evidence before me that this was the driving consideration behind the 2008 amendment. I rely in particular on the Walters W/S and (to a much lesser extent) the contemporaneous DWP correspondence with the Social Security Advisory Committee (SSAC).

56. The constraints of space mean I can only summarise the key points from the Walters W/S. The DWP's main computer system or central hub was the Departmental Central Index (DCI) until 2006/07, which was then replaced by the Customer Information System (CIS). Both the DCI and CIS held limited claimant information. The administration of retirement pensions was delivered through the Pension Strategy Computer System (PSCS), one of the DWP's satellite systems feeding into the main hub, which dated from 1989 and (rather inevitably) had very limited functionality. Mr Walters explains in some detail why at the time the DWP did not have a policy of contacting married women directly to inform them that they were shortly due to become entitled to a Category B pension when their husbands reached 65. In short, the limitations of its IT systems meant that it did not consistently hold sufficient details to enable it to do so. However, starting from 2005, the DWP both introduced telephone claims for pensions and rolled out the Pension Transformation Programme Customer Account

Maintenance IT system (PTP CAM) with improved functionality. These operational reforms included two aspects of the new IT system which enabled the automatic payment of Category B pensions to married women.

57. The first aspect applied only to married women who claimed their own Category A pension *after* 2008. PTP CAM allowed DWP staff to set a future task (a 'BF', presumably as in 'Brought Forward') on the woman's account when the claim indicated she was married. Setting a BF in this way would prompt the agent processing the husband's Category A claim at a future date to consider the wife's Category B entitlement. This type of linkage of a couple's respective claims had not been feasible under the previous PSCS regime.

58. The second aspect applied to married women who had already become entitled to her own Category A pension *before* 2008 and whose husband claimed *after* 2008. A BF could not have been set on the wife's account as her claim may have been some years earlier. However, once the husband now made his claim and indicated he was married, a task could be created on the new system, with its improved functionality, for a review of the wife's entitlement (and potentially an increase in the light of her Category B supplement).

59. The Walters W/S explains how these IT changes and the associated DWP staff training were rolled out from 2005 through to 2007. As a result, by 2008 the advent of the PTP CAM system meant that Category B claims (although not the associated verification checks) could be dispensed with for married women who, following implementation, claimed a Category A pension and for those whose husbands claimed after the 2008 changes. However, as Mr Walters explains, "there was no functionality on the system to alert us to those women who were already entitled to have claimed for their category BL pensions but had not done so" (Walters W/S §56). He concludes as follows:

> 57. To identify these individuals, we could have run a search, or 'scan' of PSCS in 2008. However, the task of performing such a search and reviewing the records of those identified, then contacting all of these individuals and dealing with their entitlements would have been a significant additional burden on the Department, when the purpose of the PTP programme was to try to improve the efficiency and productivity of the system. … This process would also have had to have started well in advance of the 2008 Change being made in order to ensure that the Department could have met its legal obligations from the date it came into force, had it wished to make the change retrospective.

60. As regards situations in which both members of a couple qualified for a Category A pension before the 2008 amendment, Mr Walters's evidence is that "it was intended and understood that a Category BL pension could not be awarded unless and until the necessary claim had been made for the Category BL pension. I am not aware that there was any consideration to including a provision in the 2008 Regulations that would have allowed an award of a category BL pension in these circumstances without a claim" (Walters W/S §74). He gives four reasons why that degree of retrospectivity was not envisaged. First, there was no legal duty on the DWP to invite claims and in any event the Department provided publicity information on making retirement pension claims. Second, embarking on a manual process to bring other claimants within the scope of the change would have been inconsistent with the aim of promoting more efficient administration. Third, there was no way of reliably identifying all possible eligible claimants within the existing IT functionality. Fourth, a retrospective element to the exercise would have resulted in a significant increase in staffing costs. As such, "DWP

changed the law with prospective effect only once it was confident its computer systems and processes supported the change" (Walters W/S §79).

61. The Explanatory Memorandum to the ensuing 2008 instrument essentially does little more than paraphrase the statutory amendment, when discussing the policy background (at paragraph 7.2, with added emphasis):

> Regulation 2 also introduces a new category of case involving awards of Category B retirement pension. It again affects those who are already entitled to a Category A retirement pension or to a graduated retirement benefit. *The new provision is that where the beneficiary has a spouse or civil partner who becomes entitled to a Category A retirement pension in his or her own right, the beneficiary will not need to make a separate claim for Category B retirement pension.* If the Category B retirement pension exceeds the Category A retirement pension already being received, the DWP will pay the additional amount automatically.

62. This arguably takes us little further forward, although the italicised third sentence in this passage is consistent with the 2008 amendment having only prospective effect for new cases, i.e. those in which the claimant's husband makes a post-17 March 2008 Category A pension claim. The DWP's correspondence with SSAC (18 January 2008) is perhaps a little more illuminating:

> Firstly we wish to add another circumstance in which a person can be awarded a Category B retirement pension automatically. This is where the spouse or civil partner of a person successfully claims a Category A retirement pension in their own right, thereby triggering a potential entitlement to a Category B retirement pension for the person in question. The emphasis here is upon the word "potential" because, under current legislation, unless the person claims their Category B retirement pension, there is no entitlement.
>
> …
>
> Operational colleagues dealing with claims for state retirement pension advise that they are now in a position to be able to award a Category B retirement pension in these circumstances automatically. The necessary prerequisite is that the beneficiary is already entitled to either a Category A retirement pension or to a graduated retirement benefit. This has been written into the proposed Regulation. The proposal will mean that entitlement will now be triggered by the individual's spouse or civil partner claiming a Category A retirement pension in their own right, whether that claim is made upon reaching state pension age or after a period of deferral.

63. The final sentence in this last passage is undoubtedly more consistent with the 2008 amendment being intended to have effect only for cases going forward ("entitlement <u>will now</u> be triggered by the individual's spouse or civil partner claiming a Category A retirement pension in their own right", with emphasis added).

64. In short, the Explanatory Memorandum and the SSAC correspondence are consistent with the construction advanced by Mr Milford, but what really makes his case compelling is the Walters W/S.

65. I do not regard the force of his case to be weakened by the Webb W/S filed on behalf of the Appellant. The Webb W/S inevitably majors more on the policy issues than on the pragmatic operational considerations facing the DWP. There is a detailed critique of the DWP's

information strategy for retirement pension claimants, including the quality and effectiveness of DWP leaflets. Sir Steve Webb also provides a careful analysis of the DWP's reasons for not taking action with regard to the Pre-2008 Married Women at the point of the 2008 amendment. In addition, the Webb W/S particularises the ways in which women, and especially married women have been, and to some extent still are, disadvantaged by the old system of retirement pensions, and seeks to quantify those affected. There are, with respect, undoubtedly a number of very well-made points in the witness statement, but they are primarily relevant to high level policy considerations. Understandably enough, and despite his distinguished ministerial career, there is much less about the nitty-gritty (or granular) operational issues underpinning the Department's pragmatic approach.

66. In particular, the Webb W/S does not really engage with the detailed explanation in the Walters W/S about the considerations of operational feasibility associated with the 2008 amendment. One example will suffice. The Walters W/S explains (at §34) that pre-2008 the DWP would set up a PSCS account where a husband made a Category A pension claim and could open a PSCS account at the same time for his wife too. The Webb W/S seizes on this admission (at §14) as an indication that there was no reason in principle why the reverse could not apply, and a PSCS account opened for the husband when his wife retired beforehand and claimed a Category A pension. It is argued that the husband's account could then include a 'file note' requiring reassessment of the wife's claim when he retired. I am not persuaded by this suggestion. The Walters W/S makes it plain that a spouse's PSCS account could only be set up in advance if the necessary information had been supplied by the claimant. There would doubtless be very many cases where that information was missing or if provided was incorrect. In addition, the Walters W/S (at §50) explained that PSCS had limited functionality in any event for BFs. The suggestion that some sort of 'workaround' could be engineered is not convincing.

67. The second feature identified by Mr Milford as supporting his submissions on context can be dealt with much more shortly. This was that in cases covered by regulation 3(1)(cb), as with the other exceptions, the Department could be confident that the beneficiary would wish to receive the benefit in question, typically because they were already in receipt of another benefit of the same type. It cannot be assumed that an individual wishes to claim a benefit just because they meet the eligibility criteria. As Mr Milford notes, a married woman who herself has no entitlement to a Category A pension must still even today make a claim for a Category B pension when her husband retires as she is not covered by regulation 3(1)(cb) – she does not meet condition (b) as set out in paragraph 5 above and therefore cannot be one of the Post-2008 Married Women, whatever the sequence of the couple's retirements and whenever the husband qualified for his Category A pension. Furthermore, the continued exclusion of this particular cohort of women from the categories of those exempt from the requirement to make a claim for benefit is inconsistent with an expansive reading of regulation 3(1)(cb).

68. For all these reasons, my conclusion is that the legislative and indeed the policy context supports Mr Milford's reading of regulation 3(1)(cb). But what of the statutory language itself?

Regulation 3(1)(cb) – the language

69. The crucial word in regulation 3(1)(cb)(i) is "*becomes*" and the critical phrase is "*becomes entitled*". The natural meaning of both that word and that phrase is they refer to something (namely the spouse gaining entitlement to a Category A pension) occurring after the regulation comes into force. If the intention had been to cover situations where the claimant's spouse had already acquired entitlement to a Category A pension before 17 March 2008 then

different wording would have been deployed. For example, instead of "*the spouse ... becomes entitled to a Category A retirement pension*" the draftsperson would have used "*the spouse ... has become entitled to a Category A retirement pension*" or "*the spouse ... subsequently became entitled to a Category A retirement pension*". Over and beyond the ordinary meaning of the words, support for the prospective meaning of the statutory phraseology can be shown in at least two ways.

70. First, and by way of contrast, regulation 3(1)(b) removes the need for a claim to be made for a Category D pension where the claimant "is in receipt of another retirement pension" (regulation 3(1)(b)(ii) and "*<u>was</u> ordinarily resident in Great Britain on the day on which he <u>attained</u> 80 years of age*" (regulation 3(1)(b)(i), emphasis added). As such, regulation 3(1)(b) plainly envisages, by the use of the past tense, that a person might qualify for a Category D pension on the basis of reaching the age of 80 before the statutory provision in question came into force. Regulation 3(1)(cb)(i), in contrast, does not extend to such a pre-commencement event.

71. Second, it is axiomatic that different limbs of the same statutory provision should be construed so as to make sense when read together. Regulation 3(1)(cb)(i) is just the first of two limbs (in the 17 March 2008 version). The alternative limb in that version (regulation 3(1)(b)(ii)) provides that a claim for benefit is not required where "*the beneficiary marries or enters into a civil partnership with a person who is entitled to a Category A retirement pension*". Evidently, and again as a matter of the ordinary English meaning of the words in question, this can apply only where the marriage or civil partnership took place <u>after</u> the amendment came into force on 17 March 2008. If the intention had been to include unions <u>before</u> 17 March 2008, then the drafter would necessarily have referred to the situation where "*the beneficiary is married to ... a person who is entitled to a Category A retirement pension*". Indeed, if "*marries*" in regulation 3(1)(cb)(ii) actually means "*is married to*", then regulation 3(1)(cb)(i) itself would become otiose, as on that reading regulation 3(1)(cb)(ii) would cover every claimant whose spouse acquired entitlement to a Category A pension at any point in time. As Mr Milford submits, the use of the present tense – "*becomes*" in regulation 3(1)(cb)(i) and "*marries*" in regulation 3(1)(cb)(ii) – cannot sensibly be read so as to connote a different significance in separate limbs of the very same paragraph of the very same regulation.

72. As Mr Milford observed, Mr Mercer's submissions at the oral hearing were primarily focussed on the context and the associated policy and not on the language of the 2008 amendment. As to the proper construction of regulation 3(1)(cb), Mr Milford's submissions were the more persuasive for the reasons above. In addition, Mr Mercer also directed my attention to section 78(3) of SSCBA 1992, which explicitly uses the past tense in providing that "A person who is over the age of 80, <u>who reached pensionable age before 6 April 2016</u> and who satisfies such conditions as may be prescribed shall be entitled to a Category D retirement pension" if certain criteria are met. This does not assist Mr Mercer's case, not least as the relevant underlined wording of section 78(3) was amended by the Pensions Act 2014 (Schedule 12, paragraph 84) precisely so as to ensure cases where entitlement arose before April 2016 continued to be dealt with under the old retirement pensions scheme. Context, as ever, is everything.

73. There is, however, one further linguistic argument on behalf of the appellant that needs to be addressed in a little more detail. Mr Mercer contended that the use of the word "*becomes*" does not in and of itself require a claimant's spouse to become entitled to his own Category A pension on or after 17 March 2008. Rather, he submitted, "*becomes*" was used to mean only

that the husband must become entitled to his Category A pension after the beneficiary became entitled to her Category A pension, irrespective of whether the husband's entitlement arose before or after 17 March 2008. The use of the word "*becomes*" was therefore concerned with the sequence of retirements by members of a couple. On this analysis it covered the situation where a husband retired after his wife, whenever that took place, but not the case where the husband retired first followed later by his wife. If the latter circumstance were covered, then wives would be exempted from any requirement to claim a pension, which would be inconsistent with the overall statutory scheme (see SSAA 1992 section 1).

74. This sequencing argument, with respect, involves somewhat contorted reasoning and is unpersuasive for two more specific reasons at least. First, the phrase "*is entitled to either a Category A retirement pension or to a graduated retirement benefit or both*" in regulation 3(1)(cb) and the word "*becomes*" in regulation 3(1)(cb)(i) must be read consistently one with the other. In that respect "*becomes*" necessarily and in any event has to refer to a later point in time than the date when the amending regulations came into effect. Second, and crucially in my view, regulation 3(1)(cb) must be read as a whole. The opening rubric of the provision makes it plain that it is concerned with a claimant who is already entitled to their own Category A pension (and/or a GRB). Their spouse's entitlement is then a subsequent trigger event. There is accordingly no need to give "becomes" an unnatural reading when the relevant sequencing of retirements (namely that the wife has retired first) is inherent in the statutory language of the provision as a whole.

75. I therefore agree with Mr Milford that the language of regulation 3(1)(cb)(i) only points one way and that is for the reading advocated by the Secretary of State.

Regulation 3(1)(cb) and the presumption against retrospectivity

76. In deference to the able arguments on the point presented by both senior counsel, I should also say something, if only briefly (as the issue is not determinative), about the application in this case of the presumption against retrospectivity in the process of statutory interpretation.

77. Mr Mercer emphasised that, as part of his statutory construction ground at least, he was not suggesting that the Appellant's entitlement to a Category B pension went back beyond 17 March 2008 (e.g. to the date of her husband's retirement in 2000). As such, his submission was that he was not advancing an argument that the change in the law had retrospective effect. Rather, regulation 3(1)(cb) had prospective effect, being limited to removing the need for a claim with effect from 17 March 2008. He prayed in aid the venerable Poor Law authority of *R v The Inhabitants of St Mary, Whitechapel* (1848) 12 QB 120, where the relevant statute provided that "no woman residing in any parish with her husband at the time of his death shall be removed … for twelve calendar months next after his death". In that case the pauper had been widowed before the passage of the statute but removed after its enactment. Lord Denman CJ held that the widow was not subject to removal: the statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing" (at 127). Mr Mercer also drew attention to the distinction in the case law between the presumption against legislation having retroactive effect and the presumption against legislation altering vested rights (see *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 AC 816 and *L'Office Chérifien des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd* [1994] 1 AC 486). He observed that the latter presumption, which could be argued to be in

play here, was the weaker of the two. Furthermore, he argued that wider considerations of fairness outweighed any concern over interference with the Crown's vested rights.

78. Mr Milford acknowledged that Mr Mercer was not advancing a construction that was retrospective in the sense of changing the law in relation to past events. However, the Appellant's case was, he said, retrospective in the weaker sense of altering existing rights and obligations in relation to the future (see *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553). Moreover the Crown's vested rights were to be respected to the same extent as those of a private individual (*Hedderwick v Federal Commissioner of Land Tax* (1913) 16 CLR 27). *R v The Inhabitants of St Mary, Whitechapel* (1848) 12 QB 120 could be distinguished as no new duty on the state was created in that case in relation to past events – the amending statute simply required parishes to desist from removing those women newly widowed within the past year, where previously they might have done so. Whichever way it was looked at, the Appellant's case would necessarily impose on the Secretary of State a new duty in relation to past events, and in particular the not inconsiderable and resource-costly administrative task of identifying all those women in receipt of a Category A pension whose husbands had already retired before 17 March 2008. The presumption against retrospectivity (albeit in the weaker sense) accordingly applied.

Conclusion on the statutory construction ground

79. I agree with Mr Milford that both the context and language of regulation 3(1)(cb) support his construction of the provision, namely that the legislative intention is that the easement or exception should apply only to women whose husbands become entitled to a Category A pension on or after 17 March 2008, i.e. only to those beneficiaries in the cohort of Post-2008 Married Women. The Secretary of State did not need to rely on the presumption against retrospectivity but that principle provides further support for her position.

The Upper Tribunal's analysis: the human rights ground

Introduction

80. It is fair to say that the content of the appellant's human rights ground has morphed over time.

The human rights arguments evolve

81. The appellant's primary ground of appeal before the First-tier Tribunal was the statutory construction argument. Almost by way of an aside, it was further argued that "an interpretation should be adopted which does not lead to or confirm discrimination on grounds of sex". This was by way of response to an observation in the Department's mandatory reconsideration notice, namely that a claim pack had been sent to the appellant's husband with information about the possibility of a wife being able to make a claim on her husband's contributions, but no such claim had been received at the time. The notice of appeal before the First-tier Tribunal understandably argued that this was "unlawful discrimination on grounds of sex to inform a husband of a wife's rights and then to reproach a wife of not availing herself of her rights".

82. The appellant's skeleton argument for the First-tier Tribunal referred to indirect discrimination and raised both section 3 of the Human Rights Act 1998 and Article 14 of the ECHR as issues. It was argued that these provisions required regulation 3(1)(cb) to be read in

such a way as to give effect to the appellant's Convention rights. The Department's response, in a supplementary submission, was that it was constrained by its data protection obligations as to the information that could be disclosed to each partner (p.179). These human rights (or data protection) arguments appear to have been by way of a sideshow to the main dispute at first instance, and certainly were not touched on by the District Tribunal Judge in his succinct but well-focussed reasons for dismissing the appeal.

83. The appellant's grounds of appeal to the Upper Tribunal reiterated the claim of indirect discrimination "in that many more women than men seek to take advantage of their spouse's contribution record and therefore the obligation to make a second claim for a state pension falls disproportionately on women" (see paragraph 39 above). This was said to be in breach of "sections 19 and/or 149 Equality Act 2010 and/or Article 14 taken in conjunction with Article 1 Protocol 1 ECHR and/or EU law of sex discrimination including Directives 2006/54/EC and 79/7 /EC." Beyond that, however, the grounds were not further particularised – but nor would they necessarily have been expected to be, given that the First-tier Tribunal had already given permission to appeal.

84. On 28 July 2021 the Secretary of State for Work and Pensions filed a detailed response to the appellant's appeal, which dealt so far as it could with each of the several heads of indirect discrimination that had been asserted. In addition, but rather unhelpfully buried deep in the response at paragraphs 53 and 59 (rather than being flagged up at the beginning of the document), the Respondent applied for the Equality Act and EU Directive grounds to be struck out for want of jurisdiction. In a ruling dated 24 September 2021, I indicated that I was not minded to take such a drastic step as matters stood, but equally I gave a clear steer that the Appellant's efforts might be better focussed on the Human Rights Act 1988/ECHR arguments. Thereafter Mr Mercer and Ms Russell very sensibly did not pursue any submissions based on either the Equality Act 2010 or the EU Directives. Meanwhile, following several extensions of time, the Secretary of State filed her witness evidence in the form of the Walters W/S.

85. On 2 February 2022 the appellant filed her reply to the Secretary of State's response, which I had directed should stand as her skeleton argument for the oral hearing. In summary, the reply argued that it was important to distinguish between the Pre-2008 Married Women and the Post-2008 Married Women. As regards the former cohort, "the requirement to apply twice for a full pension entitlement (a category BL pension) is a violation of Article 14 in three ways", being (1) *Thlimmenos* discrimination; (2) indirect discrimination; and (3) direct discrimination based on 'other status'. In the context of the submissions on *Thlimmenos* discrimination, the reply acknowledged that the source of the obligation to make two claims lay in section 1 of SSAA 1992. As such, it was recognised that "the appellant's arguments would logically lead to section 1 of the SSAA being read down to give effect to Article 14 of the Convention pursuant to S.3 of the HRA". The appellant's reply also addressed several detailed arguments around justification, seeking to counter those advanced in both the Walters W/S and the Secretary of State's response. In conclusion, it was argued that if the claim were allowed on the basis that SSAA 1992 was discriminatory, then the claim went back to 2000. Alternatively, if the claim was upheld on either the statutory construction basis or the "discrimination through failing to ameliorate the position of all women needing to make a second claim in 2008" basis, then the claim went back to 17 March 2008.

86. On 15 February 2022 the Secretary of State filed her skeleton argument. The respondent objected that the appellant was now advancing an entirely new human rights case. In short, she argued that (i) the Upper Tribunal had no jurisdiction to deal with the new claims;

and (ii) no application to amend the notice of appeal had been made. Furthermore, (iii) the Webb W/S raised new issues which were not part of the appellant's original pleaded challenge; and (iv) the proposed new grounds faced a limitation bar under the Human Rights Act 1998, section 7(5)(a). Without prejudice to those contentions, the skeleton argument also addressed the *Thlimmenos* challenge and the issue of justification.

The Secretary of State's objections on admissibility

87. I consider it appropriate to determine the appellant's claim as it has evolved into its final state as adumbrated in the appellant's reply and as developed at the oral hearing. I am not persuaded by Mr Milford's objections to taking that course of action for the following reasons.

88. As to objection (i), Mr Milford correctly notes that the Upper Tribunal's jurisdiction is to rule on "any point of law arising from a decision made by the First-tier Tribunal" (Tribunals, Courts and Enforcement Act 2007, section 11(1)). He argues the Tribunal below was not asked to rule, and did not rule, on whether either section 1 of SSAA 1992 was discriminatory or whether the Secretary of State had discriminated against the Appellant on grounds of 'other status'. However, this submission fails to reflect the inquisitorial nature of the Upper Tribunal's jurisdiction. Its jurisprudence would be all the poorer if it were constrained by technical arguments around pleadings and were unable to take potentially valid legal points which had been missed below. Indeed, the Court of Appeal itself has been known to decide appeals on discrimination grounds which had not been considered at any earlier stage in the tribunal system (see *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123; [2018] AACR 17 at [29] *per* Henderson LJ). The fact of the matter in the present case is the First-tier Tribunal decided there was no entitlement in law to a Category B pension at any earlier date, and that decision is now properly under appeal. There is no unfairness to the Secretary of State in determining the appellant's human rights case as it has now been refined.

89. As for objection (ii), Mr Milford contends that an application to amend the notice of appeal is required but should be refused on the basis of the tests laid down in *Singh v Dass* [2019] EWCA Civ 360. This submission also overlooks the inquisitorial nature of the Upper Tribunal's jurisdiction. It is noteworthy in this context that in cases where (as here) the grant of permission has not been expressly limited, the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) – in contrast, presumably, to the CPR – make no specific provision for adding grounds of appeal after permission has been given. The Upper Tribunal accordingly has a broad discretionary power to admit a new ground, which must be exercised in keeping with the overriding objective (see *Bramley Ferry Supplies v HMRC* [2017] UKUT 214 (TCC)). I am satisfied it is fair and just to consider the new grounds, and so in accordance with the overriding objective, not least as arguments around discrimination have been part of the Appellant's case from the very outset.

90. As regards objection (iii), any potential unfairness to the Secretary of State arising out of the Webb W/S can be addressed by way of seeking further submissions (or indeed convening a further Upper Tribunal hearing), should the issues in question become determinative.

91. As for objection (iv), the Human Rights Act 1998 time-bar point, I consider the focus of this decision should remain the decision of the First-tier Tribunal, in respect of which the appellant's appeal is plainly in time. The time-bar point can be put to one side and only needs to be addressed if it likewise becomes determinative.

Article 14 of the European Convention on Human Rights

92. The conceptual scaffolding for an Article 14 challenge is not in dispute and can be taken quite shortly. As Lady Black reaffirmed in *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59; [2018] 3 WLR 1831 (at [8]):

> In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:
>
>> "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

93. The Court of Appeal's decision in *R (on the application of Drexler) v Leicestershire County Council* [2020] EWCA Civ 502; [2020] ELR 399 provides some further helpful guidance in this respect. Although that case concerned age discrimination in the context of special educational needs transport, the three principles identified by Singh LJ apply with equal (if not more) force in the realm of social security provision:

> 54. The first principle is the "margin of appreciation". Strictly speaking this is only a principle of international law and has no direct relevance in domestic law. It is a doctrine which is used by the European Court of Human Rights to respect the fact that the Council of Europe has 47 Member States, with many different cultures, traditions and legal systems. The European Court of Human Rights respects the fact that national institutions will often be better placed to make an assessment of whether, for example, a fair balance has been struck between the rights of the individual and the general interests of the community, since they have a closer understanding of conditions in their own country than an international court does or could have. The European Court of Human Rights has frequently said that the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background: see e.g. *Fretté v France* (2002) 38 EHRR 438, at para. 40, which was cited by Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2004] UKHL

> 56; [2005] 2 AC 68, at para. 39. As Lord Bingham also observed in that paragraph, a similar approach is to be found in domestic authority: see eg *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, at 381 in the opinion of Lord Hope of Craighead.
>
> 55. The second relevant principle is that not all grounds of discrimination are treated in the same way under Article 14. It is recognised in the jurisprudence both of the European Court of Human Rights and in domestic courts under the HRA that certain grounds of discrimination are "suspect", in particular race, sex, nationality and sexual orientation. These will therefore call for more stringent scrutiny than other grounds of discrimination. In the terminology used by the European Court of Human Rights, "very weighty reasons" will usually be required to justify what would otherwise be discrimination on such grounds: see e.g. *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, at paras. 15-17 in the opinion of Lord Hoffmann; and paras. 55-60 in the opinion of Lord Walker of Gestingthorpe. Lord Walker in particular drew on the terminology of "suspect" grounds which is to be derived from American jurisprudence on the Fourteenth Amendment to the US Constitution (the "equal protection" clause).
>
> 56. The third relevant principle is that the courts recognise that they are not well placed to question the judgement made by either the executive or the legislature in relation to matters of public expenditure. This is both on the ground of relative institutional competence and on the ground of democratic legitimacy. The allocation of scarce or finite public resources is inherently a matter which calls for political judgement. This does not mean that the courts have no role to play but it does mean that they must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature.

94. With those principles firmly in mind, I now turn to consider the alternative limbs of the appellant's human rights arguments.

<u>Thlimmenos</u> discrimination

95. *Thlimmenos* discrimination involves a failure to treat difference appropriately. There is a breach of Article 14 "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (*Thlimmenos v Greece* (2001) EHRR 15 at [44]). As Lord Wilson observed in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289 (at [40]):

> … the concept of discrimination is … underpinned by the fundamental principle not only that like cases should be treated alike but also that different cases should be treated differently. And in some cases … exemplified by that in the ECtHR of *Thlimmenos v Greece* (2000) 31 EHRR 12, the natural formulation of the complaint is indeed that the complainants have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently.

96. Ms Russell's central submission was that there was a violation of Article 14 by failing to make an adjustment or an accommodation for women applying for a Category B pension by removing the obstacle of making a second application for benefit. The Pre-2008 Married Women should, she argued, have had the same access to their full pension entitlement as the

Post-2008 Married Women. She acknowledged that all applicants needed to make a claim for benefit, "but the reason this constitutes *Thlimmenos* discrimination is that women claimants for a Cat BL pension have already claimed their Cat A pension and therefore given all relevant information (and demonstrated that they wish to receive their pension)" (appellant's reply at §37). This puts Pre-2008 Married Women in a materially different position to those persons who have not made a claim for benefit. The fact that it was only women who were affected until 2010 added an extra dimension of injustice based on sex.

97. Ms Russell and Mr Milford were in agreement that the third limb of the four-fold *Stott* conditions needed some reframing in the context of a *Thlimmenos* challenge. To ask whether "the claimant and the person who has been treated differently must be in analogous situations" simply does not work in that context. Rather, the question is whether the claimant has been treated in the same way as another person whose situation is relevantly different from theirs.

98. On the substance of the *Thlimmenos* challenge, Mr Milford's core submission was that the Appellant had not been placed at a disadvantage by the application of the rule about which she complains and/or there has not been relevant similarity of treatment. In the absence of such a disadvantage, and without such similarity of treatment, there is no cause to treat persons differently in the first place (*R (Drexler) v Leicestershire CC* [2019] EWHC 1934 (Admin); [2019] ELR 412 at [52] to [55] *per* Swift J). According to Mr Milford, the Appellant was hardly at a disadvantage to a person claiming a Category A pension for the first time – if anything, she was at an advantage, as she already had a Category A pension. The appellant could not point to a similarity of treatment with persons in relevantly different situations.

99. I agree with Mr Milford's analysis for the reasons he gives. I therefore conclude that the conditions for a *Thlimmenos* challenge are not met. In reality, this should come as no surprise. As Lord Carnwath observed in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289 (at [107]):

> We were referred to no Strasbourg case in which the principle has been applied in the context of social welfare legislation such as is in issue in this case. Although there is no reason to exclude its operation in this context, the absence of successful cases in Strasbourg may reflect the court's recognition in this context of the "need for national rules to be framed in broad terms" (*SG* para 15 *per* Lord Reed citing *Carson v United Kingdom* (2010) 51 EHRR 13 para 62), and the consequent difficulty of challenging the treatment of particular groups.

100. But there is a more fundamental reason still why this aspect of the appeal is going nowhere. The appellant's *Thlimmenos* challenge is avowedly directed at section 1 of SSAA 1992 and not the 2008 amendment. It is section 1 that imposes the requirement to make a claim. As such, it is self-evidently a challenge to the primary legislation. In that context, there is, put very simply, no remedy the Upper Tribunal can grant. Notwithstanding Ms Russell's advocacy, there is no realistic possibility of reading down section 1 in such a way as to allow a Category B pension to be awarded without a claim, while still going with the grain of the legislation as required by *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. The primary legislation makes it crystal clear that a claim is a prerequisite of entitlement to benefit unless the circumstances fall into one of the exceptional prescribed categories. By any reckoning any suggestion that one should start opening up and refashioning those categories would involve impermissible judicial legislation on a grand scale. Furthermore, even if one were to be persuaded that section 1 of SSAA 1992 involved unlawful discrimination, contrary to the appellant's Convention rights, the Upper Tribunal has no power to make a declaration of

incompatibility under section 4 of the Human Rights Act 1998. Thus, whichever way one turns, there are immoveable roadblocks on the road to relief.

101. Given my conclusions above, it is not necessary to address the issue of justification in the context of *Thlimmenos* discrimination. Mr Milford also pointed out that the Respondent had prepared for the appeal and filed witness evidence in support in relation to the issue of justification on the basis that the challenge was to the 2008 amendment, and not to the overall architecture of the social security scheme as premised on section 1 of the SSAA 1992. As such, he was not in a position to make detailed submissions on justification in this new context. Be that as it may, I agree with Mr Milford that in practice justification could be readily established for several reasons. It is axiomatic that courts and tribunals should be particularly slow to intervene where the alleged discrimination concerns welfare benefits in the field of social policy (see *R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [157]-[161] per Lord Reed). Furthermore, the challenge is to the judgement of Parliament enshrined in primary legislation, where respect is due to the legislature's considered decision (*R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKSC 15; [2008] 1 AC 1312 at [33] per Lord Bingham). In addition, the 'status' relied upon is of a very tenuous type (a point which is returned to below), meaning that the weight of justification required is correspondingly less (*R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 at [5] per Lord Walker).

102. For all those reasons the appellant's *Thlimmenos* discrimination claim fails.

Indirect discrimination

103. At the oral hearing Ms Russell focussed her submissions on *Thlimmenos* discrimination and direct discrimination based on 'other status', electing not to press home the indirect discrimination ground. That appeared to be a sound strategy, as I rather doubt that the indirect discrimination limb of the challenge added anything to the *Thlimmenos* dimension of the appeal.

Direct discrimination based on 'other status'

104. Ms Russell's submission was that the 2008 amendment had created an entirely arbitrary distinction based on 'other status'. The distinction in status was between the Post-2008 Married Women (for whom the requirement to apply for their benefit twice had been alleviated) and the Pre-2008 Married Women (who did not benefit from this change). The decision to retain the requirement for the latter group, based solely on the fact that their husbands' entitlement to a Category A pension arose before 17 March 2008, was therefore discriminatory and required justification. Moreover, 'status' is a term that should be given a wide and generous interpretation, applying even where it was both a description of the reason for the difference in treatment and has no significance beyond the context of that difference in treatment (see e.g. *R* (*SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [69]).

105. Mr Milford did not deny that the Appellant's position as a member of the cohort of Pre-2008 Married Women gave her a status. That was probably a wise concession, given that "the need to establish status as a separate requirement has diminished almost to vanishing point" (*Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123; [2018] AACR 17 at [41] *per* Henderson LJ). This phenomenon also reflects the direction of travel in the case law of the Strasbourg Court, which shows that the test now extends to a difference of treatment based on an identifiable characteristic as well as purely personal characteristics. Be that as it

may, Mr Milford contended that the Appellant's status was a tenuous and peripheral one, so lowering the bar so far as showing justification was concerned.

106. Mr Milford's submission was that the 'other status' discrimination challenge could not succeed in substantive terms for two reasons. One was justification (see further below). The other was that a comparison between the Pre-2008 Married Women and the Post-2008 Married Women did not disclose differential treatment in analogous circumstances, and so there could be no discrimination in the first place.

107. I accept Mr Milford's submission that a relevant comparison can be made with *R (Harvey) v Haringey LBC* [2018] EWHC 2871 (Admin); [2019] ICR 1059, in which the claimant had cohabited with her partner, who was a member of the Local Government Pension Scheme (LGPS). Before 1 April 2008 the LGPS made no provision for long-term cohabitants of scheme members to receive a survivor's pension; but after that date, it did. The claimant's partner had retired in 2003, and died in 2016, but as the pre-1 April 2008 LGPS scheme rules applied, the claimant was refused a survivor's pension. A judicial review of that decision on the basis of unlawful discrimination was unsuccessful. One of those unsuccessful grounds was in relation to 'other status'. According to Julian Knowles J (at paragraph 182):

> Overall, the reason why a post-2008 cohabitee is not in a relevantly similar position to a pre-2008 cohabitee is because they are subject to different legal regimes… the more general reason why the claimant's case fails on this aspect is because a person who is subject to one legal regime at a particular point in time is not in an analogous situation with a person subject to a different legal regime at a later point in time.

108. Ms Russell sought to argue that *R (Harvey) v Haringey LBC* was distinguishable on the basis that in this Appellant's case the Pre-2008 and the Post-2008 Married Women were being treated differently at the same time, as the two legal regimes co-existed. However, in *R (Harvey) v Haringey LBC* the pre-2008 and the post-2008 cohabitees were also being treated differently at the same time (being the date at which their partner died), as the two legal regimes co-existed. The analogy is close enough between the circumstances of these two discrimination challenges. Given the Pre-2008 and the Post-2008 Married Women were subject to different legal regimes, they were not in a relevantly similar situation to each other.

109. Accordingly, the fact of the matter is that the 'other status' that has been identified in these proceedings is inextricably tied into the introduction of a new legal regime. In this context the observations of the Strasbourg Court in *Minter v United Kingdom* (2017) 65 EHRR SE6 are instructive (emphasis added):

> 67. In *Massey* (14399/02) 8 April 2003 the applicant also invoked art.14 in conjunction with art.8, complaining that sex offenders convicted of more recent offences than his were not subject to the requirements of the Sex Offenders Act 1997 because they had completed their sentences on the commencement date of the legislation. However, the Court considered that no discrimination was disclosed by legislative measures being prospective only or by a particular date being chosen for the commencement of a new legislative regime. The Court has subsequently confirmed this position (for a recent example, see *Zammit and Attard Cassar v Malta* (1046/12) 30 July 2015 at [70]). In this regard, it has noted that *the use of a cut-off date creating a difference in treatment is an inevitable consequence of introducing new systems which replace previous and outdated schemes. However, the choice of such a cut-off date when introducing new regimes falls within the wide margin of appreciation afforded to a State when reforming its policies* (see *Amato Gauci v. Malta* (2011) 52 E.H.R.R. 25 at [71]).

110. The question of justification in the context of ‘other status’ discrimination then arises for consideration, assuming to the contrary of the above that the appellant’s case is made out so far.

Justification

111. It is common ground that the burden of proving justification lies with the Secretary of State (*R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [53] and *DH v Czech Republic* (2008) 47 EHRR 3 at [175] to [178]).

112. The question then is the standard of proof in demonstrating such justification. The authorities show that the standard of justification affords the Secretary of State a very wide margin of discretion for the reasons outlined above at paragraphs 93 and 101. This is not a case of straightforward direct discrimination on the grounds of sex, for which weighty reasons will be required. Rather, the ‘other status’ relied upon turns on the cut-off date for the introduction of a new legal order. In that context issues such as costs, the need to ration limited resources and administrative convenience may all go to provide justification. As Henderson LJ put it in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123; [2018] AACR 17 at [81]:

> …The introduction of any cut-off date for the introduction of an enhanced social security benefit is bound to have a differential impact on those who do, or do not, fall on the right side of the line; but considerations of cost (at a time of general financial stringency in the public sector), administrative convenience, and the need to ration scarce resources, will usually provide a sufficient justification for "bright line" tests of that nature, or will at least fall within the broad margin of appreciation permitted to States in the field of social policy.

113. The various authorities cited by Ms Russell in this regard – *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303; [2006] 1 WLR 3202, *R (on the application of TP and AR (TP and AR No.3)) v Secretary of State for Work and Pensions* [2022] EWHC 123 (Admin) and *R (Johnson) v Department for Work and Pensions* [2020] EWCA Civ 778; [2020] PTSR 1872 – do not in any way undermine Henderson LJ’s general statement of principle. These three latter cases simply confirm that the practical working out of that principle will be dependent on the factual matrix of each case.

114. How then does that principle play out in the context of the Respondent showing justification in the particular circumstances of the present case?

115. The Secretary of State’s starting point is that the general requirement to make a claim for benefit, as mandated by section 1 of SSAA 1992, serves three ends: (1) it avoids the administrative impossibility of identifying those individuals who are entitled to benefits without making such a claim; (2) it reinforces personal responsibility by placing the onus on individuals to make such a claim; and (3) it enables entitlement to benefit to be readily identified by reference to a particular point in time (the date of claim).

116. The purpose of the 2008 amendment, according to the Respondent’s skeleton argument (at §88), was “to administer the benefit system in a manner that is as fair and efficient as possible, and to improve this administration on an ongoing basis within the operational and budgetary constraints of the Department”. Thus, the 2008 amendment was introduced to make it easier for a cohort of women to receive Category B pensions, to which they would otherwise

only be potentially entitled, in circumstances where the Department could reasonably assume that they wished to receive the benefit. The 2008 amendment made no adverse changes to the detriment of claimants – it simply removed the requirement to make a claim for the Post-2008 Married Women once it had become practicable to do so in terms of both the operational and budgetary constraints faced by the Department.

117. The appellant's case, in essence, was that the 2008 amendment was neither fair nor efficient, contrary to the respondent's claimed justification.

118. Ms Russell contended that the 2008 amendment was not fair (appellant's reply at §44.6) because it relied on the telephone claims process outlined in the respondent's written response (at §74-§75), which was itself discriminatory, in that it relied on the husband informing his wife he was making a claim for a Category A pension. However, this seems to misunderstand the respondent's point. There might well be good grounds for criticising the ways in which the Department in effect relied (at least in part) upon a husband to inform his wife of her potential rights to a Category B pension in the period <u>before</u> 2008. But that was not the situation following the 2008 amendment. After the reform, the husband's Category A claim was itself enough to trigger a re-assessment of the wife's pension entitlement without the need for her to take any further steps.

119. Ms Russell contended that the 2008 amendment was not efficient (reply at §44.4) as it would have been more efficient at that time to remove the requirement to make a claim for both cohorts of married women. Retaining the requirement for the earlier cohort "maintains an historic injustice to women and is inefficient because it continues a burdensome and unnecessary administrative process". Indeed, it was argued that there was no reasonable relationship of proportionality between the means employed by the Secretary of State and the aim ought to be realised. There are at least three difficulties with this submission.

120. First, the appellant's critique throughout these proceedings has been that the position of the Pre-2008 Married Women was exceptional in that only they were being required to make a second claim. This argument has been deployed to argue that the decision to exclude this cohort from the reach of the 2008 amendment was neither efficient nor fair. However, the fact of the matter is that conceptually Category A and Category B pensions are not sub-categories of one benefit but different benefits with different qualifying criteria (see paragraph 53 above). Given that background, the need to make a separate claim for each benefit (unless one of the exceptions in regulation 3 applies) is entirely understandable. As noted above (see paragraph 67), it is still the case today that a married woman without any pre-existing Category A entitlement (say a recent arrival in the country with no work record here) will need to make her own Category B claim once her husband claims his Category A pension. This may seem a rather narrow and pedantic objection to the appellant's submission. The second difficulty with the claimant's case is more substantial.

121. Second, the Walters W/S makes out a compelling case for why the 2008 amendment took the exact form that it did. Mr Walters explains the general approach taken to encouraging claims for benefits (§§20-24), the practical considerations and rationale behind the introduction of regulation 3(1)(cb) (§§41-56) and the difficulties that would have lain in the way of extending the benefit of the 2008 amendment to those married women whose husbands had already become entitled to their Category A pension before that date (§§59-67). In particular, he shows how it was that the advent of new IT systems (especially PTP CAM) enabled the Department to assess whether the wife of a Category A pension claimant was herself entitled

to a Category B pension at the time of his Category A claim without the need for a separate claim being made. This is an informed and authoritative account that outweighs the Webb W/S, which lacks the same level of granular detail. As such, the Walters W/S demonstrates that it was well within the Secretary of State's wide margin of discretion in the social security policy arena to confine the effect of the 2008 amendment to married women who experienced a trigger event (i.e. their husband making a Category A pension claim) after 17 March 2008.

122. Third, the argument that the means adopted in the 2008 amendment were disproportionate is unpersuasive. Ms Russell relies on the Webb W/S, which makes the fair points that the Pre-2008 Married Women (a) were a fixed group as of 17 March 2008; and (b) were more likely to be poorer than their post-2008 comparators as they were less likely to have built up their own state pension rights. Sir Steve Webb also argues that the Department is no stranger to large-scale case reviews to identify those who have missed out on their benefit entitlements. This is where the argument based on proportionality begins to fall apart, not least because such systemic exercises – known in DWP jargon as LEAP (Legal Entitlements and Administrative Practices) exercises – are undertaken where claimants have been underpaid benefits based on their true entitlements, eg because of departmental error (see R. Thomas, 'Legal Entitlements and Administrative Practices: LEAP Exercises and Benefits Administration' (2022) 29 *Journal of Social Security Law* 49-73). LEAP exercises are neither intended nor designed to be mass take-up initiatives, which in effect is what Ms Russell was arguing that the DWP should have launched at the time of the 2008 amendment.

123. In this context the experience of the Department's current State Pension LEAP exercise is highly instructive. This major exercise has been the subject of a National Audit Office (NAO) report, *Investigation into the underpayment of State Pension* (HC 665, Session 2021-2022, 22 September 2021), a copy of which was helpfully annexed to the Walters W/S. As the summary to the NAO Report explains, and indeed as has been widely reported in the national press, "The Department for Work & Pensions has underpaid an estimated £1,053 million to pensioners due to human errors it has made dating back many years. This investigation sets out who has been affected, how it happened, how the Department assessed the scale of the problem, and what it is doing about it". It is also only right to acknowledge that since leaving ministerial office Sir Steve Webb has been instrumental in campaigning for women's pension rights and making out the case for the State Pension LEAP exercise.

124. The aggregate total estimated loss of £1,053 million (meaning an estimated average underpayment across the board in the order of £8,900 per claimant) has been calculated as follows (see NAO Report p.4; for a more detailed breakdown see Table 2, p.17):

	Estimated number affected	Estimated amount the Department will have to pay to those it has underpaid
Pensioners who should have benefited from their spouse's or civil partner's National Insurance record	53,000	£339 million
Widows and widowers who should have inherited more	44,000	£568 million

State Pension entitlement from their deceased partner		
Pensioners who should have had an increase in their pension at their 80th birthday	37,000	£146 million

125. As the NAO Report makes clear (see page 20, but note that other bullet points are omitted from the extract below), the estimated total of 53,000 pensioners in the first group in the Table above refers to the cohort of Post-2008 Married Women only:

> 1.16 The estimates exclude those where the pensioner would receive more if they claimed it, but where there was no official error because the individual needed to make a claim for the higher amount. There is no legal obligation on the Department to either seek these pensioners or pay them arrears. The Department will backdate any increased payments by 12 months from the date when a new claim is made. People who may have underclaimed their State Pension include:
>
> • potential Category BL married women, whose spouse or civil partner became entitled to State Pension prior to 17 March 2008. These pensioners are required to make a claim for any top-up payment based on their partner's National Insurance record. By contrast, those whose spouse or civil partner became entitled to State Pension after 17 March 2008 should automatically be considered for a Category BL basic State Pension …

126. An indication of the scale of the current State Pension LEAP exercise, including both an initial scan followed by manual clerical work, is given by the account of how the figure of 53,000 potential beneficiaries was arrived at (at page 33 of the NAO Report):

> *Identifying Category BL cases at risk of underpayment*
>
> 3.9 The Department initially focused on identifying underpayments to Category BL pensioners. On 4 May 2020 it commissioned a scan of the Pension Service Computer System (PSCS). This scan completed in mid-July 2020 and captured all married pensioners who currently receive less than the full category Category BL rate. The Department refined the scan results in August 2020 to remove those cases that were out of scope or where a claim for Category BL was required because the husband reached State Pension age before March 2008. This left approximately 273,000 Category BL cases for the Department to manually review and confirmed that there was a significant issue.
>
> 3.10 As the scan parameters are wide, not every case reviewed will expose an underpayment. The Department estimates that in around 52%, or 142,000, of the cases to review it will not be able to trace the pensioner's spouse, generally because they do not pay National Insurance in the UK. Of the remaining 131,000 Category BL cases identified as 'at risk', the Department estimates only 53,000 pensioners will be entitled to a lump sum of Category BL arrears.

127. The DWP's errors in administering the old state retirement pensions scheme have overwhelmingly affected women. Although only about 1 per cent of those claiming the pre-

2016 basic retirement pension have been affected by these errors, 90 per cent of those claiming the categories of pension in question are women (NAO Report, pages.17 and18). The estimates remain subject to "a high level of uncertainty" (NAO Report, page 21), and so by definition the numbers of people and figures of arrears involved may go up or down. The Department has needed to recruit more than 500 extra staff as a result of the LEAP exercise, which is expected to last until the end of 2023, at a staff cost of over £24 million (NAO Report, page 36).

128. Mr Walters also explained as follows with regard to claimants in the same position as the Appellant (Walters W/S at §64):

> The focus of the scan for the LEAP exercise was to find those individuals who should in accordance with the law have seen their State Pension amount increase. However, the scan also identified a further group of pre-2008 married women, numbering in the low hundreds of thousands, some of who could be entitled to a Category BL State Pension if they were to make a claim for it, As I have already explained, this figure would only have been the starting point for determining who could be eligible for a Category BL pension. It would still be necessary to go through the very resource-intensive manual process I have outlined above to identify the group of people who would actually have been eligible to claim for an uplift to their Category BL pension. We do not know what this number of people would have been.

129. Although we do not know the number of potential claimants in the same position as the appellant in this case, on the basis of the data from the State Pension LEAP exercise it is reasonable to assume that it is still in the tens of thousands, and potentially more, given the total potential pool of those who might (but not necessarily will) qualify is "in the low hundreds of thousands". On any basis we are talking about large numbers of women, many of whom will be currently facing financial hardship on a reduced state retirement pension.

130. The question then is what consideration was given by the respondent to the position of the Pre-2008 Married Women at the time of the 2008 amendment. Mr Walters is candid in this respect, as noted above: "I am not aware that there was any consideration to including a provision in the 2008 Regulations that would have allowed an award of a Category BL pension in these circumstances without a claim" (Walters W/S at §74). Ms Russell contends that in the absence of a contemporaneous official assessment of proportionality then reduced weight should be given now to the views of the Secretary of State (see *JT v First-tier Tribunal* [2018] EWCA Civ 1735; [2019] 1 WLR 1313 at [90] *per* Leggatt LJ). However, *JT* was a case in which the discrimination and policy choices associated with the 'same roof' rule in the criminal injuries compensation scheme were stark for all those with eyes to see. Moreover, in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123; [2018] AACR 17 Arden LJ (as she then was) was satisfied (at [91]) that the Secretary of State had discharged the burden of showing justification where there was no active consideration of the position of one group of disabled claimants at the time of the enactment of regulations: "All that the Secretary of State has to show is that it was not manifestly unreasonable to formulate the 2008 Regulations as they were enacted" (this referred, of course, to another set of 2008 Regulations in a different benefit context).

131. In the present case, we are concerned with a highly technical change to the rules governing the making of claims to retirement pensions. The 2008 amendment was brought forward in a context in which (i) the onus was on the individual to make a claim for benefit; (ii) the Department's IT systems had previously lacked the functionality to identify potentially eligible cases; (iii) the new more automated systems provided such a capability, so improving

administrative efficiency. As Mr Walters explains, it "would have been inconsistent with this to have then embarked on a manual process to bring other claimants within the scope of the change. The change was consistent with the operational reality at the time" (Walters W/S at §76).

132. Indeed, I revert to my earlier point (at paragraph 122 above) – what Mr Mercer and Ms Russell are really arguing for is that the DWP should have launched a massive take-up campaign, not simply in general terms to encourage potential Category B claimants amongst the Pre-2008 Married Women cohort to make claims but rather to identify the beneficiaries in particular and to make awards accordingly. The State Pension LEAP exercise is an indication of the scale of resources that would have had to be devoted to staffing costs for such a retrospective initiative. This would not be consistent with efficient administration, not least as the more experienced and skilled DWP staff would need to be reassigned and their roles backfilled by new recruits. All this would require powerful justification. I consider it inevitable, as the Respondent's skeleton argument put it (at §98), that "what is far more likely is that if [the Secretary of State] had understood that to be the implications of the improvement in the 2008 Regulations, she would simply not have proceeded with it at all".

133. It follows that the Secretary of State has established justification for the partial amelioration provided by the 2008 amendment.

Conclusion

134. In the course of his closing oral argument, Mr Mercer postulated the example of twin sisters, each with a Category A pension entitlement, who had married husbands who were ten years apart in age. One husband retired in 2000, the other in 2010. The sister whose husband retired in 2010 would get an automatic award of a Category B pension, whereas the one whose husband retired in 2000 would need to know that she would have to make a claim before she could qualify. He urged that I adopt a construction which avoids such an arbitrary outcome. However, that is precisely the sort of outcome which is possible, if not inevitable, with a bright line rule such as regulation 3(1)(cb). Furthermore, as Baroness Hale observed in *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820 at [36]: "The need for bright line rules in administering social security schemes has been recognised domestically, for example in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311."

135. For all the reasons above, I therefore conclude that the decision of the First-tier Tribunal dated 27 May 2020, dismissing the appellant's appeal against the Secretary of State's decision dated 20 December 2017, involves no material error of law. I accordingly dismiss the appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11).