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

GRAND CHAMBER

CASE OF BURDEN v. THE UNITED KINGDOM

(Application no. 13378/05)

JUDGMENT

STRASBOURG

29 April 2008

In the case of Burden v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Nicolas Bratza,
Boštjan M. Zupančič,
Françoise Tulkens,
Rıza Türmen,
Corneliu Bîrsan,
Nina Vajić,
Margarita Tsatsa-Nikolovska,
András Baka,
Mindia Ugrekhelidze,
Anatoly Kovler,
Elisabeth Steiner,
Javier Borrego Borrego,
Egbert Myjer,
Davíd Thór Björgvinsson,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 12 September 2007 and 5 March 2008,

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. Burden 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, a solicitor practising in Chippenham. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.

3. The applicants complained under Article 14 of the Convention 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 a Chamber within the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court), composed of Josep Casadevall, Nicolas Bratza, Giovanni Bonello, Kristaq Traja, Stanislav Pavlovschi, Lech Garlicki and Lijiljana Mijović, judges, and Lawrence Early, Section Registrar. On 30 June 2005 the Chamber President decided to give the case priority under Rule 41 and that the admissibility and merits should be examined jointly, in accordance with Article 29 § 3 of the Convention and Rule 54A. On 12 December 2006 the Chamber unanimously declared the application admissible and delivered a judgment in which it held, by four votes to three, that there had been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

5. On 23 May 2007, pursuant to a request by the applicants dated 8 March 2007, the panel of the Grand Chamber decided to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed observations. In addition, third-party comments were received from the Belgian and Irish Governments on 28 August 2007.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 September 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms	H. MULVEIN,	*Agent*,
Mr	J. CROW,	*Counsel*,
Mr	J. COUCHMAN,	
Ms	K. INNES,	
Mr	S. GOCKE,	
Mr	R. LINHAM,	*Advisers*;

(b) *for the applicants*

Mr	D. PANNICK QC,	
Mr	S. GRODZINKSI,	*Counsel*,
Ms	E. GEDYE,	
Ms	E. STRADLING,	*Solicitors*.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

10. The applicants are unmarried sisters, born on 26 May 1918 and 2 December 1925 respectively. They have lived together, in a stable, committed and mutually supportive relationship, all their lives; for the last thirty-one years in a house built on land inherited from their parents in Wiltshire.

11. The house is owned by the applicants in their joint names. According to an expert valuation dated 12 January 2006, the property was worth 425,000 pounds sterling (GBP), 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.

12. 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 significantly more than the current exemption threshold for inheritance tax (see paragraph 13 below).

II. RELEVANT DOMESTIC LAW

A. Inheritance Tax Act 1984

13. By sections 3, 3A and 4 of the Inheritance Tax Act 1984, 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 300,000 for transfers between 5 April 2007 and 5 April 2008 (section 98 of the Finance Act 2005).

14. 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 taxpayer's election, in ten equal yearly instalments, unless the property is sold, in which case outstanding tax and interest must be paid immediately (section 227(1)-(4)).

15. Section 18(1) of the Inheritance Tax 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

16. The purpose of the Civil Partnership 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.

17. 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; and (iv) not within the prohibited degrees of relationship.

18. A civil partnership is, like marriage, indeterminate in nature and can end only on death, dissolution or annulment. The Civil Partnership Act created a comprehensive range of amendments to existing legislation, covering, *inter alia*, pensions, tax, social security, inheritance and immigration, intended to create parity between civil partnership and marriage for all purposes except in the very few cases where there was an objective justification for not doing so. 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.

19. When the Civil Partnership Bill was passing through Parliament, an amendment to it was adopted 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 cohabited for at least twelve 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.

20. 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, a 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, Member of Parliament, 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

21. The Human Rights Act 1998 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 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 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.”

22. 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 Human Rights Act 1998.

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

“[W]e 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 Human Rights 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."

24. According to statistics provided by the Government and last updated on 30 July 2007, since the Human Rights Act came into force on 2 October 2000 there had been twenty-four declarations of incompatibility. Of these, six had been overturned on appeal and three remained subject to appeal in whole or in part. Of the fifteen declarations which had become final, three related to provisions that had already been remedied by primary legislation at the time of the declaration; seven had been remedied by subsequent primary legislation; one had been remedied by a remedial order under section 10 of the Act; one was being remedied by primary legislation in the course of being implemented; one was the subject of public consultation; and two (relating to the same issue) would be the subject of remedial measures which the government intended to lay before Parliament in the autumn of 2007. In one case, *A v. Secretary of State for the Home Department* [2005] 2 AC 68, the House of Lords made a declaration of incompatibility concerning section 23 of the Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State power to detain suspected international terrorists in certain circumstances. The government responded immediately by repealing the offending provision by section 16 of the Prevention of Terrorism Act 2005.

III. RELEVANT COMPARATIVE LAW AND MATERIAL

25. While in common law systems there has traditionally been freedom of testamentary devolution, in civil law systems the order of succession is generally established by statute or code, with some particularly privileged categories of heirs, normally the spouse and close relatives, being granted automatic rights to a portion of the estate (the so-called reserved shares), which cannot generally be modified by the decedent's will. The position of each heir depends therefore on the combined effect of family law and tax law.

26. From the information available to the Court, it would appear that some form of civil partnership, with varying effects on matters of inheritance, are available in sixteen member States, namely Andorra, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. Spouses and close relatives, including siblings, are granted statutory inheritance rights in virtually all member States. In a majority of member States, siblings are treated less favourably in terms of succession rights than the surviving spouse but more favourably than the surviving civil partner; and only a few member States grant the surviving civil partner inheritance rights equal to those of the surviving spouse. Inheritance tax schemes usually follow the order of succession,

although in certain countries, such as France and Germany, the surviving spouse is granted a more favourable tax exemption than any other category of heir.

THE LAW

27. The applicants complained under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 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. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

28. 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

1. The Chamber's conclusions

29. The Chamber found, unanimously, that, given the applicants' advanced age and the very high probability that one would be liable to pay inheritance tax upon the death of the other, they could claim to be directly affected by the impugned law.

2. The parties' submissions

(a) The Government

30. The Government submitted that the Chamber's reasoning did not support its conclusion. Neither applicant had yet been required to pay inheritance tax and at least one of them would definitely never have to pay it, and furthermore, since it was not inevitable that one would predecease the other, it was a matter of speculation whether either would ever suffer any loss. The 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.

31. The legal test for "victim status" was very clear from the case-law: the word "victim" denotes a person who is directly affected by the act or omission in issue (see, for example, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51). The present case was on that ground distinguishable from *Marckx v. Belgium* (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* (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* (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* (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.

(b) The applicants

32. The applicants agreed with the Chamber's unanimous finding that they could properly claim to be victims. It was virtually certain that one would predecease the other, and similarly certain that the value of the

deceased's estate would exceed the nil rate threshold for inheritance tax and that the survivor would face a significant liability to inheritance tax which would not be faced by the survivor of a marriage or civil partnership (see paragraph 15 above). Thus, as in *Marckx* (cited above) or *Johnston and Others v. Ireland* (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. It was, moreover, clear from the Court's case-law (see, for example, *Campbell and Cosans*, cited above) that the "mere threat" of conduct prohibited by the Convention might constitute the person at threat a victim, provided the threat was sufficiently real and immediate. Here the threat was very real; 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.

3. The Grand Chamber's assessment

33. The Court notes that, in order to be able to lodge a petition in pursuance of Article 34, a person, non-governmental organisation or group of individuals must be able to claim "to be the victim of a violation ... of the rights set forth in the Convention ...". In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see *Ireland v. the United Kingdom*, 18 January 1978, §§ 239-40, Series A, no. 25; *Eckle*, cited above; and *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28). The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Norris*, cited above, § 31).

34. It is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted (see *Norris*, cited above, § 31, and *Bowman v. the United Kingdom*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I) or if he is a member of a class of people who risk being directly affected by the legislation (see *Johnston and Others*, cited above, § 42, and *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A). Thus, in the *Marckx* case, cited above, the applicants, a single mother and her five-year old "illegitimate" daughter, were found to be directly affected by, and thus victims of, legislation which would, *inter alia*, limit the child's right to inherit property from her mother upon the mother's eventual death, since the law automatically applied to all children born out of wedlock. In contrast, in *Willis v. the United Kingdom* (no. 36042/97, ECHR 2002-IV), the risk to the

applicant of being refused a widow's pension on grounds of sex at a future date was found to be hypothetical, since it was not certain that the applicant would otherwise fulfil the statutory conditions for the payment of the benefit at the date when a woman in his position would become entitled.

35. In the present case, the Grand Chamber agrees with the Chamber that, given the applicants' age, the wills they have made and the value of the property each owns, the applicants have established that there is a real risk that, in the not too distant future, one of them will be required to pay substantial inheritance tax on the property inherited from her sister. In these circumstances, the applicants are directly affected by the legislation and can claim to be victims of the alleged discriminatory treatment.

B. Domestic remedies

1. The Chamber's conclusions

36. The Chamber's findings as regards exhaustion of domestic remedies were as follows (paragraphs 35-40):

> "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 *B. and L.* [*v. the United Kingdom* (dec.), no. 36536/02, 29 June 2004]). 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 (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports* 1996-IV, and *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports* 1996-VI).
>
> 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.
>
> The Court found in *Hobbs* [*v. the United Kingdom* (dec.), no. 63684/00, 18 June 2002] 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.

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. v. the United Kingdom*, 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. v. the United Kingdom*, 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.

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 ... 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.

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."

2. The parties' submissions

(a) The Government

37. The Government referred to the Court's case-law to the effect that it is incumbent on an applicant to pursue a domestic remedy if it is "effective and capable of providing redress for the complaint" (see *Hobbs v. the United Kingdom* (dec.), no. 63684/00, 18 June 2002). In the present case, since neither applicant had suffered any liability for inheritance tax, the most that the Court could award, in the event that it found in favour of the applicants, would be a declaration that the Inheritance Tax Act represented a violation of their Convention rights. Assuming that the claim was well founded on the merits, this was also the relief that the High Court in the United Kingdom would have awarded under section 4 of the Human Rights Act. If a declaration by this Court would constitute just satisfaction for the purposes of Article 41 of the Convention, the Government submitted that a declaration of incompatibility by the High Court must necessarily be regarded as an available and effective domestic remedy for the purposes of Article 35.

38. The Government referred to the information set out in paragraph 24 above and emphasised that there was not a single case where it had refused

to remedy a declaration of incompatibility. While as a matter of pure law it was true, as the Court had found in *Hobbs*, that such a declaration was not binding on the parties and gave rise to a power for the minister, rather than a duty, to amend the offending legislation, this was to ignore the practical reality that a declaration of incompatibility was highly likely to lead to legislative amendment.

(b) The applicants

39. 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 (see for example, *Montion v. France*, no. 11192/84, Commission decision of 14 May 1987, Decisions and Reports (DR) 52, p. 232, and *G. v. Belgium*, no. 12604/86, Commission decision of 10 July 1991, DR 70, p. 131). 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, lastly, *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.

3. The Grand Chamber's assessment

40. The Grand Chamber notes that the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy within the meaning of Article 35 § 1 (see the decisions in *Hobbs*, *Dodds*, *Walker*, *Pearson* and *B. and L. v. the United Kingdom*, all cited above, and also *Upton v. the United Kingdom* (dec.), no. 29800/04, 11 April 2006). Moreover, in cases such as *Hobbs*, *Dodds*, *Walker* and *Pearson*, where the applicant claims to have suffered loss or damage as a result of the breach of his Convention rights, a declaration of incompatibility has been held not to provide an effective remedy because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation.

41. The Grand Chamber is prepared to accept the Government's argument that the present case can be distinguished from *Hobbs*, given that neither applicant complains of having already suffered pecuniary loss as a result of the alleged violation of the Convention. It has carefully examined

the material provided to it by the Government concerning legislative reform in response to the making of a declaration of incompatibility, and notes with satisfaction that in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision (see paragraph 24 above). However, given that there have to date been a relatively small number of such declarations that have become final, it agrees with the Chamber that it would be premature to hold that the procedure under section 4 of the Human Rights Act provides an effective remedy to individuals complaining about domestic legislation.

42. Nonetheless, the Grand Chamber is mindful that the principle that an applicant must first make use of the remedies provided by the national legal system before applying to an international court is an important aspect of the machinery of protection established by the Convention (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV). The European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights (ibid., §§ 65-66) and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.

43. The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required first to exhaust this remedy before making an application to the Court.

44. This is not yet the case, however, and the Grand Chamber therefore rejects the Government's objection on grounds of non-exhaustion of domestic remedies.

C. Conclusion

45. The Court accordingly rejects the Government's preliminary objections.

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

A. The Chamber's conclusions

46. The Chamber rejected the Government's argument, relying, *inter alia*, on the judgment in *Marckx* (cited above), that Article 1 of Protocol No. 1 was inapplicable since there was no right under the Article to acquire possessions. The Chamber noted that the applicants complained not, as in the *Marckx* case, that they would be prevented from acquiring property but that the survivor would be required to pay tax on existing property which they jointly owned, an outcome which the Chamber had held to be highly probable. Since the duty to pay tax on existing property fell within the scope of Article 1 of Protocol No. 1, Article 14 was applicable.

47. The Chamber left open the question whether the applicants could claim to be in an analogous position to a married or Civil Partnership Act couple and found that the difference in treatment was not inconsistent with Article 14 of the Convention, for the following reasons (paragraphs 59-61):

> "In this regard, the Court recalls its finding in *Shackell* [*v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000] 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.
>
> In assessing whether the means used are proportionate to the aim pursued, and in particular whether it is objectively and reasonably justifiable to deny cohabiting 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 ... Any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of tax payers (see *Lindsay* [*v. the United*

Kingdom, no. 11089/84, Commission decision of 11 November 1986, Decisions and Reports 49, p. 181]). 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.

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, in the present case."

B. The parties' submissions

1. The Government

48. 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*, cited above, § 50; *Inze*, cited above, § 38; and *Mazurek v. France*, no. 34406/97, §§ 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.

49. 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.

Firstly, the applicants could not claim to be in an analogous situation to a couple created by marriage or civil partnership. The very essence of their

relationship was different, because a married or Civil Partnership Act couple chose to become connected by a formal relationship, recognised by law, with a number of legal consequences; whereas for sisters, the relationship was an accident of birth. Secondly, the relationship between siblings was indissoluble, whereas that between married couples and civil partners might be broken. Thirdly, a married couple and civil partners made a financial commitment by entering into a formal relationship recognised by law and, if separated, the court could divide their property and order financial provision to be made by one partner to the other. No such financial commitment arose by virtue of the relationship between siblings.

The special legal status of parties to a marriage had been recognised by the Commission in *Lindsay v. the United Kingdom* (no. 11089/84, Commission decision of 11 November 1986, DR 49, p. 181), and by the Court in *Shackell v. the United Kingdom* ((dec.), no. 45851/99, 27 April 2000).

50. 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*, cited above).

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 Civil Partnership 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.

51. 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 cohabiting family members. Such a change would have considerable financial implications, given that the annual income from inheritance tax was approximately 2.8 billion pounds sterling.

2. The applicants

52. The applicants argued that if, as they had previously contended, 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 claim that 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.

53. 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. They had not raised a general complaint about their preclusion from entering into a civil partnership, because their concern was focused upon inheritance-tax discrimination and they would have entered into a civil partnership had that route been open to them. It was circular for the Government to hold against the applicants the very fact that they cannot enter into a civil partnership.

54. 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 cohabiting 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 cohabitation.

55. 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 cohabit, 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. While the applicants accepted that the Court had no jurisdiction to dictate to the Government how best to remedy the discrimination, the amendment 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 cohabited 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 Civil Partnership 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.

C. The third parties' submissions

1. The Government of Belgium

56. According to the Belgian Government, a State was entitled to pursue, through its taxation system, policies designed to promote marriage and to make available the fiscal advantages attendant on marriage to committed homosexual couples. Such policies pursued the common goal of the protection of the form of family life which, in the view of national legislatures, provided the best prospect of stability.

2. The Government of Ireland

57. The Irish Government submitted that the applicants had failed to establish discrimination contrary to Article 14, since their entire complaint hinged upon the fundamentally erroneous assumption that they were in an analogous position to a married couple and/or a Civil Partnership Act couple. The applicants' submissions failed to advert to the significant legal obligations inherent in marriage/civil partnership. There was no single, homogeneous comparator between the applicants and the above types of couple; indeed, it was clear from the applicants' arguments that their position was analogous, not to married or Civil Partnership Act couples, but rather to any persons in an established, mutually supportive, cohabiting

relationship. It would be truly extraordinary if the enactment of legislation conferring rights upon same-sex couples who chose to register their relationship could have the effect of requiring the State to extend the entitlements thereby conferred to a potentially infinite class of persons in cohabiting relationships.

D. The Grand Chamber's assessment

58. The Grand Chamber notes that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X).

59. Taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid. While the interference is generally justified under the second paragraph of this Article, which expressly provides for an exception as regards the payment of taxes or other contributions, the issue is nonetheless within the Court's control, since the correct application of Article 1 of Protocol No. 1 is subject to its supervision (see, for example, *Orion-Břeclav, S.R.O. v. the Czech Republic* (dec.), no. 43783/98, 13 January 2004). Since the applicants' complaint concerns the requirement for the survivor to pay tax on property inherited from the first to die, the Grand Chamber considers that the complaint falls within the scope of Article 1 of Protocol No. 1 and that Article 14 is thus applicable.

60. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV). Such 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, and this margin is usually wide when it comes to general measures of economic or social strategy (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 51-52, ECHR 2006-VI).

61. The applicants claim to be in a relevantly similar or analogous position to cohabiting married and Civil Partnership Act 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.

62. The Grand Chamber commences by remarking that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members (see paragraph 17 above and, generally, *B. and L. v. the United Kingdom*, cited above). The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.

63. Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see *B. and L. v. the United Kingdom*, cited above, § 34). In *Shackell* (cited above), the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since "marriage remains an institution which is widely accepted as conferring a particular status on those who enter it". The Grand Chamber considers that this view still holds true.

64. Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage (see paragraphs 16-18 above).

65. As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand (see *Shackell*, cited above), the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. This view is unaffected by the fact that, as noted in paragraph 26 above, member States

have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance-tax exemptions to the various categories of survivor; States, in principle, remaining free to devise different rules in the field of taxation policy.

66. In conclusion, therefore, the Grand Chamber considers that the applicants, as cohabiting sisters, cannot be compared for the purposes of Article 14 to a married or Civil Partnership Act couple. It follows that there has been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Rejects* unanimously the Government's preliminary objections;

2. *Holds* by fifteen votes to two 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 in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 April 2008.

Vincent Berger	Jean-Paul Costa
Jurisconsult	President

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

(a) concurring opinion of Judge Bratza;
(b) concurring opinion of Judge Davíd Thór Björgvinsson;
(c) dissenting opinion of Judge Zupančič;
(d) dissenting opinion of Judge Borrego Borrego.

J-P.C.
V.B.

CONCURRING OPINION OF JUDGE BRATZA

The Grand Chamber has reached the same conclusion as the Chamber but by a somewhat different route. As appears from the judgment (see paragraph 47), the Chamber left open the question whether the applicants, as siblings, could claim to be in an analogous position to a married couple or to those in a civil partnership, holding that any difference of treatment was in any event reasonably and objectively justified, regard being had to the wide margin of appreciation enjoyed by States in the area of taxation. The Grand Chamber has preferred to found its decision on the lack of analogy between those who have entered into a legally binding marriage or civil partnership agreement, on the one hand, and those, such as the applicants, who are in a long-term relationship of cohabitation, on the other.

While I fully share the view of the majority of the Grand Chamber that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, I continue to have a preference for the reasoning of the Chamber in arriving at this conclusion.

CONCURRING OPINION OF JUDGE DAVÍD THÓR BJÖRGVINSSON

I agree with the majority in finding that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. However, I prefer different reasoning.

When Article 14 is applied, in essence two questions must be answered: firstly, whether there is a difference in treatment of persons in relevantly similar or analogous situations; secondly, if this is the case, whether the difference in treatment is justified.

The majority has in paragraphs 62-65 of the judgment found that cohabiting sisters cannot be compared for the purposes of Article 14 of the Convention to married or civil partnership couples. Therefore, they are not in a relevantly similar or analogous situation and no breach of Article 14 has occurred.

The reasoning of the majority, as presented in paragraphs 62-65 of the judgment, is in my view flawed by the fact that it is based on the comparison of factors of a different nature and which are not comparable from a logical point of view. It is to a large extent based on reference to the specific legal framework which is applicable to married couples and civil partnership couples but which does not, under the present legislation, apply to the applicants as cohabiting sisters. However, although in the strict sense the complaint only relates to a difference in treatment as concerns inheritance tax, in the wider context it relates, in essence, to the facts that different rules apply and that consanguinity between the applicants prevents them from entering into a legally binding agreement similar to marriage or civil partnership, which would make the legal framework applicable to them, including the relevant provisions of the law on inheritance tax.

I believe that in these circumstances any comparison of the relationship between the applicants, on the one hand, and the relationship between married couples and civil partnership couples, on the other, should be made without specific reference to the different legal framework applicable, and should focus only on the substantive or material differences in the nature of the relationship as such. Despite important differences, mainly as concerns the sexual nature of the relationship between married couples and civil partnership couples, when it comes to the decision to live together, the closeness of the personal attachment and most practical aspects of daily life and financial matters, the relationship between the applicants in this case has, in general and for the alleged purposes of the relevant inheritance-tax exemptions in particular, more in common with the relationship between married or civil partnership couples, than there are differences between them. Despite this fact, the law prohibits them from entering into an agreement similar to marriage or civil partnership and thus take advantage of the applicable rules, including the inheritance-tax rules. That being so, I

am not convinced that the relationship between the applicants as cohabiting sisters cannot be compared with married or civil partnership couples for the purposes of Article 14 of the Convention. On the contrary, there is in this case a difference in treatment of persons in situations which are, as a matter of fact, to a large extent similar and analogous.

The question then arises whether the difference in treatment is objectively and reasonably justified. In substance I agree with the reasoning offered in paragraphs 59-61 of the Chamber judgment on this point, which are cited in paragraph 47 of this judgment, namely that the difference in treatment for the purposes of granting of inheritance-tax exemptions was reasonably and objectively justified.

In this regard it should also be borne in mind that the institution of marriage is closely linked to the idea of the family, consisting of a man and a woman and their children, as one of the cornerstones of the social structure in the United Kingdom, as well as in the other member States of the Council of Europe. On the basis of this assumption, a whole framework of legal rules, of both a private and a public nature, has come into existence over a long period of time. These rules relate to the establishment of marriage and mutual rights and obligations between spouses in both personal and financial matters (including inheritance) and in relation to their children, if any, as well as with regard to taxes (including inheritance taxes), social security, and other matters. The applicability of such rules, or similar rules, in many of the member States have gradually, step by step, and mostly upon the initiative of the legislature in the respective countries, been extended to cover relationships other than those traditionally falling under marriage in the formal legal sense, namely civil partnership couples (including individuals of the same sex), and thereby the legislator has responded to new social realities and changing moral and social values. However, it is important to have in mind that each and every step taken in this direction, positive as it may seem to be from the point of view of equal rights, potentially has important and far-reaching consequences for the social structure of society, as well as legal consequences, namely for the social security and tax system in the respective countries. It is precisely for this reason that it is not the role of this Court to take the initiative in this matter and impose upon the member States a duty to further extend the applicability of these rules with no clear view of the consequences that it may have in the different member States. In my view it must fall within the margin of appreciation of the respondent State to decide when and to what extent this will be done.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I have voted for a violation in this case for reasons which have little to do with policy and values but have everything to do with formal logic. In other words, the majority's position is logically inconsistent. The simplest way of explaining this is to say that where a person in certain situations has said A, he is logically required to say B. In this case the issue is clearly discrimination concerning the inheritance-tax exemption for two unmarried sisters who have lived together for many years in the same household. They, when approaching old age, wanted to have the right to inheritance-tax exemption given that the exemption has been granted by the United Kingdom legislature to other couples living together in the same household.

This brings us straight to the *medias res* of the tax law. The policies applied to taxation are clearly very important because they give financial incentives to certain choices that people are likely to make. For example, if it were to be a policy of the law-giver to encourage heterosexual marriage it would then be logical for the legislator to offer certain tax credits, advantages and incentives to couples living together irrespective of whether they have children or not. If the legislature wants to encourage childbearing, it will give the same traditional tax incentives only to couples living together and having children. If the legislature wishes to discourage divorce, it will premise these advantages on the couples remaining together.

As to the reasonable goals such incentives are intended to further, they may or they may not be disclosed by the law-giver. But even if they are completely disclosed it does not mean that they are completely predictable. These tax incentives act together with many other factors including many other tax incentives and disincentives. In any event, tax policy is an economic policy but it is also a social policy in disguise. For example, progressive taxation is a strongly equalising economic factor undoing many untoward aspects of social stratification.

As for the inheritance-tax policy, radical solutions have sometimes been applied. An extremely high inheritance tax, for example, may indicate the law-giver's preference for earned rather than inherited wealth. Be that as it may, the inheritance-tax policy is not a simple linear decision-making choice. Rather, it is an integral part of a complex web of economic decisions that heavily influence the distribution of wealth and thus the whole social structure.

Before we move onto the question of discrimination, let us point out that the term "discrimination" simply means making and establishing differences. This meaning also derives from the Latin word *discriminare*. All decision-making in all three branches of power is about establishing and enforcing different decisions for different situations. In this sense, there is nothing wrong with "discriminating" unless the "specific establishment of

differences" pertains to what in constitutional law we call a "suspect class", such as the classes taxatively enumerated in Article 14 of the European Convention on Human Rights. In other words, where gender, race, colour of skin, language, religion, political or other opinion, national or social origin, minority status, property, birth or other status are concerned, discrimination is in principle proscribed. These suspect classes, it is well to point out, are simply an exception to the general rule which permits all kinds of differentiated decision-making for other non-suspect classes. Prohibition of discrimination – enforcing distinction – is thus an exception rather than the rule.

When it comes to the suspect classes this does not mean that the discrimination is categorically forbidden. Rather, it means that within these classes discrimination is permitted through the application of equal protection, proportionality and reasonableness tests. Even within the suspect classes, discrimination may be permissible if the goal pursued by the discrimination is sufficiently compelling and if the law or other decision under scrutiny is rationally related to this sufficiently important interest.

It is clear that some of the Article 14 categories, for example, race or national origin, call for the strictest scrutiny test. Under this test, the decision (or the law underlying it) would be upheld only if it was suitably tailored to serve a compelling State interest. When it comes to gender or illegitimacy of birth, the decision would be presumed invalid under the intermediate test unless substantially related to a sufficiently important interest.

The mildest proportionality (reasonableness) test is applied to social and economic matters such as the one at hand. Here, the test inquires whether the legislation at issue is rationally related to a legitimate government interest. The question, in other words, is whether not giving tax exemption to the two Burden sisters is rationally related to a legitimate government interest.

Of course, it is always possible to say that a government has a legitimate interest in collecting money from taxes paid by the taxpayers. The same goes for the inheritance tax payable upon the death of the person whose estate becomes taxable when transferred through inheritance to another person. What is the legitimate government interest behind this kind of taxation?

It is difficult to maintain that there is anything inherently legitimate about taxing the transfer of wealth upon the death of an individual. For example, one might argue that the State adds insult to injury when taxing an estate left to the survivors of a close relationship. In this sense, one might imagine a scale of taxation that would be progressive in positive correlation with the relational distance between the deceased and the surviving relative. But this is just one aspect of inheritance taxation, an example perhaps of how inherently questionable the inheritance taxation is in principle.

When it comes, therefore, to the differentiation between different classes as regards inheritance taxation it is inherently difficult to maintain that the treatment of one class in preference to another class is rationally related to any legitimate government interest. Yet, once we accept inheritance taxation as something normal, the differentiation between different classes for inheritance taxation purposes becomes decisive.

If the government has decided not to tax married couples, this is the starting point for the suspicion of discrimination in our case. The government may reasonably maintain that the close relationship of a couple provides sufficient reason for the tax exemption. Those who are not married, in other words, are then *a priori* not entitled to the tax exemption. The cut-off criterion is clear.

However, when the government decides to extend this privilege to other modes of association, this black and white distinction is broken and the door is open for reconsideration of the question whether the denial of the tax advantage to other modes of association is rationally related to a legitimate government interest.

The majority deals with these questions in paragraphs 62-65. In paragraph 62 of the judgment the majority remarks:

> "[T]he relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members."

I ask myself, at this point, why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question.

One could easily reverse the argument and say, for example, that the "consanguine" identical twins are far closer genetically and otherwise, since in reality they are clones of one another than anybody could ever be to anybody else. And yet if the Burden sisters were identical twins they would not be entitled to the same exemption, in counter distinction to even the most ephemeral and fleeting relationship. So, what does the qualitative difference referred to by the majority come to? Is it having sex with one another that provides the rational relationship to a legitimate government interest?

In paragraph 63 of the judgment the Grand Chamber then expresses the view that marriage confers a special status on those who enter into it. The analysis of paragraph 63 tends to show that the majority does not regard the arguments in paragraph 62 as sufficiently persuasive, in other words, the majority feels that it must add, *ex abundante cautela*, this "special nature" of marriage as a contract. If the contract is not explicit, the legal consequences do not flow from it. But this argument, too, is specious – even

if we do not consider common law marriage as a historical phenomenon in which consensual cohabitation, even under canon law, confers all the rights and duties on the couple concerned. The further reference to different solutions in different member States being irrelevant – since at least some of them consider cohabitation a factual question with legal consequences equivalent to an explicit marriage – makes it imperative for the majority to resort to the final rescue in saying (see paragraph 65 of the judgment):

> "This view is unaffected by the fact that, as noted in paragraph 26 above, member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance-tax exemptions to the various categories of survivor; States, in principle, remaining free to devise different rules in the field of taxation policy."

Needless to say, this final reference to margins of appreciation makes all other argumentation superfluous.

The logic "if you say A, you should also say B", which I referred to at the beginning of this dissenting opinion, is explicitly reiterated in paragraph 53 of *Stec and Others*:

> "If ... a State does decide to create a benefits scheme ..., it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in [*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01], §§ 54-55, ECHR 2005-X)."

A priori, the State is not required to create a benefit, in this case extramarital tax exemptions. If the State nevertheless does decide to extend the tax exemption to one extramarital group, it should employ at least a minimum of reasonableness while deciding not to apply the benefit to other groups of people in relationship of similar or closer proximity.

I believe making consanguinity an impediment is simply arbitrary.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

(Translation)

To my great regret, I cannot agree with the majority's approach, as in my opinion the judgment does not deal with the problem raised by this case.

1. The complaint

The complaint arises from the fact that the applicants are not entitled to inheritance-tax exemption. They are two sisters who have "lived together, in a stable, committed and mutually supportive relationship, all their lives" (see paragraph 10 of the judgment) and are unable to enter into a civil partnership, being legally prevented from doing so by the Civil Partnership Act 2004, under which the exemption may be claimed only by the homosexual couples contemplated therein (Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1).

2. The Chamber's judgment (or the true judicial response to a complaint)

"[T]he inheritance-tax exemption for married and civil partnership couples ... pursues a legitimate aim." After examining that aim the Chamber, in accordance with the Court's case-law, went on to assess "whether the means used [were] proportionate to the aim pursued". The majority of the Chamber took the view 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" (paragraph 61 of the Chamber judgment).

The Chamber's judgment was adopted by four judges; three judges expressed their disagreement in two dissenting opinions. In the first of those opinions Judges Bonello and Garlicki said: "The majority seems to agree that there has been a marginal situation or an individual case 'of apparent hardship or injustice' (paragraph 60 of the Chamber judgment) 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." The second dissenting opinion, that of Judge Pavlovschi, follows the same general line.

3. The approach followed by the majority of the Grand Chamber

The United Kingdom authorities (see paragraphs 19 and 20 of the judgment) and the Chamber's judgment expressly and explicitly recognise

the injustice due to the lack of provision for inheritance-tax exemption in the case of close relations, like the applicants. That circumstance is completely ignored in the Grand Chamber's judgment.

The question of the State's margin of appreciation and its limits, which is at the heart of the case and was dealt with as such in the Chamber's judgment, has completely disappeared from the Grand Chamber's judgment.

The majority of the Grand Chamber assert that there are two differences between the applicants' relationship and that between two civil partners, the first being the sisters' consanguinity and the second the legally binding nature of a civil partnership. The majority accordingly consider that since the two situations are not comparable there has been no discrimination.

But who has disputed the existence of a relation of consanguinity between two sisters or the legal status of a civil partnership? No one. These are two facts over which there is no disagreement. Trying to ground a case on undisputed facts is the best example there can be of a circular, or I might even say concentric, argument.

The parties before the Court, the Chamber which first heard the case, the panel of five judges, I myself and, I would think, all those who have taken an interest in the case consider that the "serious question affecting the interpretation ... of the Convention" (Article 43 § 2 of the Convention) on which the Grand Chamber was required to rule in the present case is a very simple one: it is whether or not granting inheritance-tax exemption to same-sex couples in a civil partnership but not to the applicant sisters, who are also a same-sex couple, is a measure proportionate to the legitimate aim pursued.

In my opinion, by declining to give a reply to the complaint before the Court, the majority of the Grand Chamber have disregarded a Grand Chamber precedent expressed in the following terms: "Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14" (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55 *in fine*, ECHR 2005-X).

This judgment of the Grand Chamber will no doubt be described as politically correct. I consider nevertheless that it has not been rendered in accordance with Article 43 of the Convention because the Grand Chamber, instead of trying to explain the difference in treatment for tax purposes between the two types of couple mentioned, preferred not to give reasons and restricted itself to a description of the facts, saying for example that two sisters are linked by consanguinity or that a civil partnership has legal consequences. The fact that the Grand Chamber did not give a reply to the applicants, two elderly ladies, fills me with shame, because they deserved a different approach. I would like to close by quoting Horace, who wrote in *Ars Poetica*: "*parturient montes, nascetur ridiculus mus*".