



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF BURDEN and BURDEN v. THE UNITED KINGDOM

(Application no. 13378/05)

*This version was rectified (paragraphs 10, 11 and 28) on 20 March 2007
under Rule 81 of the Rules of Court*

JUDGMENT

STRASBOURG

12 December 2006

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
29 April 2008**

*This judgment will become final in the circumstances set out in Article 44 § 2 of the
Convention. It may be subject to editorial revision.*

In the case of Burden and Burden v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,

Sir Nicolas BRATZA,

Mr G. BONELLO,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 12 September and 21 November 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 13378/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two British nationals, Ms J.M. and Ms S.D. Burden (“the applicants”), on 29 March 2005.

2. The applicants were represented by Ms E. Gedye of Wood, Awdry and Ford, solicitors practising in Chippenham. The United Kingdom Government (“the Government”) were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.

3. The applicants complained under Article 14 taken in conjunction with Article 1 of Protocol No. 1 that, when the first of them died, the survivor would be required to pay inheritance tax on the dead sister's share of the family home, whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act 2004, would be exempt from paying inheritance tax in these circumstances.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 30 June 2005 the President decided to give the case priority treatment under Rule 41 of the Rules of Court and that the admissibility and merits should be examined jointly, in accordance with Article 29 § 3 of the Convention and Rule 54A.

6. The applicants and the Government each filed written observations (Rule 59 § 1). On 11 April 2006 the Chamber decided, after consulting the parties, to hold a hearing on the admissibility and merits (Rule 59 § 3 *in fine*).

7. The hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 12 September 2006.

There appeared before the Court:

(a) for the Government

Ms K. McCLEERY,
Mr J. CROW
Mr J. COUCHMAN,
Ms S. TARIQUE,
Mr R. LINHAM,

*Agent,
Counsel,
Adviser,
Adviser,
Adviser,*

(b) for the applicant

Mr S. GRODZINSKI,
Ms E. STRADLING

*Counsel,
Solicitor,*

The Court heard addresses by Mr Crow and Mr Grodzinski, as well as their answers to questions put by Judge Bratza.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows.

9. The applicants are unmarried sisters, born on 26 May 1918 and 2 December 1925 respectively. They have lived together all their lives; for the last 30 years in a house built on land inherited from their parents in Wiltshire.

10. The house is owned by the applicants in their joint names. According to an expert valuation dated 12 January 2006, the property was worth GBP 425,000, or GBP 550,000 if sold together with the adjoining land. The sisters also jointly own two other properties, worth GBP 325,000 in total. In addition, each sister owns in her sole name shares and other investments worth approximately GBP 150,000. Each has made a will leaving all her property to the other.

11. The applicants submitted that the value of their jointly-owned property had increased to the point that each sister's one-half share was

worth more than the current exemption threshold for inheritance tax (see paragraph 13 below), and that the survivor might have to sell the house in order to pay the tax.

II. RELEVANT DOMESTIC LAW

A. Inheritance tax

12. By sections 3, 3A and 4 of the Inheritance Tax Act 1984 (“the 1984 Act”), inheritance tax is charged at 40% on the value of a person's property, including his or her share of anything owned jointly, passing on his or her death, and on lifetime transfers made within seven years of death. The charge is subject to a nil rate threshold of GBP 275,000 for transfers between 5 April 2005 and 5 April 2006; GBP 285,000 for transfers during the tax year 2006-2007; and GBP 300,000 for 2007-2008 (section 98 of the Finance Act 2005).

13. Interest is charged, currently at 4%, on any tax not paid within six months after the end of the month in which the death occurred, no matter what caused the delay in payment. Any inheritance tax payable by a person to whom land is transferred on death may be paid, at the tax-payer's election, in ten equal yearly instalments, unless the property is sold, in which case outstanding tax and interest must be paid immediately (1984 Act, section 227(1)-(4)).

14. Section 18(1) of the 1984 Act provides that property passing from the deceased to his or her spouse is exempt from charge. With effect from 5 December 2005, this exemption was extended to a deceased's “civil partner” (see paragraphs 16-18 below).

B. The Civil Partnership Act 2004 (“2004 Act”)

15. The purpose of the 2004 Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and to confer on them, as far as possible, the same rights and obligations as entailed by marriage.

16. A couple is eligible to form a civil partnership if they are (i) of the same sex; (ii) not already married or in a civil partnership; (iii) over the age of 16; (iv) not within the prohibited degrees of relationship.

17. A civil partnership is, like marriage, indeterminate in nature and can end only on death, dissolution or annulment. The 2004 Act created a comprehensive range of amendments to existing legislation, covering *inter alia* pensions, tax, social security, inheritance and immigration. The courts have similar powers to control the ownership and use of the civil partners'

property upon dissolution of a civil partnership as upon dissolution of a marriage.

18. When the Civil Partnership Bill was passing through Parliament, an amendment to it was passed in the House of Lords by 148 votes to 130, which would have had the effect of extending the availability of civil partnership, and the associated inheritance tax concession, to family members within the “prohibited degrees of relationship”, if (i) they were over 30 years of age; (ii) they had co-habited for at least 12 years; and (iii) they were not already married or in a civil partnership with some other person. The amendment was reversed when the Bill returned to the House of Commons.

19. During the course of the debate in the House of Lords, Lord Alli, a Labour Peer, stated:

“I have great sympathy with the noble Baroness, Lady O’Caithlin [the Conservative Peer who proposed the amendment], when she talks about siblings who share a home or a carer who looks after a disabled relative. Indeed, she will readily acknowledge that I have put the case several times—at Second Reading and in Grand Committee—and I have pushed the Government very hard to look at this issue. There is an injustice here and it needs to be dealt with, but this is not the Bill in which to do it. This Bill is about same-sex couples whose relationships are completely different from those of siblings.”

During the same debate, Lord Goodhart, Liberal Democrat Peer, stated:

“There is a strongly arguable case for some kind of relief from inheritance tax for family members who have been carers to enable them to continue living in the house where they have carried out their caring duties. But that is a different argument and this is not the place or the time for that argument. This Bill is inappropriate for dealing with that issue.”

During the course of the debate in the Standing Committee of the House of Commons, Jacqui Smith MP, Deputy Minister for Women and Equality, stated:

“As I suggested on Second Reading, we received a clear endorsement of the purpose of the Bill—granting legal recognition to same-sex couples, ensuring that the many thousands of couples living together in long-term committed relationships will be able to ensure that those relationships are no longer invisible in the eyes of the law, with all the difficulties that that invisibility brings.

We heard a widespread agreement from Members across almost all parties that the Civil Partnership Bill is not the place to deal with the concerns of relatives, not because those concerns are not important, but because the Bill is not the appropriate legislative base on which to deal with them.”

C. The Human Rights Act 1998 (“the 1998 Act”)

20. The 1998 Act entered into force on 2 October 2000. Section 3(1) provides:

“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 the Convention rights.”

Section 4 of the 1998 Act provides (so far as relevant):

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ...

(6) A declaration under this section ... -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and

(b) is not binding on the parties to the proceedings in which it is made.”

Section 6 of the 1998 Act provides:

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

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

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

(b) in the case of one or more provisions of ... 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. ...”

Section 10 of the 1998 Act provides:

“(1) This section applies if –

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies –

(i) all persons who may appeal have stated in writing that they do not intend to do so; or

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.”

21. The Government submitted that the objective of giving the national courts the power under section 4 had been to provide a formal means for notifying the Government and Parliament about a situation in which legislation was found not to comply with the Convention, and to provide a mechanism for speedily correcting the defect. Once a declaration had been made (or once the European Court of Human Rights had found a violation based on a provision of domestic law), there were two alternative avenues for putting right the problem: either primary legislation could be introduced in Parliament, or the Minister concerned could exercise his summary power of amendment under section 10 of the 1998 Act.

22. When the Human Rights Bill passed through the House of Lords on 27 November 1997, the Lord Chancellor explained that:

“we expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility.”

One of the Ministers with responsibility for the 1998 Act explained to the House of Commons on 21 October 1998 that:

“Our proposals [for remedial orders] safeguard parliamentary procedures and sovereignty, ensure proper supervision of our laws and ensure that we can begin to get the ability both to enforce human rights law and to create a human rights culture. They also ensure that we can do it in the context of not having to worry that if something is decided by the Strasbourg court or by our courts that creates an incompatibility, we do not have a mechanism to deal with it in the quick and efficient way that may be necessary.”

The most recent report of the Joint Committee on Human Rights, published on 4 August 2006, showed that declarations of incompatibility had been made in twenty cases between December 2000 and December 2004. In seven of these cases the declaration had been overturned on appeal, or the judgment on appeal was pending. In ten cases the offending legislation had been amended or repealed (in one case by a remedial order), and in the remaining three cases, amendments to the offending legislation were pending or under consideration.

THE LAW

23. The applicants complained under Article 1 of Protocol No. 1, taken in conjunction with Article 14 of the Convention, that when one of them died, the survivor would face a significant liability to inheritance tax, which would not be faced by the survivor of a marriage or a civil partnership. Article 1 of Protocol No. 1 provides:

“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 preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] 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.”

I. ADMISSIBILITY OF THE APPLICATION

24. The Government contested the admissibility of the application on a number of grounds under Articles 34 and 35 § 1 of the Convention. Article 34 provides:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ... ”

Article 35 § 1 states:

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

A. The applicants' victim status

25. The Government submitted that the complaint was prospective and hypothetical, because no liability to inheritance tax had yet accrued, and might never accrue. The present applicants could not, therefore, claim to be “victims” of any violation, and their complaint represented a challenge to the tax regime *in abstracto*, which the Court could not entertain.

The present case was on that ground distinguishable from *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, where the applicants had been complaining about certain provisions of Belgian law that applied automatically to the illegitimate child and her mother, and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, where the complaint concerned rights of inheritance where the parent had already died. In contrast, the requirement to pay inheritance tax did not apply automatically. The applicants were not so affected by the risk of a future liability to tax as to bring them into a comparable position to the applicants

in *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, where the Court found that a threat of inhuman and degrading punishment could in itself breach Article 3 of the Convention, or *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, where the existence of criminal sanctions for homosexual acts must necessarily have affected the applicant's daily conduct and private life.

26. The applicants responded that it was all but inevitable that one of them would predecease the other, and similarly certain that the value of the deceased's estate would exceed the nil rate threshold for inheritance tax (see paragraph 13 above). Thus, as in *Marckx* (cited above), or *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, both of which concerned complaints about the effect of illegitimacy on succession rights under domestic law, the applicants ran a very high risk of a violation of their Convention rights. Even before either had died, the legislation had an impact on them, as it affected their choices about disposing of their property. They had “an awful fear” hanging over them that the house would have to be sold to pay the tax, and they should not have to wait until one of them died before being able to seek the protection of the Convention.

27. The Court recalls that under Article 34 of the Convention it may receive applications from individuals and others “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see, for example, *Cornwell v. the United Kingdom*, no. 36578/97, decision of 11 May 1999).

28. It is true that neither of the applicants is, at the present time, under an obligation to pay inheritance tax, since no such liability can arise until one of them dies. However, the sisters are aged 88 and 81 respectively. The property owned by each far exceeds the current nil-rate band for inheritance tax. The Court agrees with the applicants that, from the present perspective, it appears virtually certain that one of them will in the not too distant future be required to pay substantial inheritance tax on the property inherited from her sister. In this respect the present case is closer to *Marckx* than to, for example, *Willis v. the United Kingdom*, no. 36042/97, § 49, ECHR 2002-IV, where the Court found the applicant's complaint about discrimination concerning the future non-payment to him of a Widow's Pension or equivalent to be “hypothetical”, because of the lack of certainty that the applicant would satisfy the statutory conditions for entitlement by the time he reached the age at which a woman in his position would be eligible to apply.

29. The Court concludes, therefore, in the light of the applicants' advanced age and the very high probability that one will be liable to pay inheritance tax upon the death of the other, that they can claim to be directly

affected by the impugned law. It follows that the Court rejects the first of the Government's objections to the admissibility of the application.

B. Domestic remedies

30. The Government further contended in the alternative that, if the applicants had an arguable complaint under the Convention, they could and should have brought a claim for a declaration of incompatibility under section 4 of the 1998 Act (see paragraph 21 above).

31. The applicants were both currently alive and neither had yet incurred any liability to inheritance tax. Since no pecuniary loss had been suffered, the Court could not make a pecuniary award in their favour, and would, at most, make a declaration that there had been a violation of the applicants' Convention rights. If a declaration by this Court would constitute just satisfaction for any breach of the applicants' rights, a declaration of incompatibility by the High Court should similarly be regarded as an effective remedy.

32. The Government argued that, consistently with the Court's approach and with the generally accepted principles of international law, they did not have to demonstrate either (i) that an application for a declaration of incompatibility under section 4 of the 1998 Act would necessarily have succeeded, or (ii) that provisions on inheritance tax in the 1984 Act would necessarily have been amended in any identified manner within any specific time period, even if a declaration of incompatibility were made. It was sufficient, for Article 35 § 1 to be engaged, that there was an available domestic remedy with a realistic prospect of success which the applicants had failed to pursue.

33. They noted that in *Hobbs v. the United Kingdom* (dec.), no. 63684/00, 18 June 2002, the Court had found that, in the circumstances of that case, a declaration of incompatibility under section 4 of the 1998 Act was not sufficiently certain to be capable of providing redress, such as to require exhaustion by the applicant, on the grounds that: (i) a declaration of incompatibility is not binding on the parties to the litigation; (ii) the Minister has a power, but not a duty, to amend the relevant legislation; and (iii) the Minister could exercise his power to change the law only if there were "compelling reasons" for so doing. *Hobbs*, however, was a decision on its particular facts and could not be regarded as authority for any general proposition that a declaration of incompatibility under section 4 of the 1998 Act would never be capable of providing an effective remedy. In particular, the applicant in *Hobbs* had already suffered a financial disadvantage for which he was seeking monetary compensation. The present application was different because neither applicant had yet suffered any financial disadvantage. Moreover, the decision in *Hobbs* had inevitably been based on the extremely limited evidence and submissions then before the Court.

Since the Court had now been provided with more information about the domestic law, in particular the ministerial statements set out in paragraph 23 above, it was both possible and appropriate for it to revisit its previous decision.

34. The applicants referred to the Commission's case-law to the effect that the remedies an applicant is required to make use of must not only be effective but also independent of discretionary action by the authorities (for example, *Montion v. France*, no. 11192/84, Commission decision of 14 May 1987, Decisions and Reports (DR) 52, p. 227 and *G. v. Belgium*, no. 12604/86, Commission decision of 10 July 1991, DR 70, p. 125). They argued that a declaration of incompatibility could not be regarded as an effective remedy because the procedures to change the law could not be initiated by those who had obtained a declaration or enforced by any court or organ of State. The Court had accepted a similar argument in *Hobbs* and also in *Dodds v. the United Kingdom* (dec.), no. 59314/00, 8 April 2003, *Walker v. the United Kingdom* (dec.), no. 37212/02, 16 March 2004, *Pearson v. the United Kingdom* (dec.), no. 8374/03, 27 April 2004 and, finally, *B. and L. v. the United Kingdom* (dec.), no. 36536/02, 29 June 2004, where the Government had made submissions almost identical to those in the present case.

35. The Court is very much aware of the subsidiary nature of its role and that the object and purpose underlying the Convention, as set out in Article 1—that rights and freedoms should be secured by the Contracting State within its jurisdiction—would be undermined, along with its own capacity to function, if applicants were not encouraged to pursue the means at their disposal within the State to obtain available redress (see the *B. and L.* decision, cited above). The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention thus obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (*Akdivar and Others v. Turkey*, no. 21893/93, §§ 65-67, *Reports* 1996-IV; *Aksoy v. Turkey*, no. 21987/93, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI).

36. The Government argue that the remedy under the Human Rights Act allowing an applicant to seek a declaration from a domestic court that legislation is incompatible with the Convention is sufficiently certain and effective for the purposes of Article 35 § 1. Such a declaration creates a discretionary power in the relevant government minister to take steps to amend the offending provision, either by a remedial order or by introducing a Bill in Parliament.

37. The Court found in its *Hobbs* decision (cited above) that this remedy was not sufficiently effective, essentially for two reasons: first, because a

declaration was not binding on the parties to the proceedings in which it was made; and, secondly, because a declaration provided the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention. Moreover, the minister concerned could exercise that power only if he considered that there were “compelling reasons” for doing so.

38. The Court considers that the instant case is distinguishable from *Hobbs*, where the applicant had already suffered financial loss as a result of the discrimination about which he complained but could not have obtained monetary compensation through the grant of a declaration of incompatibility. It is closer to *B. and L.*, where there had been no financial loss, although those applicants had already been prevented by the impugned legislation from marrying each other. In the present case, as in *B. and L.*, it is arguable that, had a declaration of incompatibility been sought and made, the applicants might have been able to benefit from a future change in the law.

39. However, it remains the case that there is no legal obligation on the minister to amend a legislative provision which has been found by a court to be incompatible with the Convention. The Court notes that, according to the information provided by the Government, by August 2006 such amendments had occurred in ten out of the thirteen cases where a declaration had been finally issued by the courts, and in the remaining three, reforms were pending or under consideration (see paragraph 23 above). It is possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure. At the present time, however, there is insufficient material on which to base such a finding.

40. The Court does not consider that these applicants could have been expected to have exhausted, before bringing their application to Strasbourg, a remedy which is dependent on the discretion of the executive and which the Court has previously found to be ineffective on that ground.

It therefore rejects the Government's second objection to admissibility.

C. Delay

41. In the alternative, the Government submitted that the application was inadmissible under the six-months rule. The discrimination of which the applicants complained arose when an exemption for spouses was first introduced by the Finance Act 1975, and it first impacted on the applicants when they began co-habiting.

42. The applicants contended that the violation about which they complained, arising out of legislative measures, was continuing, so that the six-months time-limit did not apply (see *Norris*, cited above). Further and in

the alternative, the discrimination has intensified since the coming into force of the 2004 Act on 5 December 2005.

43. The Court repeats that it has found the applicants to be directly affected by a provision of domestic law, given the high probability that it will automatically apply to the survivor following the first sister's death. In these circumstances and since there is no domestic remedy which the applicants can be required to exhaust, the six-months time-limit does not apply.

D. The Court's conclusion on admissibility

44. The Court considers that the application as a whole raises questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other ground for declaring it inadmissible has been established. The application must therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicants' complaint.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

A. The parties' submissions

1. The Government

45. The Government emphasised that there was no right under Article 1 of Protocol No. 1 to acquire possessions; in the Court's case-law on domestic inheritance laws, it had consistently held that, before the relevant death occurred, the presumptive heir had no property rights and that his or her hope of inheriting in the event of death could not therefore amount to a "possession" (see *Marckx*, § 50; and also *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, § 38; *Mazurek v. France*, no. 34406/96, §§ 42-43, ECHR 2000-II). Since each applicant was still alive and her complaint, as surviving sister, concerned the potential future impact of domestic law on their power to inherit, Article 1 of Protocol No. 1 did not apply, and nor therefore did Article 14. The complaint made by each sister as the prospective first-to-die was also outside the ambit of Article 1 of Protocol No. 1, because there was no restriction under domestic law on the applicants' ability to dispose of their property, only a potential liability to tax arising after death, when the deceased would no longer be in a position to enjoy her former possessions.

46. In the alternative, if the Court were to find that the complaint fell within the ambit of Article 1 of Protocol No. 1, the Government denied that domestic law gave rise to any discrimination contrary to Article 14.

First, the applicants could not claim to be in an analogous situation to a couple created by marriage or civil partnership (“a couple”). The very essence of their relationship was different, because a couple chose to become connected, whereas for sisters it was an accident of birth. In choosing to become a couple by entering into a formal relationship recognised by law, the partners also made a financial commitment to each other, and agreed to give the courts powers to divide their property and to order one partner to provide for the other on separation. The special legal status of parties to a marriage had been recognised by the Commission in *Lindsay v. the United Kingdom*, no. 11098/84, Commission decision of 11 November 1986, Decisions and Reports 49, p. 181 and by the Court in *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000. No such financial commitment arose by virtue of the relationship between siblings.

47. The Government accepted that, if the applicants could be described as in an analogous position to a couple, there was a difference in treatment as regards exemption from inheritance tax. However, this difference in treatment did not exceed the wide margin of appreciation enjoyed by the State, both in the field of taxation and when it came to financial measures designed to promote marriage (see *Lindsay* and *Shackell*).

The policy underlying the inheritance tax concession given to married couples was to provide the survivor with a measure of financial security, and thus promote marriage. The purpose of the 2004 Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and the inheritance tax concession for civil partners served the same legitimate aim as it did in relation to married couples. Given the development of society's attitudes, the same arguments justified the promotion of stable, committed same-sex relationships. That objective would not be served by extending similar benefits to unmarried members of an existing family, such as siblings, whose relationship was already established by their consanguinity, and recognised by law. The difference in treatment thus pursued a legitimate aim.

48. The difference in treatment was, moreover, proportionate, given that the applicants, as siblings, had not undertaken any of the burdens and obligations created by a legally recognised marriage or civil partnership. If the Government were to consider extending the inheritance tax concession to siblings, there would be no obvious reason not to extend it also to other co-habiting family members. Such a change would have considerable financial implications, given that the annual income from inheritance tax was approximately GBP 2.8 billion.

2. *The applicants*

49. The applicants argued that if, as they had previously argued, they could claim to be victims of discrimination, the fact that neither had yet died could not provide a separate and substantive defence. Unlike the applicants in *Marckx*, the present applicants were not complaining about a provision of the English law of inheritance and, the principle that the Convention does not guarantee the right to acquire possessions on intestacy or through voluntary disposition was irrelevant. In circumstances where it was effectively inevitable that there would be significant tax to pay by the surviving sister, the facts fell within the scope of Article 1 of Protocol No. 1, and Article 14 was thus also applicable.

50. The applicants could properly be regarded as being in a similar situation to a married or same-sex Civil Partnership Act couple. While it was true, as the Government had asserted, that many siblings were connected by nothing more than their common parentage, this was far from the case with the present applicants, who had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners. Their actions in so doing were just as much an expression of their respective self-determination and personal development as would have been the case had they been joined by marriage or a civil partnership. The powers of the domestic courts to make property orders upon the breakdown of a marriage or civil partnership did not entail that the applicants were not in an analogous situation to such couples as regards inheritance tax. Moreover, the very reason that the applicants were not subject by law to the same corpus of legal rights and obligations as other couples was that they were prevented, on grounds of consanguinity, from entering into a civil partnership. The one significant difference between the applicants and a married couple was that the applicants, being sisters, would not lawfully be entitled to have a sexual relationship. This difference was not, however, relied upon by the Government, nor could it be, given that there was no requirement in the 2004 Act for those wishing to enter into a civil partnership to be in a sexual relationship with each other.

51. Given that, as the Government asserted, the purpose of the inheritance tax exemption for married and civil partnership couples was the promotion of stable and committed relationships, the denial of an exemption to co-habiting adult siblings served no legitimate aim. The mere fact of being sisters did not entail a stable, committed relationship, and only a small minority of adult siblings were likely to share the type of relationship enjoyed by the applicants, involving prolonged mutual support, commitment and co-habitation.

52. The applicants agreed with the Government that there was no obvious reason why, if the exception were granted to siblings, it should not also be extended to other family members who co-habit, but argued that this

did not support a conclusion that the difference in treatment bore any relationship of proportionality to any legitimate aim. Such an exemption would, in fact, serve the policy interest invoked by the Government, namely the promotion of stable, committed family relationships among adults. Whilst the applicants accepted that the Court had no jurisdiction to dictate to the Government how best to remedy the discrimination, the amendments to the Civil Partnership Bill passed by the House of Lords (see paragraph 19 above) showed that it would be possible to construct a statutory scheme whereby two siblings or other close relations who had co-habited for a fixed number of years and chosen not to enter into a marriage or civil partnership could obtain certain fiscal rights or advantages. The Government's reliance on the margin of appreciation was misplaced in the light of the recognition given to the injustice faced by those in the applicants' position when the 2004 Act was passing through Parliament (*ibid.*). The applicants pointed out that the Government had been unable to provide an estimate of the loss of revenue which would flow from an inheritance tax exemption along the lines proposed in the House of Lords. They could not estimate the cost either, but pointed out that the lost revenue would have to be offset by the potential gains, for example, those flowing from an increased tendency, encouraged by the exemption, of close relations to care for disabled or elderly relatives, thus avoiding the need for State-funded care.

B. The Court's assessment

53. The applicants do not complain, as in *Marckx*, that they will be prevented from acquiring property; they complain instead that the survivor will be required to pay tax on property they jointly own; an outcome which the Court has held to be highly probable (see paragraph 30 above). Since the duty to pay tax on existing property falls within the scope of Article 1 of Protocol No. 1, Article 14 is applicable.

54. It is for the national authorities to make the initial assessment, in the field of taxation, of the aims to be followed and the means to be used (*Lindsay*, cited above). The State enjoys a wide margin of appreciation in this field, as is usual when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 46; *National and Provincial Building Society and Others v. the United Kingdom*, judgment of 23 October 1997, *Reports* 1997-VII, § 80). A government may often have to strike a balance between the need to raise revenue and the need to reflect other social objectives in its taxation policies. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds. The Court will generally

respect the legislature's policy choice in this field unless it is “manifestly without reasonable foundation” (ibid.; and see also *Lindsay*, cited above) and subject to the proviso that, in creating and implementing a scheme of taxation, the State must not discriminate between tax-payers in a manner which is inconsistent with Article 14 of the Convention (see, *mutatis mutandis*, *Stec and Others v. the United Kingdom* (dec.), [GC], nos. 65731/01 and 65900/01, §§ 54-55, ECHR 2005-...).

55. Article 14 safeguards individuals placed in similar positions from discrimination in the enjoyment of the rights and freedoms set out in the Convention and Protocols (see *Marckx*, § 32 and *Darby v. Sweden*, judgment of 23 October 1990, Series A no. 187, § 31). A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-...).

56. The applicants claim to be in a similar or analogous position to cohabiting married and civil partnership couples for the purposes of inheritance tax. The Government, however, argue that there is no true analogy because the applicants are connected by birth rather than by a decision to enter into a formal relationship recognised by law.

57. The Court recalls that in *Shackell*, while observing that there might well be an increased social acceptance of stable relationships outside the traditional relationship of marriage, it found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, citing the Commission's opinion in *Lindsay* that “[m]arriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who co-habit.” Since the coming into force of the 2004 Act in the United Kingdom, a same-sex couple now also has the choice to enter into a legal relationship designed by Parliament to correspond almost exactly to marriage (see paragraphs 16-18 above).

58. It is true that the decisions in *Shackell* and *Lindsay* were made in the knowledge that a man and a woman outside the prohibited degrees of family relationship are generally free to choose whether or not to take on the “corpus of rights and obligations” involved in marriage. The applicants, as sisters, do not have this choice, and indeed it goes to the heart of their complaint that, despite their decision to live together in an exclusive relationship for many years, English law does not accord a level of recognition to their co-habitation approaching that given to a married or civil partnership couple. The Court does not, however, have to decide if that

lack of choice has any bearing on the question whether, for the purposes of inheritance tax, the applicants can be regarded as being in an analogous position to married and civil partnership couples, because, for the reasons set out below, it considers that, even assuming that the applicants can be compared to such a couple, the difference in treatment is not inconsistent with Article 14.

59. In this regard, the Court recalls its finding in *Shackell* that the difference of treatment for the purposes of the grant of social security benefits, between an unmarried applicant who had a long-term relationship with the deceased, and a widow in the same situation, was justified, marriage remaining an institution that was widely accepted as conferring a particular status on those who entered it. The Court decided in *Shackell*, therefore, that the promotion of marriage by way of the grant of limited benefits for surviving spouses could not be said to exceed the margin of appreciation afforded to the respondent State. In the present case, it accepts the Government's submission that the inheritance tax exemption for married and civil partnership couples likewise pursues a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner. The Convention explicitly protects the right to marry in Article 12, and the Court has held on many occasions that sexual orientation is a concept covered by Article 14 and that differences based on sexual orientation require particularly serious reasons by way of justification (see, for example, *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX and the cases cited therein). The State cannot be criticised for pursuing, through its taxation system, policies designed to promote marriage; nor can it be criticised for making available the fiscal advantages attendant on marriage to committed homosexual couples.

60. In assessing whether the means used are proportionate to the aim pursued, and in particular whether it is objectively and reasonably justifiable to deny co-habiting siblings the inheritance tax exemption which is allowed to survivors of marriages and civil partnerships, the Court is mindful both of the legitimacy of the social policy aims underlying the exemption, and the wide margin of appreciation that applies in this field (see paragraph 55 above). Any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of tax payers (see *Lindsay*, cited above). The implementation of any such scheme must, inevitably, create marginal situations and individual cases of apparent hardship or injustice, and it is primarily for the State to decide how best to strike the balance between raising revenue and pursuing social objectives. The legislature could have granted the inheritance tax concessions on a different basis: in particular, it could have abandoned the concept of marriage or civil partnership as the determinative factor and extended the concession to siblings or other family members who lived together, and/or

based the concession on such criteria as the period of cohabitation, the closeness of the blood relationship, the age of the parties or the like. However, the central question under the Convention is not whether different criteria could have been chosen for the grant of an inheritance tax exemption, but whether the scheme actually chosen by the legislature, to treat differently for tax purposes those who were married or who were parties to a civil partnership from other persons living together, even in a long-term settled relationship, exceeded any acceptable margin of appreciation.

61. In the circumstances of the case, the Court finds that the United Kingdom cannot be said to have exceeded the wide margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exemptions was reasonably and objectively justified for the purposes of Article 14 of the Convention. There has accordingly been no violation of the Article, read in conjunction with Article 1 of Protocol No. 1 to the Convention, in the present case.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by four votes to three that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 12 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Josep CASADEVALL
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- (a) The joint dissenting opinion of Mr Bonello and Mr Garlicki;
- (b) The dissenting opinion of Mr Pavlovski.

J.C.M.
T.L.E.

JOINT DISSENTING OPINION OF JUDGES BONELLO AND GARLICKI

1. We decided to dissent because we are convinced that the prospective imposition of “full” inheritance tax on the surviving sister violates Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. In particular, we are not persuaded by the manner in which the “margin of appreciation” doctrine has been applied to this case.

We do agree that there must be a wide margin of appreciation offered to the national authorities in tax matters. We further agree that any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of taxpayers. We would also be prepared to agree that, with regard to tax matters, there may be some kind of presumption that the solutions adopted by the national legislature remain within this margin of appreciation. Such presumption would mean that it is, in principle, the applicant who must demonstrate that the application of the tax legislation in his or her case exceeded the State's margin of appreciation and led to unreasonable and unjustified effects.

However, this “burden of proof” is not unlimited. In our opinion, once an applicant is able to demonstrate that the way in which the tax legislation was applied created a situation of apparent hardship or injustice, the onus shifts towards the Government, who must then show that there were good reasons for their actions. Furthermore, if our Court decides to accept that such a situation of apparent hardship or injustice remains compatible with the Convention standards, it must give a full explanation as to how it applied the “margin of appreciation” concept.

2. The majority seems to agree that there has been a marginal situation or an individual case “of apparent hardship or injustice” (paragraph 60) in respect of the applicants. What seems to us, however, to be missing in the majority's position is a full explanation as to why and how such injustice can be justified. A mere reference to the margin of appreciation is not enough. It should also be recalled that, in the absence of such explanation, a problem of discriminatory treatment may arise, even outside the traditional arena of the Convention rights (see, *mutatis mutandis*, *Stec and Others v. the United Kingdom* (dec.) [GC], cited in paragraph 54 of the majority's judgment, §§ 54-55).

The national legislature is, generally speaking, free to adopt any reasonable policy of inheritance tax exemptions. As long as the United Kingdom confined the exemptions to married couples, such categorisation might have been justified under Article 12 of the Convention. However, once the UK legislature decided to extend the exemption to permanently cohabiting same-sex couples, the problem left the specific sphere of Article 12. Thus, any further categorisation in the area of inheritance

tax-exemptions has to satisfy general standards of reasonableness and non-arbitrariness resulting from Article 14. Of course, we do not want to cast doubt upon the reasonableness of extending exemptions to those same sex couples choosing to form a civil partnership and denying such exemption to mixed-sex couples preferring not to enter into any form of official union. But once the legislature decides that a permanent union of two persons could or should enjoy tax privileges, it must be able to justify why such a possibility has been offered to some unions while continuing to be denied to others. The problem of siblings living together permanently did not escape the attention of the UK legislators and an appropriate amendment was proposed by the House of Lords. It was, however, rejected in the House of Commons on the basis of widespread agreement that the Civil Partnership Bill “is not the appropriate legislative base on which to deal with [the problem]” (see paragraph 19 of the judgment). Such an approach may have been correct from the perspective of parliamentary technique, but it could not absolve the legislature from providing an equitable solution to the problem at a later stage.

3. The situation of permanently cohabiting siblings is in many respects - emotional as well as economical – not entirely different from the situation of other unions, particularly as regards old or very old people. The bonds of mutual affection form the ethical basis for such unions and the bonds of mutual dependency form the social basis for them. It is very important to protect such unions, like any other union of two persons, from financial disaster resulting from the death of one of the partners.

The national legislature may establish a very high threshold for such unions to be recognised under tax exemption laws; it may also provide for particular requirements to avoid fraud and abuse. But unless some compelling reasons can be shown, the legislature cannot simply ignore that such unions also exist.

The situation of permanently cohabiting siblings under the UK legislation has also been negatively affected by the fact that – being within the prohibited degrees of relationship – they cannot form a civil partnership. In other words, they have been deprived of the possibility of choice offered to other couples. That is why the present case cannot be determined by reference to the *Shackell v. the United Kingdom* decision (see paragraph 46 of the judgment), since the latter was based on the fact that the persons affected were generally free to choose whether or not to enter into a formal union.

4. The injustice generally inherent in the UK approach appears particularly striking in the circumstances of this case. Both sisters have already attained a rather advanced age; they have been together for several decades and neither of them has children. It is obvious that the State will be

able to collect its tax in full upon the death of the surviving applicant. But the State wants to do it twice: first upon the death of the first sister and later by imposing a new inheritance tax on what still remains of the estate. As we see it, this is scarcely compatible with Article 14 taken in conjunction with Article 1 of Protocol No. 1. It may also raise problems under Article 8 if the extent of her tax obligations compels the surviving sister to leave her house or otherwise sacrifice the lifestyle to which she has been accustomed.

DISSENTING OPINION OF JUDGE PAVLOVSKI

This case confirms, yet again, the truth of the words uttered by Benjamin Franklin many, many years ago, to the effect that “nothing in this world is certain but death and taxes”. Practice shows that this statement is still valid, even in our 21st century.

There is a well-known opinion that all judicial decisions can, in theory, be split into four categories: (a) legal and fair; (b) illegal, but fair; (c) illegal and unfair; and (d) legal, but unfair.

In my view, the decision reached by the majority in this case may be placed in the fourth category. I am firmly convinced that a judicial decision, which represents, by its very nature, the highest expression of justice, cannot be unfair. Yet I have genuine difficulty in accepting the fairness of the judgment delivered in the case of *Burden and Burden v. the United Kingdom*.

Unfortunately, in reaching their conclusion that

“... the United Kingdom cannot be said to have exceeded the margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exceptions was reasonable and objectively justified...” (see paragraph 61),

the majority failed to adduce any reason or argument for doing so. This circumstance prevents me from expressing my opinion concerning the legal aspects of the above conclusion.

Therefore, I will focus only on the issue of the general unfairness of this judgment.

In particular, this unfairness leads me to disagree with the judgment and prevents me from sharing the majority's opinion that there has been “no violation” in the instant case.

In my opinion, the decisive element in the case before us is the nature of the property belonging to the applicants, and their personal attitude to it.

Had assets purchased by the applicants during their co-habitation been at stake, I would have had no difficulty in accepting the majority's approach and, moreover, I would have readily agreed that part of such shared assets, inherited by a surviving sibling, could and should be considered as taxable property. In the case before us, however, we are faced with a qualitatively different situation. The case concerns the applicants' family house, in which they have spent all their lives and which they built on land inherited from their late parents. This house is not simply a piece of property - this house is something with which they have a special emotional bond, this house is their home.

It strikes me as absolutely awful that, once one of the two sisters dies, the surviving sister's sufferings on account of her closest relative's death should be multiplied by the risk of losing her family home because she cannot afford to pay inheritance tax in respect of the deceased sister's share of it.

I find such a situation fundamentally unfair and unjust. It is impossible for me to agree with the majority that, as a matter of principle, such treatment can be considered reasonable and objectively justified. I am firmly convinced that in modern society there is no “pressing need” to cause people all this additional suffering.