

INHERITANCE TAX – exemption for transfers between spouses – whether exemption also applies to transfers between persons who are not legally married but who have lived together as husband and wife – no – whether the word spouse includes someone who is not legally married – no – whether section 3 of Human Rights Act 1998 applies to a death before 2 October 2000 where a notice of determination is issued by the Inland Revenue after that date – no – if wrong on that last conclusion, have appellant's Convention rights been violated? - Respondents agreed that facts fell within Arts 8 and 14 of Convention and Art 1 of First Protocol and that there was a difference in treatment between the Appellant and married persons - whether married persons and unmarried persons in an analogous situation – no – whether difference in treatment objectively justified – yes – appeal dismissed - IHTA 1984 s 18 – HRA 1998 s 3 and Sch 1 Arts 8 and 14 and First Protocol Art 1

THE SPECIAL COMMISSIONERS

KRIEMHILD ELIZABETH HOLLAND
EXECUTOR OF MICHAEL JOHN HOLLAND DECEASED - Appellant
- and -
THE COMMISSIONERS OF INLAND REVENUE - Respondents

SPECIAL COMMISSIONERS: STEPHEN OLIVER QC
DR NUALA BRICE

Sitting in London on 6 to 8 November 2002

Nicholas Blake QC and Murray Hunt, counsel, instructed by Messrs Irwin Mitchell, solicitors, for the Appellant

Christopher Tidmarsh, QC, instructed by the Solicitor of Inland Revenue, for the Respondents

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DECISION

The appeal

1. Kriemhild Elizabeth Holland, (the Appellant) as Executor of Michael John Holland deceased, appeals against a notice of determination dated 11 May 2001 in the following form:

"The Commissioners of Inland Revenue have determined –

In relation to the deemed disposal for the purposes of inheritance tax on the death on 17 April 2000 of Michael John Holland ("the Deceased")

That, having regard to the fact that you were not the spouse of the Deceased at the occasion of the deemed disposal, the transfer of value which then occurred was not an exempt transfer within the meaning of s 18 Inheritance Tax Act 1984."

The legislation

2. Section 1 of the Inheritance Tax Act 1984 (the 1984 Act) provides that tax shall be charged on the value transferred by a chargeable transfer. Section 2(1) provides that a chargeable transfer is a transfer of value which is made by an individual which is not an exempt transfer. The relevant part of section 18 provides:

"18 Transfers between spouses

(1) A transfer of value is an exempt transfer to the extent that the value transferred is attributable to property which becomes comprised in the estate of the transferor's spouse or, so far as the value transferred is not so attributable, to the extent that that estate is increased."

3. Thus the effect of section 18 is to give exemption from inheritance tax for transfers between spouses.

4. The Human Rights Act 1998 (the 1998 Act) came into force on 2 October 2000. The relevant parts of section 3 provide:

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation;"

5. Convention rights are defined in section 1 of the 1998 Act and include the rights and freedoms in the Articles of the Convention set out in Schedule 1. Articles 8 and 14 and Article 1 of the First Protocol are relevant in this appeal and the relevant parts of those Articles provide:

"Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 14

Prohibition of discrimination

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

THE FIRST PROTOCOL

Article 1

Protection of property

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

The issues

6. The Appellant was not married to Mr Michael John Holland but had lived with him as husband and wife for thirty-one years before his death. She claimed that the property which passed to her on his death should be exempt from inheritance tax under section 18 of the 1984 Act. This claim was refused by the Inland Revenue on the ground that the Appellant was not the spouse of Mr Holland.

7. The Appellant argued that the word spouse in section 18 was not restricted to those who were legally married but also included those who had lived together as husband and wife. Alternatively, the Appellant argued that the 1998 Act applied as the notice of determination had been given after that Act came into force. It followed that section 3(1) of the 1998 Act required the word spouse in section 18 of the 1984 Act to be read in a way compatible with Article 14 of the Convention so as to remove discrimination on the grounds of status so that the Appellant could enjoy the rights and freedoms in Article 8 and Article 1 of the First Protocol.

8. The Respondents argued that the word spouse in section 18 meant those who were legally married. The Respondents also argued that the 1998 Act did not apply as the death of Mr Holland had occurred before the 1998 Act came into force. However, if the 1998 Act did apply then the Respondents accepted that the facts fell within Articles 8 and 14 and Article 1 of the First Protocol of the Convention and that there was different treatment between the Appellant on the one hand and a married person on the other. Nevertheless, the Respondents argued that married persons were not in an analogous situation to that of the Appellant's situation and that the difference in treatment had an objective and reasonable justification.

9. Thus the issues for determination in the appeal were:

(1) whether the word spouse in section 18 of the 1984 Act meant a person who is legally married or whether it included a person who had lived with another as husband and wife; if the former, then

(2) whether the 1998 Act applied in a case where the death occurred before the 1998 Act came into force but the notice of determination was given after the Act came into force; if the latter:

(3) whether a wider interpretation of the word spouse was required by section 3(1) of the 1998 Act so as to give effect to the rights in Article 14 of the Convention read with Article 8 and/or Article 1 of the First Protocol and to remove discrimination on the grounds of status and, in particular :

(a) whether married persons were in an analogous situation to that of the Appellant's situation; or

(b) whether the difference in treatment had an objective and reasonable justification.

The evidence

10. A bundle of documents was produced. There was an agreed statement of facts. Oral evidence was given by the Appellant on her own behalf. The Appellant had put her evidence in the form of a witness statement which she signed on 3 May 2002. Witness statements by Denise Rebuschung and Gil Nelson were also produced on behalf of the Appellant and were not objected to by the Respondents. Two witness statements by Mr Martyn Haigh, Assistant Director, Capital Taxes dated 3 May 2002 and 28 October 2002 respectively were produced on behalf of the Respondents and were not objected to by the Appellant.

The facts

11. From the evidence before us we find the following facts.

12. The Appellant and Mr Holland first met in 1965. In that year Mr Holland separated from his first wife and the Appellant separated from her first husband.

13. In 1967 the Appellant entered into a relationship with Mr Holland and in 1968 they moved together to a house in Middlesex. In 1969 the Appellant changed her name to Holland by deed poll and became known as Mrs Holland. On 18 June 1969 the Appellant's first marriage was dissolved by decree nisi.

14. In 1969 Mr Holland and the Appellant moved to another house also in Middlesex and in 1973 they moved to Maidenhead where they lived for the rest of Mr Holland's life and where the Appellant lives to this day.

15. In the years following 1969 Mr Holland and the Appellant lived in all respects as husband and wife. They had two children, a son who is now 31 years old and a daughter who is now 25. Their children, and most of their acquaintance, assumed that they were married. Mr Holland provided for his family and took care of all the finances.

16. In 1972 Mr Holland instructed solicitors to process his divorce from his first wife and he obtained a decree absolute in 1974. In 1993 the Appellant started to look for her divorce papers with a view to getting married to Mr Holland. However, the Appellant's solicitors could not find her decree absolute. A search was made at the Principal Registry but it could not be found. In 1997 another firm of solicitors were asked to search for the decree absolute but they could not find

it either. Both Mr Holland and the Appellant thought that they could not get married until they had a copy of the Appellant's decree absolute.

17. Mr Holland died suddenly of a heart attack on 17 April 2000. He left a Will dated 25 June 1973 under which he appointed the Appellant to be his executor and left all his estate to her if she survived him. With his will Mr Holland left a statement giving the reasons why he left nothing to his then lawful wife. He outlined his association with the Appellant who had looked after their joint home and attended to his health and welfare and that of their son; the statement said that he felt under a greater moral obligation to the Appellant than any moral or legal liability to his lawful wife.

18. On 4 October 2000 a certificate was obtained from the Principal Registry of the Family Division that the decree absolute dissolving the Appellant's first marriage had been made on 19 September 1969.

19. On 14 November 2000 the Appellant, as executor of Mr Holland, submitted the Inland Revenue account. This showed a gross estate of £700,381 and a net estate of £639,742. It assessed the total amount of inheritance tax payable as £179,824.40. Of the assets in the estate the value of the deceased's residence was shown as £195,000 and there were quoted stocks and shares with a value of £437,581.

20. On 11 December 2000 probate of Mr Holland's Will was granted to the Appellant.

21. On 22 December 2000 the Appellant's representatives wrote to the Inland Revenue seeking their approval to a claim by the Appellant for spouse exemption in respect of the property passing to her from Mr Holland. The Inland Revenue replied on 16 January 2001 to say that spouse exemption only applied to transfers between person who were lawfully married to each other. On 6 April 2001 the Appellant asked for a formal notice of determination and on 11 May 2001 the notice of determination was issued which is in dispute in this appeal.

The legislative history

22. Both parties relied upon the history of section 18 and so, before considering their arguments in detail, we give an outline of that history.

23. Estate duty was introduced by the Finance Act 1894. It did not contain any provisions which were specific to married persons but did provide that, although duty was payable when property was put into settlement, it was not payable subsequently until the death of a person who was competent to dispose of the property. However, an additional estate duty, called settlement estate duty, was charged in respect of settled property, except where the only life interest was that of a wife or husband of the deceased person. Settlement estate duty was abolished in 1914 after which estate duty was charged on each passing of the settled property except in the cases of the parties to a marriage. Thus after 1914 there was an exemption from estate duty on the death of a life tenant who was a surviving spouse where estate duty had been paid on the death of the first spouse. (See Finance Act 1914 section 14).

24. These provisions were criticised on two main grounds. First, because the exemption only applied to property put into trust on the death of the first spouse and not to property passing to the surviving spouse absolutely. And, secondly, because the relief applied on the death of the second spouse and therefore

benefited the beneficiaries of the estate of the surviving spouse; it did not benefit the surviving spouse.

25. The case for reform was discussed in a Green Paper published in March 1972 called "Taxation of Capital on Death – A possible Inheritance Tax in place of Estate Duty" Cmnd 4930. The Green Paper discussed both improvements to estate duty and also a possible new form of death duty called an inheritance tax. (In that context the phrase "inheritance tax" was used to describe a possible tax on beneficiaries which in the event was not enacted.) Paragraph 39 of the Green Paper (which appeared in the section which discussed improvements to estate duty) was referred to in argument and it read:

"Surviving spouses and settled property

39. The present estate duty provides a special relief where a surviving spouse takes on the other's death a limited interest in settled property. The settled property is liable to estate duty on the death of the first spouse but not when it passes on the death of the survivor. This is a relic of the time when settled property generally could pass free of duty and in the context of the present estate duty law may be thought to be anomalous in that the benefit of the relief goes, not to the surviving spouse, for whom relief may be most needed, but to the person who inherits on his or her death (who may be a complete stranger). It is for consideration whether this relief should be replaced by one which ensured that the full benefit went to the widow or widower."

26. Later that year section 121 of the Finance Act 1972 introduced an exemption from estate duty of property up to £15,000 if left to a spouse of the deceased. (The same section introduced an exemption of up to £50,000 for property left to charities and an exemption without limit for property left to certain heritage bodies.)

27. Estate duty was replaced by capital transfer tax in 1975 which introduced the unlimited exemption for transfers between spouses. In the Parliamentary Debates on the Finance Bill in Standing Committee A (*Official Report*: 5 February 1975 Cols 791 to 802) an amendment was considered to define the word "spouse" to include a "common law wife" meaning a person who was not legally married. The debate highlighted the difficulty of defining exactly who should benefit and raised the question as to whether those in very brief liaisons should be included. Ultimately the amendment was negatived and the relief was restricted to spouses.

The authorities

28. Both parties had put in lengthy skeleton arguments before the hearing. However, the arguments at the hearing departed from the skeletons. We have based our decision on the arguments put to us at the hearing.

29. The following authorities were referred to in argument at the hearing:

Dyson Holdings Limited v Fox [1976] QB 503

Crake v Supplementary Benefits Commission [1982] 1 All ER 498

Harrogate Borough Council v Simpson (1984) 17 HLR 205, CA

Lindsay v United Kingdom (1986) (Com Dec 1 November 1986) DR 49 p 181

X v United Kingdom (1997) 24 EHRR 143

Frankland v Inland Revenue Commissioners [1997] STC 1450

Fitzpatrick v Sterling Housing Association Ltd (1999) [2001] AC 27 (HL); [1998] Ch. 304 (CA)

Victor Chandler International Ltd v Customs and Excise Commissioners (February 2000) [2000] 1 WLR 1296

Shakell v United Kingdom ECHR decision of 27 April 2000

Wilson v First County Trust Limited (No. 2) [2001] EWCA Civ 633; [2002] QB 74 (May 2001)

Alconbury Developments Limited v Secretary of State for the Environment (9 May 2001) [2001] 2 WLR 1389

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another [2001] EWCA Civ 713 (17 May 2001)

Regina v Lambert [2001] UKHL 37 (July 2001)

Home Office v Wainwright [2001] EWCA Civ 2081; [2002] 3 WLR 405 (December 2001)

R (on the application of Hooper and Others) v Secretary of State for Work and Pensions [2002] All ER (D) 193 (14 February 2002)

International Transport Roth GmbH v Secretary of State for the Home Department (22 February 2002) [2002] EWCA Civ 158

Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2002] All Er (D) 56 (6 March 2002)

Lloyds UDT Finance Ltd v Chartered Finance Trust Holdings plc and others (Britax International GmbH and another, Pt 20 defendants) [2002] EWCA Civ 806; [2002] STC 956 (31 May 2002)

Mendoza v Ghaidan [2002] EWCA Civ 1533 (5 November 2002)

30. The following decisions from other jurisdictions were also referred to:

Miron v Trudel (1995) 124 DLR (4th) 693 (Canada)

Wakim, In re; Ex parte McNally (1999 73 ALJR 839 (Australia)

Reasons for decision

31. We consider separately each of the issues in the appeal.

1. *Is the word spouse in section 18 restricted to one who is legally married?*

32. The first issue in the appeal is whether the word spouse in section 18 of the 1984 Act means a person who is legally married or whether it also means a person who has lived with another as husband and wife.

33. For the Appellant Mr Blake argued that legal marriage ceremonies were very recent in law dating from Lord Hardwicke's Marriage Act of 1753. He also argued that there was no definition in the 1984 Act of the word spouse and one meaning of the word spouse was a person who was betrothed or espoused to another rather than married. He pointed out that other provisions of the 1984 Act (for example section 22(2)(c)) used the phrase "party to a marriage" and he accepted that, if that phrase had been used in section 18, then the Appellant would have no ground of appeal. In support of his arguments Mr Blake relied upon the "always speaking" rule of interpretation which meant that words had to be interpreted in the light of their meaning at the date they fell to be considered. He relied upon *Dyson, Fitzpatrick and Mendoza* for the principle that statutory terms had to be interpreted so as to recognise changing social practices and attitudes in order to give practical effect to the intention of Parliament and the principle that Parliament intended individuals to enjoy equality under the law. He also referred to *Miron v Trudel*.

34. For the Respondents Mr Tidmarsh argued that the word spouse was a semi-technical word with a clear and well established meaning. All the indications in the legislation were that it meant a person who was married and there was nothing in the context of section 18 to indicate that any meaning, other than the ordinary meaning, was intended. Section 18 had to be considered within the context of the taxing statutes as a whole which included the Income and Corporation Taxes Act 1988 (the 1988 Act) and the Taxation of Chargeable Gains Act 1992 (the 1992 Act). All this legislation was inter-connected and together presented a coherent tax code. If the word spouse were to be given an altered meaning in section 18 of the 1984 Act then the same would have to apply to other references to married persons in the rest of the tax code. The taxing statutes were not social legislation and did not aim to achieve social purposes. Together they constituted a code published by Parliament on which subjects were entitled to rely in regulating their affairs and the need for certainty was therefore paramount. The word spouse was a specific word and, unlike the word family, was not a general or flexible word and there was no doubt about its meaning. He relied upon *Frankland* for the principles that in construing a fiscal statute the court's function was to interpret the legislation and not to legislate under the guise of interpretation; that Parliament's intention had to be deduced from the words used; and that tax statutes had to be considered as part of a code published by Parliament on which people were expected and entitled to regulate their affairs. He also relied upon *Victor Chandler* at 1304 and 1306 for the

principle that any new interpretation must be within the mischief of the provision to be interpreted and within the intention of Parliament and here it was relevant that Parliament in its Debates had deliberately voted not to adopt the interpretation proposed by the Appellant.

35. The authorities relied upon by Mr Blake illustrate the principle that a changing meaning may be given to statutory words. *Dyson* (1974) concerned the changing meaning of the word family for the purposes of the Rent Acts which gave protection to "a member of the tenant's family". The question was whether a woman who had lived with the tenant for twenty one years as his wife was a member of his family. The Court of Appeal held that the question had to be answered according to the understanding of the ordinary man using the word in its popular sense at the relevant time. The meaning of the word family had radically changed and a woman who had lived with a man as his wife would now be included as a member of the tenant's family. At 512 Bridge LJ said:

"Now, it is, I think, not putting it too high to say that between 1950 and 1975 there has been a complete revolution in society's attitude to unmarried partnerships of the kind under consideration. Such unions are far commoner than they used to be. The social stigma that once attached to them has almost, if not entirely, disappeared. ... The ordinary man in 1975 would, in my opinion, certainly say that the parties to such a union, provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not."

36. Thus *Dyson* is authority for the principle that the meaning of a word must accord with the understanding of the ordinary man using the word in its popular sense at the relevant time. *Dyson* also established the principle that the meaning of the word family has changed over time and now includes an unmarried couple living as man and wife. However, it is not authority for the view that the meaning of the word spouse has changed at all. In our view the ordinary man in the year 2000 (or indeed in the year 2002) would certainly say that the word spouse means a man and a woman who are legally married.

37. *Fitzpatrick* (1997 CA; 1999 HL) also concerned the application of the Rent Acts. The statute provided that a surviving spouse of the original tenant could succeed to his statutory tenancy on death and for those purposes "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant". If those provisions did not apply then a "person who was a member of the original tenant's family" was entitled to an assured tenancy. The plaintiff had lived with the protected tenant of a flat in a permanent and stable homosexual relationship since 1976 and on the tenant's death in 1994 applied to take over the statutory tenancy. His application was refused and he appealed, arguing that he had lived with the original tenant as his wife or husband or was a member of the original tenant's family. The Court of Appeal held that the phrase "living with the original tenant as his or her wife or husband" applied only to a heterosexual relationship and that the plaintiff was not a member of the tenant's family. The House of Lords agreed that the words "as his or her wife or husband" connoted a relationship between a man and a woman and so did not apply to a same sex relationship but over-ruled the Court of Appeal and held that a same-sex partner of a tenant was capable of being a member of his family for the purposes of the Rent Acts.

38. Thus *Fitzpatrick* recognizes that the meaning of the word family has changed over time and now includes a couple in a same sex relationship. However, it is

not authority for the view that the meaning of the word spouse has changed and it is only the meaning of the word spouse which is relevant in this appeal. In that connection at p34 Lord Slynn of Hadley said:

"The first question then is whether the plaintiff was the "spouse" of Mr Thompson within the meaning of paragraph 2 of Schedule 1 of the 1977 Act, as amended. I recognise that if the non-gender specific noun "spouse" stood alone the matter might be more debatable as Mr Blake contends, though the ordinary meaning is plainly "husband" or "wife". In the context of this Act, however, "spouse" means in my view legally a husband or wife. The 1988 amendment extended the meaning to include as a "spouse" a person living with an original tenant "as his or her wife or husband". This was obviously intended to include persons not legally husband and wife who lived as such without being married. That prima facie means a man and a woman .."

39. The *Fitzpatrick* decision requires us to recognize that the ordinary meaning of the word spouse is plainly husband or wife and, in our view, within the context of the 1984 Act, spouse means legally a husband or wife. Unlike the Rent Acts, there is no extension in the 1984 Act to persons living as husband or wife, nor is there any extension to persons living as a member of the deceased person's family, and so the rest of the judgment in *Fitzpatrick* has no relevance to this appeal. Mr Blake sought to argue that the Appellant was a member of Mr Holland's family, within the extended meaning of that word following the decision in *Fitzpatrick*, and that the family member she was was his spouse. We do not agree. She was not his spouse and for the purposes of inheritance tax it is irrelevant whether she was, or was not, a member of his family.

40. We are confirmed in our view that the word spouse in section 18 means a person who is legally married as this is consistent with the other provisions of the 1984 Act and with the provisions of the tax code generally. We accept the argument of Mr Tidmarsh that the 1984 Act is a taxing statute which cannot be considered outside the context of all other taxing statutes which together form a tax code. The tax code recognises the legal obligations of married persons to contribute to one another's maintenance.

41. Other examples of special provisions relating only to married persons are found in the 1984 Act itself. In considering the 1984 Act it is relevant that it taxes not only transfers of value on death but also transfers of value made within seven years of death. Again, some of the provisions of the 1984 Act are advantageous for married persons and other are not. In each case certainty is required so that at any time it is possible to say that a person comes within the provisions or not. For example, section 11 provides that a disposition is not a transfer of value if it is made by one party to a marriage in favour of the other and is for the maintenance of the other. Section 30 applies to conditionally exempt transfers and contains special provisions relating to transfers where the transferor and his spouse are beneficially entitled to the property. Section 48 applies to excluded property and provides that, in general, a reversionary interest is excluded property but not if it is one to which either the settlor or his spouse has been beneficially entitled. Section 161 contains the related property provisions and provides that property is related to property comprised in a person's estate if it is comprised in the estate of his spouse. Section 203 is a corollary to section 18 and provides that in certain circumstances a spouse who receives a transfer becomes liable for the tax on another transfer made by the other spouse. The Finance Act 1986 also contains provisions relating to inheritance tax. Section 102A applies to

a disposal of an interest in land by way of gift with reservation and applies if either the donor or his spouse enjoys a significant right or interest in the land. Some of these provisions provide advantages for spouses (for example, section 18) but others do not.

42. A number of examples of the special treatment for spouses in the income tax legislation appear in the 1988 Act. Section 257A gives a special personal allowance for some married couples. Section 304 contains special provisions for transfers of shares between husband and wife in connection with the business expansion scheme. Section 347B contains provisions about maintenance payments by one of the parties to a marriage to the other. Section 660A contains provisions about the income arising under a settlement where the settlor retains an interest and contains special provisions about the spouse of the settlor. Some of these provisions favour married couples (for example, sections 267A and 347B) but others do not (for example, section 660A). The same theme of special treatment for spouses has been carried through to capital gains tax, which was first introduced in 1965 and where the provisions are now found in the 1992 Act. Section 58 provides that there is no capital gains tax on transfers between husband and wife (which is an advantage for married couples) but section 222(6) provides that a husband and wife can have relief on the disposal of only one residence whereas an unmarried couple could have relief on the disposal of two (which is a disadvantage for married couples).

43. As both the 1992 Act and the 1984 Act concern capital taxes there is a coherence of provisions. For example, section 58 of the 1992 Act, which exempts from capital gains tax transfers between husband and wife, is mirrored by section 18 of the 1984 Act which exempts from inheritance tax such transfers during life or on death.

44. The fact that the whole of the taxing statutes form an inter-connected code, and that there are many provisions which are specific to married persons, confirms our view that when Parliament used the word spouse in section 18 of the 1984 Act it intended to mean only married persons and not persons living together as husband and wife.

45. Finally, of course, the intention of Parliament, that the word spouse in section 18 means a person who is legally married, appears unequivocally from the *Official Report* of 5 February 1975 (see paragraph 27 above).

46. Mr Tidmarsh laid emphasis upon the practical difficulties which would arise if the exemption in section 18 were extended to persons living together as man and wife as suggested by the Appellant. We appreciate the need for certainty, especially bearing in mind the number of provisions which relate to married persons. However, we do not consider that practical or administrative difficulties should dictate the interpretation of statutory provisions. We have to apply the words of the statute even if they do give rise to practical difficulties. Other statutes have used the phrase "living together as man and wife" and, if that phrase appeared in the taxing statutes, we would give effect to it. The fact is, however, that although the phrase does appear in other statutes, it does not appear in the 1984 Act which also indicates to us that it is the intention of Parliament that the 1984 Act should apply only to spouses, that is persons who are legally married.

47. Our conclusion on the first issue in the appeal is that the word spouse in section 18 of the 1984 Act means a person who is legally married and does not mean a person who has lived with another as husband and wife.

(2) Does the 1998 Act apply?

48. The second issue in the appeal is whether the 1998 Act applies in a case where the "acts" of the public authority (i.e. the Respondents notice of determination and the exercise of our appellate function) take place after the 1998 Act came into force while the event leading to those acts (i.e. the death) occurred before. This is not an easy issue to resolve.

49. For the Appellant Mr Blake argued that the relevant date was the date of the notice of determination. That was the "act" or "action" referred to in sections 6 and 7 of the 1998 Act. He relied upon *Wilson* and *Lambert* and distinguished *Britax* where there was no act by a public authority before the appeal was considered by the High Court. On that basis, he argued, we were required to follow the directions in section 3 of that Act with regard to adopting a compliant interpretation.

50. For the Respondents Mr Tidmarsh argued that the 1998 Act had no application because the relevant event was the death of Mr Holland and so the charge to tax arose before the 1998 Act came into force. The combination of sections 1 and 4 of the 1984 Act meant that tax was charged on the death of any person. Section 216 provided that the personal representatives of a deceased person had to deliver an account before the expiration of six months and section 226 provided that the tax was normally payable six months after the date of the chargeable transfer. Under section 221 the purpose of a notice of determination was to enable the Respondents to give notice that they were of the view that a transfer of value had been made or to give a decision on a claim; under section 242 the Respondents could not take legal proceedings for the recovery of tax unless the amount had been agreed or a notice of determination issued. The notice of determination did not create the liability but had the same function for inheritance tax purposes as an assessment had for income tax. Section 22(4) of the 1998 Act was not relevant in this appeal because these proceedings were not brought by or at the instigation of a public authority. Mr Tidmarsh relied upon *Britax* and *Wainwright* and argued that some parts of *Wilson* were no longer good law.

51. Before considering the authorities cited to us we have found it helpful to recall the provisions of the 1998 Act which are relevant to this issue. Sections 1 and 2 are in a part headed "Introduction". Section 1 incorporates the Convention rights. Section 2 provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account the jurisprudence of the European Court of Human Rights. Sections 3, 4 and 5 are in a part headed "Legislation". Section 3 provides that, so far as it is possible to do so, primary and subordinate legislation must be read in way which is compatible with Convention rights. Pausing there, it is relevant that section 3 only applies "where it is possible to do so"; if it is not possible to read legislation so as to give effect to Convention rights then section 3(2)(b) specifically provides that the incompatible primary legislation remains valid and enforceable. Section 4 provides that where a court is satisfied that a provision of primary legislation is incompatible with a Convention right it may make a declaration of incompatibility. We are not within the definition of court for the purposes of section 4 and so we cannot declare primary legislation to be incompatible with Convention rights; we

are however bound by section 3 and must interpret the legislation, so far as it is possible to do so, in a way which is compatible with Convention rights.

52. Sections 6 to 9 are in a part headed "Public authorities". Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right unless, as a result of primary legislation, the authority could not have acted differently. Section 6(3) provides that a public authority includes a court or tribunal and a person whose functions are of a public nature. Pausing there, both the Respondents, when issuing the notice of determination, and the Special Commissioners in hearing this appeal, are public authorities for the purposes of that provision. Section 7(1) provides:

"7(1) A person who claims that a public authority has acted ... in a way which is made unlawful by section 6(1) may-(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or(b) rely on the Convention rights concerned in any legal proceedings. ...".

53. Section 7(6) defines legal proceedings as proceedings brought by or at the instigation of a public authority and an appeal against the decision of a court or tribunal. This appeal is not, therefore, legal proceedings within the meaning of section 7(1)(b) because it is not brought by or at the instigation of the Respondents and it is not an appeal against a decision of a court or tribunal. However, this appeal is proceedings against a public authority (the Respondents) and we are the appropriate tribunal. Thus these proceedings come within section 7(1)(a). 54. Section 22(4) provides that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place but otherwise that subsection (section 7(1)) does not apply to an act taking place before the coming into force of that section. That means that, as these proceedings come within section 7(1), but not within section 7(1)(b), it is not open to the Appellant to make a claim in respect of "acts" taking place before 2 October 2000.

55. The question then arises as to whether the notice of determination is an "act" of a public authority within the meaning of section 6(1). Before answering this question we first consider the authorities cited to us. 56. *Wilson* (May 2001) concerned the enforceability of a loan agreement under the Consumer Credit Act. The loan agreement was made on 22 January 1999. On 24 September 1999 the County Court judge held that the contract was enforceable but on appeal, on 23 November 2000, the Court of Appeal held that it was unenforceable. The question then arose as to whether the absolute bar on enforcement in the Consumer Credit Act infringed the creditor's Convention rights to a fair trial and the protection of property. It was argued that the 1998 Act did not apply as the loan agreement was entered into before the Act came into force. At page 89 Sir Andrew Morritt VC referred to section 22(4) and said:

"Parliament took the view – no doubt as a matter of policy – that public authorities should not be exposed to proceedings in respect of acts (alleged to be incompatible with Convention rights) which had taken place before sections 6 and 7 had come into force. Nor should the decisions of courts and tribunals made before those sections had come into force be impugned on the ground that the court or tribunal was said to have acted in a way which was incompatible with Convention rights. ... The second limb of section 22(4) is required because, without it, public authorities would be exposed to claims in respect of acts (said to be unlawful under

section 6(1)) which had taken place before section 7 had come into force."

57. Thus *Wilson* recognizes that the 1998 Act does not apply to acts which took place before the Act was in force and it establishes that decisions of courts and tribunals made before the Act came into force cannot be impugned. This principle has been adopted subsequently. However, it does not assist us in deciding whether section 3(1) applies to the notice of determination and/or our decision, both of which take place after the Act is in force.

58. In *Wilson*, in a passage relied upon by the Appellant, Sir Andrew Morritt went on to decide that find that a court, which was required by section 6(1) to act in a way which was compatible with Convention rights, had to have regard to the facts as they were at the time that it made the order, and that it was the making of the court order rather than the date of the loan agreement which was the relevant event. As the provisions of the Consumer Credit Act were incompatible with Convention rights a declaration of incompatibility was made. That would support the Appellant's case as it indicates that in this appeal, irrespective of the date of death, both the giving of the notice of determination by the Respondents and, indeed, the giving of our decision as the appellate Special Commissioners, are relevant acts occurring when the 1998 Act was in force. However, this principle was not followed subsequently – appeals to the higher courts after the Act came into force were decided on the basis that decisions of the lower courts given before the Act came into force were upheld, even though the order of the higher court was an "act".

59. In *Lambert* (July 2001) a defendant was convicted of being in possession of a controlled drug and appealed relying upon Article 6(2) of the Convention. His appeal was dismissed by the Court of Appeal before the 1998 Act came into force. The House of Lords held that decisions of courts or tribunals made before the Act came into force could not be impugned, even though that decision was an "act" of the House of Lords made after the 1998 Act came into force. Thus the House of Lords established the principle that judicial appellate "acts" occurring after the Act came into force, which related to adjudications by lower courts or tribunals before the Act came into force, were not obliged to give retrospective effect to the 1998 Act. Lord Hope said at page 244:

" As soon as section 3(1) was brought into force the interpretive obligation was binding on all courts irrespective of the date when the legislation was enacted. I agree that it would have been binding on the trial court had the section been in force at the date of the trial. But there is nothing in the 1998 Act to indicate that that subsection is to be applied retrospectively to acts of court or tribunals which took place before the coming into force of section 3(1). The provisions of section 22(4) are to the contrary. There would have been no point in enacting that section 7(1)(b) was to have retrospective effect in the way which that subsection provides but not otherwise if appellate courts were to be obliged by section 6(1) to give retrospective effect to that subsection in all cases where they were required to adjudicate upon acts by courts or tribunals."

60. In *Wainwright* (December 2001) the plaintiff visited a prison in 1997 and was searched in an unseemly manner. At first instance the judge awarded damages and gave leave to appeal. In the Court of Appeal one of the issues was whether the 1998 Act applied. Again the judgment of the Court of Appeal was an "act"

occurring after the 1998 Act came into force. It was held that that 1998 Act did not have retrospective effect because the matters complained of occurred before the Act came into force. 61. Both *Lambert* and *Wainwright* concerned the position of appellate courts in criminal matters which are a little removed from the facts of the present appeal. We have been more assisted by *Britax* which concerns the taxing statutes and is also more recent (May 2002). That appeal concerned the application of the Capital Allowances Act 1990 (the 1990 Act) to trading operations in the accounting period ending on 31 December 1999. The proceedings started in the High Court between two parties one of whom had given tax warranties to the other. In a judgment given on 22 November 2001 the Vice-Chancellor had to interpret the provisions of section 35(2) of the 1990 Act. Section 35(1) contained provisions relating to writing down allowances for expensive motor cars and section 35(2) restricted the extent to which expenditure on the hiring of an expensive motor car was deductible in computing the profits of the trade. The issue was whether the word "hiring" was limited to contracts where the hirer was the end user or whether it applied to all contracts of hire. The Vice-Chancellor decided that section 35(2) applied to all rentals and *Britax* appealed to the Court of Appeal. One of its arguments was that section 3 of the 1998 Act required the narrower construction as the wider construction gave rise to a breach of Article 14 and Article 1 of the First Protocol. The ground of the argument was that the judgment of the Vice-Chancellor was an "act" after the 1998 Act came into force and that section 6(1) of the 1998 Act applied to that judgment. At paragraphs 84 to 93 of his judgment Jonathan Parker LJ referred to a number of authorities including *Wilson* and *Wainwright* and then went on:

"91. Thus, it is no longer open to argument in this court that section 3(1) of the 1998 Act operates retrospectively.

92. Further, I cannot accept Mr Walters' submission that in order to give rise to the retrospectivity issue there must have been some act or decision prior to the commencement date which was valid when performed but which would be rendered invalid if the 1998 Act were to apply retrospectively, and that there was no such act or decision in the instant case. The events in question were the trading activities of Autolease during the accounting period ended 31 December 1999, the issue in the proceedings is as to the tax consequences of those trading activities. Plainly, Mr Walters' reliance on the 1998 Act requires that it should operate retrospectively in relation to those trading activities, and to that issue, so as to produce a result (in terms of the true construction of section 35(2)) which was not available under the law as it then stood. 93. Accordingly, in my judgment Mr Walters' third submission fails on the retrospectivity issue."

62. Thus *Britax* makes it clear that, if in the present circumstances there had been no intervening notice of determination, the Special Commissioners, in giving their decision, should look only at the law as it was at the date of death of Mr Holland and that section 3(1) of the 1998 Act would not apply. The event in question in this appeal was the death of Mr Holland and the issue in these proceedings is the tax consequences of that death.

63. The question then arises as to whether the intervening notice of determination alters that result. Clearly the notice of determination was an act of a public authority which occurred after the passing of the 1998 Act. Mr Blake, as already noted, distinguished the decision in *Britax* on the ground that there was no "act" of a public authority before the decision of the High Court whereas in this

appeal there had been an intervening "act" of a public authority in the form of the notice of determination.

64. In order to decide whether the notice of determination should alter the position arrived at in *Britax* we analyse the nature of the notice of determination. The charge of inheritance tax in the present situation is imposed by reason of the transfer of value made on death. Liability is imposed on the personal representative (Mrs Holland) by section 200(1)(a) of the 1984 Act. The tax has to be paid by the personal representatives when rendering the Inland Revenue account. If the tax is paid late, interest runs from a date related to the date of death. See sections 216(1) and 226(1). Although inheritance tax laws may change, the relevant inheritance tax laws which apply are those in force at the date of death (unless Parliament specifically enacts a retrospective law). Thus the date of the relevant death is the start of the personal representatives' liability for inheritance tax. Where it is desired to appeal a matter concerning inheritance tax it is first necessary for the Respondents to give a notice of determination and the person receiving that notice may then appeal against it. Where the recipient either makes no appeal or appeals without success, the Respondents may take enforcement proceedings to recover the amount shown due in the notice of determination. See section 242(1).

65. We turn now to look at the notice of determination in the present case in its statutory context.

66. Section 221(1) provides (so far as relevant) -

"(1) Where it appears to the Board that a transfer of value has been made or where a claim under this Act is made to the Board in connection with a transfer of value, the Board may give notice in writing to any person who appears to the Board to be the transferor or the claimant or to be liable for any of the tax chargeable on the value transferred, stating that they have determined any of the matters specified in the notice."

s.221(2) specifies those "matters" as covering, *inter alia*, the date of the transfer, the value transferred, the transferor, the tax chargeable and "any other matter that appears to the Board to be relevant for the purposes of this Act." Section 221(3) provides:

"(3) A determination ... of any fact relating to a transfer of value -

(a) shall, if that fact has been stated in an account or return ... and the Board are satisfied that the account or return is correct, be made by the Board in accordance with that account or return, but

(b) may, in any other case, be made by the Board to the best of their judgment."

Section 222 gives an appeal against any determination.

67. The personal representatives lodged their account on 14 November 2000 and they paid the tax then payable. On 22 December 2000 they applied for the Board's "approval to now claim spouse exemption for the property now passing ... to Mrs K E Holland". The Notice of Determination dated 11 May 2001 is set out in

full in paragraph 1 of this Decision. In it the Board determine that Mr Holland's transfer of value was not "an exempt transfer".

68. A notice of determination is necessarily declaratory of the position at the time by reference to which the charge to tax was imposed. It operates to determine one or more of the "matters" referred to in section 221(2). All those matters are relevant only to the charge to tax and the consequent liability for and enforcement of it. Other than so determining a matter a notice will neither create a new liability nor release a person liable from an existing one. The present notice declares the legal status of the transfer that took place when Mr Holland died on 17 April 2000. That transfer had caused the charge for which Mrs Holland, as personal representative, is now liable. The notice did no more than respond to and refuse her claim for spouse exemption. Apart from giving her the right to appeal it neither affected nor produced any change in her rights as compared with their position at the time of Mr Holland's death. The Board have no discretion to apply changes in the law that may have occurred since the death. To that extent the act of the Respondents in giving a notice of determination is akin to an act of a judicial authority which, after the coming into force of the 1998 Act, interprets primary legislation as it applies to an event before the coming into force of the 1998 Act. Our reasoning so far leads to the conclusion that the intervening notice of determination does not alter the duty of the Special Commissioners, on the principles established in *Britax*, to look only at the law as it was at the date of the death of Mr Holland.

69. On the other hand we appreciate the argument that the notice of determination was issued after the Act came into force and after that date section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with Convention rights. However, section 6(2) provides:

"(2) Subsection (1) does not apply to an act if-

(a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions."

70. It will be seen from our answer to the first and third issues in this appeal that, in our view, the Inland Revenue, in issuing the notice of determination, could not have acted differently as a result of the provisions in section 18 of the 1984 Act. Accordingly, even if the intervening notice of determination meant that the provisions of the 1998 Act applied, in our view the provisions of section 6(2)(a) mean that the Inland Revenue did not act unlawfully. For that reason also the 1998 Act would not apply.

71. We have not found the answer to this issue to be without difficulty as there is no authority directly on the point we have to decide. However, on balance we prefer the view that, in giving our decision, we should look at the law as it was at the date of death of Mr Holland irrespective of the fact that a notice of determination was issued after the 1998 Act came into force. That seems to be in

accordance with the principles in the authorities and also with the status of a notice of determination.

72. Our conclusion on the second issue in the appeal, therefore, is that the 1998 Act does not apply.

73. However, in case we are wrong in that conclusion we go on to consider the third issue in the appeal.

*(3) Is a wider interpretation of the meaning of the word spouse required by the 1998 Act?*⁷⁴. The third issue is whether a wider interpretation of the word spouse is required by section 3 of the 1998 Act so as to give effect to the rights in Article 14 of the Convention and to remove discrimination on the grounds of status. (We have no power to make a declaration of incompatibility under section 4 of the 1998 Act. Our only powers derive from section 3 which provides that we should read primary legislation in a way which is compatible with the Convention *so far as it is possible to do so*.)⁷⁵. We first consider whether there has been any breach of Convention rights and then go on to consider whether, if there has been, it is possible to read the primary legislation in a way compatible with the Convention.

76. The Convention rights at issue in this appeal are Article 14 read with Article 8 and Article 1 of the First Protocol. Guidance as to the reach and application of article 14 has been given by the Court of Appeal in *Michalak* where, at paragraph 20 of his judgment Brooke LJ said:

"It appears to me that it will usually be convenient for a court, when invited to consider an Article 14 issue, to approach its task in a structured way. ... If a court follows this model it should ask itself the four questions I set out below. If the answer to any of the four questions is "no" then the claim is likely to fail and it is in general unnecessary to proceed to the next question. These questions are: (i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see Human Rights Act 1998, section 1(1))? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification; in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

77. Mr Tidmarsh for the Respondents accepted, following *Hooper*, that marriage was a question of "other status" within the meaning of Article 14 of the Convention and that the facts of this appeal fell within Article 8 and Article 1 of the First Protocol of the Convention; he also accepted that there was different treatment between the Appellant on the one hand and a married person on the other. Thus the *Michalak* questions (i) and (ii) had to be answered in the affirmative. However, he argued that that the answer to each of the *Michalak* questions (iii) and (iv) was no as married persons were not in an analogous situation to that of the Appellant and that the difference in treatment had an objective and reasonable justification. 78. Thus the questions we have to consider are:

(a) whether the Appellant was in an analogous situation to that of a married person; or

(b) whether the difference in treatment had an objective and reasonable justification.

(a) *Analogous situation*⁷⁹. For the Appellant Mr Blake argued that the Appellant and Mr Holland had lived together for thirty-one years in a single household and had made a durable commitment of a monogamous relationship. The social function of the unit thus voluntarily formed was nuptial or matrimonial in character consisting of two shared lives with emotional interdependence. This function was the same as a marital relationship and there was no material difference. As from a functional, societal and economic point of view there was no difference it was discriminatory if there were unequal treatment. He relied upon *Mendoza* for the principle that the jurisprudence of the Convention was not conclusive as in that appeal the Court of Appeal had regarded same sex couples as in an analogous situation with heterosexual couples whereas both the European Court of Human Rights and the Court of Justice had decided that they were not in an analogous situation. He relied upon *Miron v Trudel* for the view that married and unmarried couples were both in a relationship analogous to marriage. He suggested that persons in a stable, durable, committed, devoted, monogamous relationship were spouse-like and should obtain the exemption. He distinguished *Shackell* and *Lindsay* on the basis that the United Kingdom courts had moved away from the jurisprudence of the European Court of Human Rights and in *Mendoza* had recognised homosexual relationships to be analogous with married relationships. 80. For the Respondents Mr Tidmarsh argued that the authorities of the European Court of Human Rights had established the principle that married persons were not in an analogous situation with non-married persons. He relied upon *Lindsay*, *Shackell* and *Alconbury*. He argued that in *Mendoza* the Court of Appeal had not addressed the issue as to whether unmarried couples were in a situation analogous to married couples because they had accepted that cohabittees of the same sex relationship were in a situation analogous to cohabittees of different sexes. 81. In *Lindsay* (1976) the European Commission on Human Rights held that unmarried cohabittees and married couples were not in analogous situations. Although in some fields the *de facto* relationship of cohabittees was recognised there still existed differences between married and unmarried couples, in particular differences in legal status and legal effects. Marriage continued to be characterised by a corpus of rights and obligations which differentiated it markedly from the situation of a man and woman who cohabited. 82. In *Shakell* (2000) the issue was whether an unmarried woman was entitled to widow's benefit. She claimed that the fact that the benefit was only payable to a widow who had been married was discrimination and violated Article 14 of the Convention read with Article 8 and Article 1 of the First Protocol. The European Court of Human Rights approved the decision in *Lindsay* while noting that it was then fourteen years old but went on to say:

"The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is not therefore comparable to that of a widow."

83. Section 2 of the 1998 Act provides that we must take into account the judgments of the European Court of Human Rights and opinions of the

Commission. However, we are bound by the decisions of the higher courts in the United Kingdom. It follows that we must take account of the decisions in *Lindsay* and *Shackell* unless there are conflicting decisions of our higher courts. We are not aware of any conflicting decisions of the higher courts on the meaning of the word spouse and, indeed, in *Fitzpatrick*, Lord Slynn stated that the ordinary meaning of the word spouse is husband or wife. In this connection we are mindful of the guidance of the House of Lords in *Alconbury* at paragraph 26 where Lord Slynn said that, in the absence of special circumstances, we should follow any clear and constant jurisprudence of the European Court of Human Rights.

84. Mr Blake argued that the United Kingdom courts in *Mendoza* had gone further than the European Court of Human Rights in *Lindsay* and *Shackell*. It will be recalled that the House of Lords held in *Fitzpatrick* that a person in a same sex relationship could not be said to be living as husband and wife but was a member of the family. In *Mendoza* (2002) the Court of Appeal was asked to revisit the decision in *Fitzpatrick* in the light of the 1998 Act and, in the light of those provisions, held that a person in a same sex relationship was living with another as husband and wife. Thus *Mendoza* equates cohabitation by same sex couples with cohabitation by heterosexual couples but it does not go so far as to say that non married couples can be equated with married couples.

85. We therefore conclude that persons who live together as husband and wife without being legally married are not in a situation analogous to married persons.

Objective justification 86. The fourth *Michalak* question is whether any difference in treatment has an objective and reasonable justification. For the Appellant Mr Blake relied upon *Miron v Trudel* for the principle that discrimination on the ground of marital status was not objectively justified. He relied upon paragraph 39 of the Green Paper Cmnd 4930 as indicating that the purpose of the spouse exemption was to benefit a person in a matrimonial relationship who would experience hardship at a vulnerable moment if required to raise substantial amounts of capital tax. He also relied upon the Parliamentary Debates and argued that they disclosed no intention to exclude persons living together as husband and wife from the exemption; the Debates made it clear that it was only the difficulties of definition which had prevented the exemption being extended to those who were not married. 87. For the Respondents Mr Tidmarsh argued that to restrict the relief in section 18 of the 1984 Act was objectively justified.

Paragraph 39 of the 1972 Green Paper had to be considered in its context which was that of possible amendment to the existing estate duty. He disputed that the Parliamentary Debates had shown an intention to benefit those who were not married. He argued that certainty was required in the administration of tax statutes and that the mutual obligations of married persons for financial support were an objective justification. 88. In considering the question of objective justification we have been guided by the judgment of Buxton LJ in *Mendoza*. The issues before the Court concerned the *Michalak* questions (i) and (iv) only. As *Michalak* question (i) is not in issue in this appeal we turn to consider paragraphs 15 to 36 of the judgment of Buxton LJ which concerned *Michalak* question (iv), namely objective justification. In paragraph 15 Buxton LJ identified two examples of objective justification, namely, when a provision came within the legitimate ambit of the state's discretion (the margin of judgment) and when a provision was required by the jurisprudence of the Convention. 89. As far as the state's margin of judgment was concerned, Buxton LJ held that it did not apply in *Mendoza* for three reasons. First, that it was not enough to claim that what had been done fell within the permissible ambit of Parliament's discretion; a much

more positive argument was required. Secondly, that it was easier for a discretionary area of judgment to be recognised where the issues involved questions of social or economic policy than where rights of high constitutional importance were involved. And thirdly that steps taken in implementation of a policy must be reasonable and proportionate and logically explicable as forwarding that policy.

90. Applying those principles to the facts of the present appeal in our view it is permissible for Parliament to legislate so that different tax provisions apply to married persons. This reflects the fact that married persons have mutual rights and obligations relating to maintenance during their lives and after their deaths. For example, Parliament has given spouse-specific rights to married persons in the intestacy rules. These interlocking property rights and obligations are a justification for a different tax treatment. The difference in treatment does not raise matters of high constitutional importance. And, finally, the steps taken by Parliament to implement its policy of recognising in the tax laws the mutual obligations of married persons are reasonable and proportionate and logically explicable as forwarding that policy.

91. As far as the Convention jurisprudence is concerned, for the Appellant Mr Blake relied upon *Miron v Trudel* where the issue was whether benefits provided under an insurance policy for a married spouse should be paid to a person who was not legally married. The appeal was brought as a matter of constitutional law under the Charter of Rights before the Supreme Court of Canada which held that the word "spouse" did not apply to unmarried partners. We have not otherwise found that decision to be of assistance. Four judges decided that matter one way, four the other, and one judge decided it but for different reasons. We prefer to rely upon *Lindsay and Shackell*. 92. We conclude that persons who live together as man and wife without being married are not in an analogous situation to married persons and that the difference in treatment in section 18 of the 1984 Act is objectively justified. There is therefore no breach of Article 14 and we are not obliged by section 3 of the 1998 Act to give a wider interpretation to the meaning of the word spouse in section 18.

Is it possible to read section 18 so as to give effect to Convention Rights?

93. However, even if there had been such a breach, we do not consider that in this appeal it is possible, under section 3 of the 1998 Act, to read the word spouse in section 18 of the 1984 Act as meaning anything other than a person which is legally married. In our view the position would then be that the primary legislation would be incompatible with the Convention. It would have to be left to a higher court to make a declaration of incompatibility. No doubt in considering whether to make such a declaration the higher court would bear in mind the provisions of the taxing statutes as a whole and the implication that if one statutory provision relating to spouses is discriminatory then it is likely that they will all be discriminatory. No doubt the higher court will also bear in mind that it would create discrimination against married persons if all the tax advantages given to them were extended to others but if the tax disadvantages remained.

94. Indeed, we can see an argument that, if discrimination on the ground of status does infringe the Convention rights of heterosexual unmarried couples in the position of the Appellant, then there would be no reason to stop there. The same arguments would apply to same sex couples and, within the context of the taxing acts, to any group of individuals in financially interdependent relationships.

For example, if the spouse relief were to be extended to unmarried persons living as husband and wife and to same sex couples we see no reason why it should not also be extended to, say, a family unit of two brothers, one of whom was handicapped and was dependent upon the other. In our view these considerations, together with the need to ensure a uniform treatment throughout the taxing statutes, raise very wide issues which are not amenable to solution by a wider interpretation of section 18. If there is incompatibility then the matter is best left to Parliament.

95. Our conclusion on the third issue in the appeal is that married persons are not in an analogous situation to that of the Appellant's situation and that the difference in treatment has an objective and reasonable justification. There was, therefore, no discrimination. However, even if there were discrimination then we do not consider that it is possible, under section 3(1) of the 1998 Act, to read the word spouse in section 18 in a way which would remove that discrimination.

Decision

96. Our decisions on the issues for determination in the appeal are:

(1) that the word spouse in section 18 of the 1984 Act means a person who is legally married and does not include a person who has lived with another as husband and wife;

(2) that the 1998 Act does not apply in this appeal; but in case we are wrong about that then:

(3) that married persons are not in an analogous situation to that of the Appellant's situation and that the difference in treatment has an objective and reasonable justification. There was, therefore, no discrimination. However, even if there were discrimination, we do not consider that it is possible, under section 3(1) of the 1998 Act, to read the word spouse in section 18 in a way which would remove that discrimination.

97. That means that the appeal must be dismissed.

Court of Appeal certificate

98. In accordance with section 56A(2) of the Taxes Management Act 1970 we hereby certify that our decision involves a point of law relating wholly or mainly to the construction of an enactment which has been fully argued before us and fully considered

by us. This means that if both parties consent, and if the leave of the Court of Appeal is obtained, the Appellant may appeal from our decision directly to the Court of Appeal.

STEPHEN OLIVER QC

DR NUALA BRICE

SPECIAL COMMISSIONERS