HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 30

on appeal from: [2003]EWCA Civ 814

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Her Majesty's Commissioners of Inland Revenue (Respondents)
***ex parte* Wilkinson (FC) (Appellant)**

ON
THURSDAY 5 MAY 2005

The Appellate Committee comprised:

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

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

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

LORD HOFFMANN

My Lords,

Introductory

2. The appellant Mr Wilkinson is a widower. His wife died on 23 June 1999. If he had been a widow, he would have been entitled to a widow's bereavement allowance by way of deduction from his liability for income tax under section 262 of the Income and Corporation Taxes Act 1988 ("ICTA"):

> "(1) Where a married man whose wife is living with him dies, his widow shall be entitled?
>
> (a) for the year of assessment in which the death occurs, to an income tax reduction calculated…[etc]

> (b) (unless she marries again before the beginning of it) for the next following year of assessment, to an income tax reduction calculated…[etc].

There was no similar allowance for widowers.

3. After the death of his wife, Mr Wilkinson learned that other widowers had been complaining that the tax law was unfairly discriminatory. In 1997 Mr Christopher Crossland petitioned the European Court of Human Rights, alleging that the law infringed article 14 read with article 8 of, and with article 1 of the First Protocol to the Convention. The Government did not contest the admissibility of his claim and in September 1999 it reached a friendly settlement by which it paid Mr Crossland £575 (the value of the tax reduction to which he would have been entitled) and his costs. It did the same when a Mr Fielding petitioned on 17 June 1997.

4. At the time when Mr Crossland and Mr Fielding petitioned, the Human Rights Act 1998 had not yet come into force. Even if section 262 of ICTA infringed Convention rights, they would have had no claim in domestic law. But after the 1998 Act came into force on 2 October 2000, Mr Wilkinson wrote to the Inland Revenue making a claim for an allowance under section 262. He said that having to pay tax is something which affects a citizen's "peaceful enjoyment of his possessions" within the meaning of article 1 of the First Protocol. Article 14 therefore requires that in matters of taxation there shall be no discrimination on grounds of sex. The refusal of an allowance was therefore an unlawful act (or failure to act) by the Revenue under section 6(1) of the 1998 Act:

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

5. The Revenue at first denied that the allowance came within the ambit of article 1 of the First Protocol, but they no longer do so. Nor have they put forward anything by way of justification for the discrimination. It was in fact removed when section 34 of the Finance Act 1999 abolished the widow's allowance in relation to deaths on or after 6 April 2000.

6. The Revenue take no point on the fact that the tax year for which the relief is claimed by Mr Wilkinson had expired before the 1998 Act came into force. They admit that the refusal of allowances to widowers was a breach of their Convention rights. But the Revenue say that the application of section 6(1) is excluded by section 6(2):

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

7. The Revenue say that they have no statutory power to make widowers an allowance. It follows that they "could not have acted differently" within the meaning of section 6(2)(a). Mr Wilkinson responds that they do have such a power. It is derived from section 1 of the Taxes Management Act 1970 ("TMA") which says that income tax "shall be under the care and management of the Commissioners of Inland Revenue". That, says Mr Wilkinson, gives the Revenue a discretionary power to grant extra-statutory concessions which could include making allowances to widowers. In order to act compatibly with the Convention rights, they are therefore obliged to do so.

8. The Revenue deny that section 1 confers so wide a power as to enable them to create an allowance for widowers when Parliament plainly intended to grant one only to widows. Furthermore, they say that even if they had such a discretionary power, they would be protected by section 6(2)(b). In giving the allowances to widows, they would be giving effect to section 262 and without reliance upon the allowances to widows under that section, no case of discrimination can be made out.

9. Finally, Mr Wilkinson says that it is irrational or an unfair abuse of power to treat him differently from Mr Crossland and Mr Fielding

merely because he has not petitioned the Court in Strasbourg. If they were entitled to payment, so should he be.

10. Moses J accepted Mr Wilkinson's argument that section 1 of TMA enabled the Revenue to make allowances to widowers when failure to do so would lead to a violation of Convention rights. It followed that section 6(2)(a) of the 1998 Act did not apply. The Revenue could have acted differently. But he said that section 6(2)(b) applied. In giving allowances only to widows, the Revenue was giving effect to section 262. Mr Wilkinson therefore had no claim under the 1998 Act. He also rejected the argument that the Revenue was not entitled to treat Mr Wilkinson differently from the earlier Strasbourg petitioners.

11. The Court of Appeal dismissed the appeal for rather different reasons. They did not accept that section 1 of TMA gave the Revenue power to grant an extra-statutory allowance. It followed that the commissioners could not have acted differently and were protected by section 6(2)(a). If the Court of Appeal had agreed with Moses J on the breadth of the power under section 1 of TMA, they would have disagreed with his conclusion that section 6(2)(b) applied. That section, they said ([2003] 1 WLR 2683, para 52), was concerned with ?

> "the grant by Parliament of a statutory power which, regardless of the circumstances in which it is exercised, will inevitably be incompatible with Convention rights."

That was not the case here, where the exercise of the power under section 1 of TMA would have enabled the commissioners to give effect to Convention rights.

12. Finally, the Court of Appeal agreed with Moses J in rejecting the argument based on unequal treatment compared with the Strasbourg petitioners.

13. It will be seen that some of the issues which arise in this appeal are similar to those in the case of *Hooper v Secretary of State for Works and Pensions* [2005] UKHL 29, in which judgment is also being given this morning. I do not propose to repeat the views which I and other

noble lords have expressed in *Hooper's* case but will merely cross-refer as occasion arises.

Construction

14. Before your Lordships, Miss Dinah Rose raised, with leave, an entirely new point on behalf of Mr Wilkinson. She submitted that it was possible to read section 262 as including widowers. If it was, that was an end of the matter. He had a statutory entitlement to an allowance.

15. The foundation for this submission was section 6 of the Interpretation Act 1978, which provides that "unless the contrary intention appears…words importing the feminine gender include the masculine". Miss Rose accepts that ICTA is brim-full of indications of contrary intent. The purpose of section 6 is to save the parliamentary draftsman from having to say "he or she" or to find awkward gender-neutral terms. But Part VII of ICTA, which deals with personal reliefs, has no difficulty in finding a gender-neutral term when it wishes to be gender-neutral. It says "individual" (section 256(1)) or "spouse" (section 259(4), now repealed). And section 258 (also now repealed) which gave an allowance for a widower with a housekeeper, provided in subsection (4) that the section?

> "shall apply to a claimant being a widow as it applies to a claimant being a widower".

There is no similar extension in section 262.

16. Thus it is clear that by no process of interpretation, attempting to ascertain what a reasonable reader would understand the notional author of the text ("Parliament") to have meant by using those words in their context, could "widow" in section 262 be read to include "widower". But Miss Rose says that does not matter. Section 3 of the 1998 Act is a counterweight which neutralises the indications of contrary intent in section 262 itself and the context provided by the rest of Part VII of the 1988 Act. Section 6 of the Interpretation Act shows that it is possible to read section 262 compatibly with the Convention and therefore one should do so.

17. I do not believe that section 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes acontextual meanings. That would be playing games with words. The important change in the process of interpretation which was made by section 3 was to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted. Just as the "principle of legality" meant that statutes were construed against the background of human rights subsisting at common law (see *R v Home Secretary, Ex p Simms* [2000] 2 AC 115), so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. This of course goes far beyond the old-fashioned notion of using background to "resolve ambiguities" in a text which had notionally been read without raising one's eyes to look beyond it. The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But, with the addition of the Convention as background, the question is still one of *interpretation*, i.e. the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.

18. It is therefore sometimes possible, as my noble and learned friend Lord Nicholls of Birkenhead pointed out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, paras 26-33, to construe a statutory provision as referring to, or qualified by, some general concept implied rather than expressly mentioned in the language used by Parliament. Thus in the *Ghaidan* case, the words "*as* his or her wife or husband" (my emphasis) were interpreted to refer to a relationship of social and sexual intimacy exemplified by, but not limited to, the heterosexual relationship of husband and wife. The deemed background of the Convention enabled the House to adopt this construction in preference to the more restricted construction adopted before the 1998 Act came into force. It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.

19. In the present case, there is no way in which any reasonable reader could understand the word "widow" to refer to the more general concept of a surviving spouse. The contrary indications in the language of Part VII of the 1988 Act are too strong. In my opinion Miss Rose was right to concede in the lower courts that it was not possible to read it compatibly with Convention rights.

Extra-statutory concessions

20. The next question is whether the commissioners had power under section 1 of TMA to make an extra-statutory allowance to all widowers. On this point the judgment of the Court of Appeal is in my opinion unanswerable. The commissioners are not "the Crown", owners of the consolidated fund and able to deal with its property like any other owner (see *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506, para 27). In that respect, this case is different from *Hooper's* case. The commissioners are a statutory body created by the Inland Revenue Regulation Act 1890. They are charged by section 13(1) of that Act to "collect and cause to be collected every part of inland revenue." Section 1 of TMA gives them what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 636 as?

> "a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection."

21. This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under section 1 of TMA. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and

on grounds not of pragmatism in the collection of tax but of general equity between men and women.

22. It follows that in my opinion the legislation gave the commissioners no power to act otherwise than to disallow claims for allowances by widowers and that they are therefore protected by section 6(2)(a).

23. It is unnecessary to consider what the position would have been if the powers of the commissioners under section 1 of TMA had been wider, but for the reasons given in *Hooper's* case, I think that the commissioners would have been protected by section 6(2)(b). The Court of Appeal said that the subsection applied in a case in which a decision to exercise a statutory power would inevitably be incompatible with Convention rights. But this in my opinion involves looking at the wrong statute. The reason why the commissioners are protected by section 6(2)(b) is not because they were "giving effect" to section 1 of TMA by insisting that it was a discretion and not a duty. They are protected because they were giving effect to section 262 by giving the allowance only to widows. If section 6(1) "does not apply" to what they did under section 262, there is no basis for saying that a failure to make an allowance to widowers was (as a matter of domestic law) in breach of a Convention right.

Just satisfaction

24. As in my opinion the commissioners are protected by section 6(2)(a), it is unnecessary to decide what damages Mr Wilkinson could have recovered if he had had a cause of action. But the point has some relevance to his argument that he has not been treated equally with pre-1998 Act petitioners to Strasbourg and therefore I must say something about it.

25. Section 8(4) provides that in determining whether to award damages or the amount of the award, the court must take into account the principles applied by the Strasbourg court in affording just satisfaction to the injured party. In *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 the House recently had occasion to consider what that meant in the specific context of breaches of article 6. But Lord Bingham of Cornhill emphasised more generally that the purpose of awarding damages under the 1998 Act was to allow

claimants to recover in an English court what they would have recovered in Strasbourg; no more nor less. It did not create a statutory duty for which damages could be recovered as if the breach of Convention rights was a tort in English law. And the jurisprudence of the Strasbourg court shows that it is more concerned with upholding human rights in member States than with awarding damages.

26. A general principle applied to affording just satisfaction is to put the applicant so far as possible in the position in which he would have been if the State had complied with its obligations under the Act. In a discrimination case, in which the wrongful act is treating A better than B, this involves forming a view about whether the State should have complied by treating A worse or B better. Normally one would conclude that A's treatment represented the norm and that B should have been treated better. In some cases, however, it will be clear that A's treatment was an unjustifiable anomaly. Such a case is *Van Raalte v Netherlands* (1997) 24 EHRR 503, in which the Court found a breach of article 14 read with article 1 of the First Protocol because the law exempted unmarried childless women over 45 from paying contributions under the General Child Benefits Act without exempting unmarried childless men. The exemption for women was abolished in 1989 but judgment was not given until 1997. The court rejected a claim for repayment of the contributions from which the applicant would have been exempt if he had been a woman.

27. In my opinion the reason for the rejection of this claim is that if the State had complied with its Convention obligations, it would done what it did in 1989 and not exempted either men or women. It follows that the applicant would have been no better off. He would still have had to pay. In the circumstances, the judgment itself was treated as being sufficient just satisfaction.

28. The same is true in this case. There was no justification whatever for extending the widows' allowance to men. If, therefore, Parliament had paid proper regard to article 14, it would have abolished the allowance for widows. Mr Wilkinson would not have received an allowance and no damages are therefore necessary to put him in the position in which he would have been if there had been compliance with his Convention rights.

Irrationality and abuse of power

29. Mr Wilkinson, as I have said, complains that the commissioners are acting irrationally and unfairly abusing their powers by not paying him. He would be bound to succeed in a petition to Strasbourg and it is therefore abusive and unreasonable to try to wear him down by making him go through the lengthy procedure of obtaining a ruling of admissibility.

30. In my opinion the commissioners are acting reasonably and within their powers. As I have said in considering the question of just satisfaction, Mr Wilkinson would not in my view be entitled to pecuniary damages either under article 41 at Strasbourg or in a domestic court. The commissioners appear not to have taken this point in the friendly settlement with Mr Crossland, no doubt because it was cheaper to pay him £575 than to have the matter argued out. But that does not mean that they are not entitled to take the point against Mr Wilkinson or anyone else.

31. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

32. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons which he has given, with which I agree, I would dismiss the appeal.

33. I should like to add that, on the issue of just satisfaction, I respectfully agree with the further thoughts which my noble and learned friend Lord Brown of Eaton-under-Heywood has set out in his speech.

LORD SCOTT OF FOSCOTE

My Lords,

34. I have had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Hoffmann and agree with him that this appeal should be dismissed. I want, however, to say a word or two about the applicability to this case of section 6(2) of the Human Rights Act 1998.

35. It is clear, and has been accepted on all sides, that section 262 of the Income and Corporation Taxes Act 1988 (ICTA) discriminates between widows and widowers in favour of the former. Married women become entitled to a bereavement allowance, by way of a deduction from their liability to tax, on the death of their husbands. Married men do not become entitled to any such allowance on the death of their wives. This is discrimination on the ground of sex. Nor is there any difficulty in accepting that this discrimination relates to the rights guaranteed by Article 1 of the First Protocol to the ECHR. Widowers' non-entitlement to the bereavement allowance means that the tax régime bears more hardly on them and their possessions than it would do if they were widows. So, is the giving of the bereavement allowance to widows and the withholding of the allowance from widowers an "unlawful act" for the purposes of section 6(1) of the 1998 Act? Is the Revenue acting "in a way which is incompatible with the Convention"?

36. Prima facie the Revenue is plainly so acting and the only question is whether sub-section (2) of section 6 disapplies sub-section (1). Paragraph (a) of sub-section (2) disapplies sub-section (1) if "as a result of primary legislation [the Revenue] could not have acted differently." Section 262 of ICTA extends the allowance to widows and withholds it from widowers. So the Revenue cannot withhold the section 262 allowance from widows nor can they extend the allowance to widowers. Paragraph (a), in my opinion, plainly applies.

37. But Ms Dinah Rose, counsel for the appellant, points to the power conferred on the Revenue by section 1 of the Taxes Management Act 1970:

> "Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland Revenue."

She argues that this power would enable the Commissioners, if minded to do so, to authorise extra-statutory allowances against tax to be afforded to widowers so as to off-set the discriminatory effect of section 262. She fortifies her argument by pointing out, also, that when, in 1997, a widower initiated proceedings in Strasbourg complaining of the discriminatory effect of section 262, the Commissioners reached a friendly settlement with him under which he was paid a sum equal to the tax that he would not have had to pay had he been entitled to the section 262 allowance. The sum was treated as a repayment of tax and was made under the management of taxes power conferred on the Commissioners by section 1 of the 1970 Act.

38. In my opinion, the appellant's complaint that he is the victim of an "unlawful act" for section 6(1) purposes must be rejected.

39. First, the section 262 discrimination in favour of widows and against widowers is required by the language of section 262 itself. Section 6(2)(a) applies.

40. Second, the refusal, or failure, by the Commissioners to exercise the management power conferred by section 1 of the 1970 Act so as to make an ex-gratia repayment of tax to the appellant does not discriminate between him and widows. There is no suggestion that a widow who did not qualify for the section 262 allowance, i.e. a widow who was not living with her husband when he died, has been or will be the beneficiary of an ex-gratia repayment of tax to compensate her for not being entitled to the statutory allowance. To compare widowers with widows who *do* qualify for the statutory allowance is not an apt comparison because it leads the widowers straight into section 6(2)(a).

41. Third, a comparison of the appellant's position with that of the widower, or widowers, who had instituted proceedings in Strasbourg and whose complaints were then settled by the Revenue agreeing to a repayment of tax does not, in my opinion, assist the appellant. A settlement of litigation instituted by a taxpayer does not place the Revenue under an obligation to treat taxpayers who have not instituted litigation in the same manner.

42. For these reasons, as well as those given by my noble and learned friend, I agree that this appeal should be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

43. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann and for the reasons he gives I agree that the appeal should be dismissed. In particular I agree, first, that the commissioners had no power under section 1 of the Taxes Management Act 1970 to make extra-statutory allowances to widowers to match those made to widows and, secondly, that the commissioners are therefore protected against this domestic law claim by section 6 (2) (a) of the Human Rights Act 1998. (For the reasons I have set out at some length in the parallel case of *Hooper* [2005] UKHL 29 I respectfully disagree with the reasoning in para 23 of my Lord's speech: had the commissioners' powers under section 1 of the 1970 Act been wider then I agree that they would still have been protected under section 6 (2) but rather because it would have been unlawful for them to exercise that power inconsistently with Parliament's manifest will that widows alone should benefit than because section 6 (1) simply "does not apply" to the allowances made to widows). I further agree with what Lord Hoffmann says at paras 24-28 of his speech with regard to just satisfaction, although on this particular issue I wish to add a few thoughts of my own.

44. Discrimination claims under article 14 of the European Convention on Human Rights seem to me to present particular difficulties when it comes to the requirements of just satisfaction (whether pursuant to article 41 of the Convention or section 8 of the 1998 Act). The principle of restitutio in integrum applies comparatively straightforwardly in non-discrimination cases: the claimant is prima facie entitled to recover whatever financial loss he can prove was directly consequent on the violation of his rights. The award of compensation to homosexuals discharged from the armed forces in breach of article 8 for the loss of earnings and pension rights are good examples of this—see *Lustig-Prean & Beckett v United Kingdom* (2000) 31 EHRR 601 and *Smith and Grady v United Kingdom* (2000) 31 EHRR 620. Discrimination claims, however, even those where the discrimination is purely as to financial benefit, by their very nature are

different. Over the period complained of the applicant(s) (call him or them A) ex hypothesi will have been treated less favourably than another/others (B). The problem is not so much whether the court should level up or level down as it is sometimes put. There can be no question of levelling down: B cannot retrospectively be deprived of benefits already received. The problem is rather whether, in respect of the period complained of, just satisfaction requires that A should recover the same financial benefits as received by B. Sometimes it will be clear that he should; sometimes clear that he should not. The decisions of the European Court of Human Rights respectively in *Darby v Sweden* (1990) 13 EHRR 774 and in *Van Raalte v The Netherlands* (1997) 24 EHRR 503 conveniently illustrate each of these extremes. Other cases, however, will be less clear.

45. In *Darby v Sweden* the claim related to a two-year period during which A, a Finnish citizen, working in Sweden but only temporarily resident there, was liable for full municipal tax including a special tax payable to the Church of Sweden. Had he been formally registered as resident in Sweden, as a non-member of that Church, A would have been liable for only 30% of the special tax. Having found the distinction in treatment by reference to residence unlawful the court, perhaps unsurprisingly, found A entitled to repayment of the excess tax paid (70% of the special tax) together with interest.

46. In *Van Raalte* A was an unmarried childless man over 45 complaining of a law which exempted unmarried childless women over 45 from paying contributions under the General Child Benefits Act. Apart from the exempted women, the entire adult population was subject to the Act, both as contributors and as potential beneficiaries. The court concluded (para 44) that "irrespective of whether the desire to spare the feelings of childless women of a certain age can be regarded as a legitimate aim, such an objective cannot provide a justification for the gender-based difference of treatment in the present case". It was held, however, that A was not entitled to retrospective exemption from his contributions under the Act. Even without the unlawful discrimination he would still have been paying his contributions. He was therefore no worse off as a result of the discrimination (save, of course, to the very limited extent that his contributions, in common with those of every other contributor, had doubtless been marginally larger to compensate for the lack of contribution by the limited class of exempted women).

47. Looking just at these two cases it is tempting to draw a simple inference: where, as in *Darby v Sweden*, there clearly *is* a case for

preferential treatment of a certain group and A falls into it, he should recover by way of just satisfaction the same benefit as the rest of the group. (In *Darby v Sweden*, of course, although non-members of the Church of Sweden were justifiably relieved of the bulk of the relevant tax, there was no case for treating non-members differently according to whether they were permanently or only temporarily resident in Sweden.) Where, however, as in *Van Raalte*, there is no case for treating anyone preferentially (ie group B has wrongly benefited) then A should not recover. This is tantamount to asking simply whether the real complaint is that one group has been wrongly advantaged over the general body of contributors or whether the complainant's group has been wrongly deprived of a legitimate advantage. On this approach the present appellant would clearly fail whereas the widowers in the parallel case of *Hooper* (where under the new legislative regime bereavement payments and bereaved parents allowances are now made to widows and widowers alike) would succeed.

48. On analysis, however, this seems perhaps too simplistic a view. In any claim against a public authority for financial compensation in respect of past discrimination it must be remembered that the general public (often the general body of taxpayers) will be footing the bill. In determining the requirements of just satisfaction, just as in the application of the Convention as a whole, regard should be had not only to the victim's rights but also to the interests of the public generally. Take a case where A establishes discrimination on the basis that he should have been placed in the same class as B, both of them advantaged financially over class C. To compensate A for his past financial disadvantage vis à vis B would be costly for C (the non-benefiting class of taxpayers)—disproportionately so if class A is large, classes B and C comparatively small. Whether this would be fair to C would depend upon the justification for advantaging A and B over C in the first place, and indeed for doing so to the extent that B was originally advantaged over A and C. It might well be fairer overall to leave A uncompensated in respect of the past discrimination against him. At the very least, bearing in mind that class A are taxpayers too, fairness to C might require that class A's compensation be reduced to reflect the fact that they too would have had to pay more tax to fund their own additional benefits. Just these considerations, indeed, may yet arise in the parallel case of *Hooper* were a claim for just satisfaction now to be advanced in Strasbourg.

49. Moreover, by the same token that it will not invariably be right to compensate the complainant even where there *is* a case for preferential treatment of one class and A falls into it, it will not invariably be

inappropriate to compensate the complainant even though there was no case for anyone to be treated preferentially in the first place. Take, for example, the case of a public body unjustifiably paying its male employees more than women doing the same job. It could not then reasonably be argued that the men's excess wages represented an unjustified windfall which should not properly be paid to the women also. Such an argument, indeed, would almost certainly fail even if the employer proved that, had all employees been paid the same, this would have been at the women's (lower) rate—a plausible case if, say, the women employees substantially outnumbered the men. This example, I may say, formed the bedrock of Miss Rose's argument in respect of just satisfaction in the present appeal.

50. What, then, distinguishes the employee case from *Van Raalte* itself? The critical feature of the *Van Raalte* case which to my mind distinguishes it from the employee case is that the complainant in *Van Raalte* was in essentially the same position as all other contributors to the scheme (save only for the wrongly exempted group). Realistically the discrimination was no more against him than against the others: there was simply no case for exempting anyone. It would thus have been most unfair to the general body of contributors (category C) to have required them to subsidise not merely the exempted class of women but also the equivalent men. That, however, is not the position in employment cases. In the postulated employment case the discrimination can clearly be seen to have been against the less well-paid women. If the men doing the same work were thought to be worth the higher wage, so too were the women. There can be nothing unfair in making the employer compensate the women in respect of the past discrimination against them (although, of course, in the case of a public authority, the compensation will indirectly fall to be paid by the general public).

51. Into which category, then, does the present appeal fall? Is the situation here akin to that in *Van Raalte* or to the employment type of case? To my mind there can be only one answer to this question: the position here is just as it was in *Van Raalte*. The Court of Appeal rightly characterised the widows bereavement allowance as "an anachronistic relic of a tax regime abandoned by 1994" and rightly concluded that the discrimination "provided widows with an unjustified advantage not merely over widower taxpayers but over all taxpayers."

52. In a case like this, therefore, the past discrimination suffered by widowers is less (and less deserving of compensation) than would be the

discrimination suffered by the general body of taxpayers were they now required to fund this unjustified benefit not only for qualifying widows but for widowers too.

53. Even though, as the House was told, the issue of just satisfaction only arose at the reconvened hearing before the Court of Appeal and at the prompting of the Court itself, in my judgment it provides an ample basis for declining now to pay out to this appellant.