



Neutral Citation Number: [2021] EWCA Civ 1572

Case No: B6/2020/1675

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**SIR JAMES MUNBY SITTING AS**  
**A DEPUTY HIGH COURT JUDGE**  
**ZC20P04055**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/11/2021

**Before:**  
**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**

**LORD JUSTICE MOYLAN**  
and  
**LORD JUSTICE DINGEMANS**

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**FAIZ SIDDIQUI** **APPELLANT**  
-V-  
**JAVED SIDDIQUI and RAKSHANDA SIDDIQUI** **RESPONDENTS**

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**Hugh Southey QC (instructed by Dale Langley Solicitors) for the Appellant**  
**Justin Warshaw QC, Joshua Viney and Jennifer MacLeod (instructed by Clintons**  
**Solicitors) for the Respondents**

Hearing date: 5th March 2021

Further written submissions dated 1st September and 27th September 2021

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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 Tuesday 2<sup>nd</sup> November 2021.

**Lord Justice Moylan:**

1. The Appellant is the adult son of the Respondents. He has applied for permission to appeal and, if granted, he appeals from the order made by Sir James Munby, sitting as a Deputy High Court Judge, on 30 September 2020 by which he dismissed the Appellant’s applications for financial orders against the Respondents under section 27 of the Matrimonial Causes Act 1973 (“the MCA 1973”); under section 15 and Schedule 1 of the Children Act 1989 “the CA 1989”; and under the inherent jurisdiction. (The Appellant may, strictly, be an Applicant until his application for permission to appeal has been granted but I propose to call him the Appellant in this judgment.)
2. Sir James Munby (“the judge”) dismissed the claims because he decided that there was no jurisdiction to make the orders sought by the Appellant. As the judge explained, at [24], orders had been sought under section 27 of the MCA 1973 and Schedule 1 of the CA 1989 on the basis that each could be construed as giving the court power to make orders in the Appellant’s favour either “by a traditional approach to statutory construction” or, alternatively, “by a process of ‘reading down’ in accordance with section 3 of the Human Rights Act 1998”.
3. The judge decided, at [47], that “the statutory language is clear and means what it says”. The result was, as I explain further below, that there was no power to make an order in the Appellant’s favour under either section 27 or Schedule 1. The judge next determined that neither provision could be “read down” so as to give the court power to make the orders sought because, at [60], such an interpretation “would be fundamentally wrong and inconsistent with principle” because it would “fly in the face of a ‘fundamental feature’, a ‘cardinal’ or ‘essential’ principle of the legislation”.
4. The judge also addressed the Appellant’s case in respect of articles 2, 6 and 8 and Article 1 of Protocol 1 (“A1P1”) of the European Convention on Human Rights (“the ECHR”) and determined, at [79], that none of them “is engaged and the applicant’s various claims do not fall within the ambit of any of them”. The judge also rejected the Appellant’s case that the statutory provisions were discriminatory under article 14.
5. Finally, the judge dismissed the Appellant’s application for an order under the inherent jurisdiction on the basis that this jurisdiction could not be exercised to make the orders sought including because, at [132], “the inherent jurisdiction is not available to assist the applicant because of the fundamental principle” that this jurisdiction cannot be used when, at [137], there is “a comprehensive statutory scheme dealing ... with the circumstances in which a child, including as here, an adult child, can make a claim against a living parent”.
6. The Appellant did not apply for a declaration of incompatibility and, indeed, at [149], his then counsel “specifically disclaimed any such application”. However, in submissions prepared by the Appellant personally and sent to the judge after the conclusion of the hearing below, the Appellant invited the judge to make declarations of incompatibility. The judge rejected this invitation. It represented, at

[157(iv)], “a complete volte face” and “it is elementary that the court cannot grant such a declaration without the involvement of the Crown”.

7. The application for permission to appeal relied on four matters in respect of each of which it was asserted that the judge “had erred when he concluded that”:

“(a) The subject matter does not come within the ambit of a right protected by the Convention (specifically articles 6, 8 and article 1 of the first protocol).

(b) Any discrimination is not on a ground that comes within the scope of article 14 of the Convention.

(c) Relevant statutory provisions cannot be read compatibly with the Convention.

(d) Alternatively, to the extent that the relevant statutory provisions cannot be read compatibly with the Convention, compatibility with article 14 cannot be achieved through the use of the courts' inherent powers.”

McCombe LJ adjourned the application for permission in respect of (a) and (b) to be determined at an oral hearing with the appeal to follow if permission was granted. He refused permission in respect of (c) and (d).

8. By application dated 25 January 2021, the Appellant applied for permission to reopen McCombe LJ’s refusal of permission in respect of grounds (c) and (d). This application was refused by Stuart-Smith LJ on 12 February 2021.
9. In the light of the above, Mr Warshaw QC argued on behalf of the Respondents that the proposed appeal in respect of grounds (a) and (b) is academic. He submitted that, even if the issue of justification were to be included, the Appellant has been refused permission to appeal the judge’s decision that the legislation cannot be read down to enable the Appellant to make a claim and has been refused permission to appeal the judge’s decision in respect of the inherent jurisdiction. Further, there is no properly constituted application for a declaration of incompatibility. This was not properly made below and the Appellant’s application to this court to give notice of this appeal to the Crown was refused by Stuart-Smith LJ who considered the prospect that this court might make a declaration “vanishingly unlikely”.
10. Despite these powerful submissions, I propose to deal with the application for permission and, if granted, the appeal on their merits because it seems to me necessary to deal with the substance of the Appellant’s case to determine whether the Appellant has any arguable claim.
11. Accordingly, the issues which I address below are those set out in grounds (a) and (b). Additionally, if the Appellant were to succeed in establishing these grounds, it would be necessary to consider the issue of justification.
12. The Appellant is represented by Mr Southey QC who did not appear below. The Respondents are represented by Mr Warshaw QC, Mr Viney (who both appeared below) and Ms MacLeod.

13. This judgment is far longer than necessary to determine this appeal. However, given the history of the proceedings, I have considered it appropriate to set out some matters, in particular the parties' submissions, in far greater detail than I would normally. This is, in part, to make it clear that I have considered all the matters raised on behalf of the parties when reaching my decision.

*The MCA 1973 and Schedule 1 of the CA 1989*

14. Section 23(1) of the MCA 1973 gives the court power to make financial provision orders on, and only on, the grant of a decree of divorce, nullity or judicial separation. It provides:

“(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders ...”

Periodical payments can be ordered for or to a child under sub-paragraph (d):

“(d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified; ...”

Sub-paragraph (e) gives the court power to make a secured periodical payments order in similar terms to (d).

15. Section 24 of the MCA 1973 Act gives the court power to make property adjustment orders in the same terms as section 23(1). Sub-paragraphs (a), (b) and (c) provide for orders to be made for the benefit of a child of the family.
16. Section 27 of the MCA 1973 is headed: “Financial provision orders, etc., in case of neglect by party to marriage to maintain other party or child of the family”. Section 27 provides:

“(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent) –

(a) has failed to provide reasonable maintenance for the applicant, or

(b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.

...

(6A) An application for the variation under section 31 of this Act of a periodical payments order or secured periodical payments order made under this section in favour of a child may,

if the child has attained the age of sixteen, be made by the child himself.

(6B) Where a periodical payments order made in favour of a child under this section ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then if, on an application made to the court for an order under this subsection, it appears to the court that -

(a) the child is, will be or (if an order were made under this subsection) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he also is, will be or would be in gainful employment; or

(b) there are special circumstances which justify the making of an order under this subsection,

the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to exercise its power under section 31 of this Act in relation to any order so revived.”

17. Section 29 of the 1973 Act is headed: “Duration of continuing financial provision orders in favour of children, and age limit on making certain orders in their favour”. It provides:

“(1) Subject to subsection (3) below, no financial provision order and no order for a transfer of property under section 24(1)(a) above shall be made in favour of a child who has attained the age of eighteen.

(2) The term to be specified in a periodical payments or secured periodical payments order in favour of a child may begin with the date of the making of an application for the order in question or any later date ... but -

(a) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age ... unless the court considers that in the circumstances of the case the welfare of the child requires that it should extend to a later date; and

(b) shall not in any event, subject to subsection (3) below, extend beyond the date of the child’s eighteenth birthday.

(3) Subsection (1) above, and paragraph (b) of subsection (2), shall not apply in the case of a child, if it appears to the court that -

- (a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
- (b) there are special circumstances which justify the making of an order without complying with either or both of those provisions.”

18. Section 31 of the MCA 1973 sets out the court’s power to vary “certain orders”. This obviously requires that one of those orders, which are defined in section 31(2), has been made, such as a periodical payments order. In addition, it is established that any application for the variation of an order under section 31 must be made prior to the expiry of the order: see *Jones v Jones* [2000] 2 FLR 307.
19. The only claim made by the Appellant under the MCA 1973 is under section 27. It is accepted that sections 23 and 24 do not apply to him because no decree of divorce, nullity or judicial separation has been granted in respect of his parents’ marriage.
20. It is also accepted that the Appellant has no right to bring a claim under sections 27(6A) or (6B). It is relevant to note that a number of requirements have to be satisfied before an application can be made by a child under either (6A) or (6B). First, a party to a marriage must have made an application. Secondly, a periodical payments order or a secured periodical payments order in favour of the child must have been made. Additionally, in respect of subsection (6A), an application to vary must have been made during the currency of the order: *Jones v Jones*. In respect of subsection (6B), the periodical payments order must have ceased to have effect when the child reached the age of 16 or on a later date but “before or on the date on which he attains the age of eighteen”. Further, in respect of both subsections, an order can only be made to extend beyond the child’s age of 16 if either (a) he/she will be in education or training or (b) there are special circumstances.
21. It can, therefore, be seen that neither section 27(6A) nor section 27(6B) gives a child a general right to make an application for financial provision. They give a child, once he/she has attained the age of 16, an autonomous right *only* to apply to *vary* an existing periodical or secured periodical payments order or to *revive* (and then vary) any periodical payments order which ceased to have effect between the ages of 16 and 18. As the judge said, at [28], a child is “enabled to apply ... only in very specific and very limited circumstances”.
22. In the present case, the Appellant has no right to make an application under either (6A) or (6B) and the court has no power to make an order under either. This is because: (i) no application has been made by either of his parents; (ii) no order for periodical payments has been made in his favour on an application made by either

of his parents; and (iii) in respect of (6A), no application was, or indeed could, be made during the currency of any order.

23. Section 15 of the CA 1989 is headed: “Orders for financial relief with respect to children”. It provides:

“(1) Schedule 1 (which consists primarily of the re-enactment, with consequential amendments and minor modifications, of provisions of section 6 of Family Law Reform Act 1969, the Guardianship of Minors Acts 1971 and 1973, the Children Act 1975 and of sections 15 and 16 of the Family Law Reform Act 1987) makes provision in relation to financial relief for children.”

24. Schedule 1, paragraph 1 provides:

“(1) On an application made by a parent, guardian or special guardian of a child, or by any person who is named in a child arrangements order as a person with whom a child is to live, the court may make one or more of the orders mentioned in subparagraph (2).”

Paragraph 1(2) sets out the orders which can be made. In addition, although the application has to be made by one of the people set out in paragraph 1(1), an order can be made, for example, for periodical payments “to the child”. Paragraph 1(3) provides that the orders can be made “at any time”.

25. Schedule 1, paragraph 2 provides:

“Orders for financial relief for persons over eighteen

(1) If, on an application by a person who has reached the age of eighteen, it appears to the court –

(a) that the applicant is, will be or (if an order were made under this paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) that there are special circumstances which justify the making of an order under this paragraph,

the court may make one or both of the orders mentioned in subparagraph (2).

(2) The orders are –

(a) an order requiring either or both of the applicant’s parents to pay to the applicant such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both of the applicant's parents to pay to the applicant such lump sum as may be so specified.

(3) An application may not be made under this paragraph by any person if, immediately before he reached the age of sixteen, a periodical payments order was in force with respect to him.

(4) No order shall be made under this paragraph at a time when the parents of the applicant are living with each other in the same household.

...

(7) The powers conferred by this paragraph shall be exercisable at any time."

26. Schedule 1, paragraph 3 deals with the duration of orders for financial relief:

"(1) The term to be specified in an order for periodical payments made under paragraph 1(2)(a) or (b) in favour of a child may begin with the date of the making of an application for the order in question or any later date or a date ascertained in accordance with sub-paragraph (5) or (6) but -

(a) shall not in the first instance extend beyond the child's seventeenth birthday unless the court thinks it right in the circumstances of the case to specify a later date; and

(b) shall not in any event extend beyond the child's eighteenth birthday.

(2) Paragraph (b) of sub-paragraph (1) shall not apply in the case of a child if it appears to the court that—

(a) the child is, or will be or (if an order were made without complying with that paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with that paragraph.

(3) An order for periodical payments made under paragraph 1(2)(a) or 2(2)(a) shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

(4) Where an order is made under paragraph 1(2)(a) or (b) requiring periodical payments to be made or secured to the parent of a child, the order shall cease to have effect if -



- (a) any parent making or securing the payments; and
- (b) any parent to whom the payments are made or secured,

live together for a period of more than six months.”

27. It will be noted that paragraph 2(3) of Schedule 1 stipulates that no application may be made by a child over 18 if a periodical payments order in his/her favour was in force “immediately before he reached the age of sixteen”. This is because a child can apply to vary or revive such an order respectively under paragraph 6(4) and paragraph 6(5). In addition, by paragraph 2(4), no order can be made “when the parents of the applicant are living with each other in the same household”. Mr Southey accepts that the latter provision means that the Appellant cannot apply for an order under the CA 1989.

28. I also set out the provisions of the ECHR relied on by the Appellant:

Article 6: Right to a fair trial.

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Article 8: Right to respect for private and family life.

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14: Prohibition of discrimination.

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

A1P1: Protection of property.

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

*Background and Judgment Below*

29. The judgment is reported as *RS v JS and another* [2020] 4 WLR 139 (the judgment itself is *FS v RS and JS* [2020] EWFC 63). References below are to the paragraphs in that judgment.
30. At the date of the hearing below, the Appellant was aged 41. The factual background is summarised by the judge as follows:

“[6] The respondents are and have at all material times been married. They have never divorced and live together in Dubai. The applicant, as I have said, is their son. He has several educational and professional qualifications: he has a first degree in Modern History; he is a qualified solicitor; he has a Masters in Taxation, for which he studied at the Institute of Advanced Legal Studies; and he is now studying for his Chartered Tax Advisory and Law School Admissions Test examinations. As against that, he has various difficulties and mental health disabilities which there is no need for me to elaborate at this stage, though their true extent is not clear; they will become highly material if the matter proceeds. Suffice it to say that his case is that they constitute “special circumstances” as that phrase is used in section 27(6B)(b) of the 1973 Act and paragraph 2(1)(b) of Schedule 1 to the 1989 Act. That is disputed, as a matter of both fact and law, by Mr Warshaw and Mr Viney. The applicant’s case is that he is in any event “vulnerable” as that word is used in the authorities relating to the inherent jurisdiction. That also is in dispute, but for the purpose of deciding the preliminary issue I am prepared to assume, though I emphasise without deciding, that he is indeed vulnerable in that sense. He has been unemployed since 2011.

“[7] His parents have supported him financially down the years and continue, to some extent, to do so. They have permitted him to live in a flat in central London, of which they are the registered proprietors, and in relation to which they have until recently been paying the utility bills. Of late, and for reasons which again there is no need to explore at this stage, the relationship between the applicant and his parents, in particular, it would appear, his father, has deteriorated and the financial support they are prepared to offer has significantly reduced.”

31. The judge did not address the merits of the Appellant’s claims because his decision addressed, and determined, only whether the court had jurisdiction to make the orders sought by the Appellant. The judge decided, as set out in his order of 30 September 2020, that the court did not have jurisdiction to make any of the financial orders sought by the Appellant.
32. The Appellant’s case below in respect of the claims under section 27 of the MCA 1973 and under Schedule 1 of the CA 1989 was, as referred to above, first that, at [24], that these provisions applied to the Appellant either “by a traditional approach

to statutory construction and, if that is wrong, by a process of ‘reading down’ in accordance with section 3 of the Human Rights Act 1998” (“the HRA 1998”). The judge rejected these arguments.

33. The judge, first, analysed the history of the legislation. In respect of section 27 of the MCA 1973, he started, at [27], with the Law Commission’s 1969 Report (Law Com. No 25) *Family Law: Report on Financial Provision in Matrimonial Proceedings* (“the 1969 Report”), in which he said, “the origins of Part II of the (MCA 1973), including section 27, are to be found”. He noted that the 1969 Report expressly addressed the issue of when a child should be entitled to apply for a financial order, an issue that arose because of the forthcoming reduction in the age of majority to 18. This meant, as set out in the 1969 Report (para 42), that there would “be many cases where orders will be obtainable in respect of children over 18 but still being educated”. The 1969 Report recommended that a child over the age of 18 should be entitled, with leave, to intervene in their parents’ matrimonial proceedings and apply for an order. The judge quoted, at [27], from the 1969 Report (para 42), which made clear that the Law Commission recommended against giving children a right to apply other than “in a suit between the parents”:

*“We should make it clear that we do not recommend that such a child should be entitled to apply except in a suit between the parents. In other words, all he should be entitled to do is to intervene with leave in his parent’s suit for divorce, nullity or judicial separation in order to apply for financial provision. We do not think that it would be desirable to give a child (particularly an adult child) a power to take his parents to court to obtain finance because, for example, he wants to embark on a scheme of training which they are not prepared to support (emphasis added).”*

34. As the judge explained, at [28]:

*“Thus clause 6 of the draft Bill (Report, page 72), which became section 6 of the 1970 Act and, in due course, section 27 of the 1973 Act as originally enacted – that is, before the insertion of subsections 6A and 6B – permitted applications to be made only by a party to the marriage. In other words, Parliament expressly limited the right of application under what is now section 27 to the parties to the marriage. Only with the insertion of subsection 6A by the Domestic Proceedings and Magistrates’ Courts Act 1978, followed by the insertion of subsection 6B by the Family Law Reform Act 1987, was a child enabled to apply, and even then only in very specific and very limited circumstances.”*

The fact that subsection (6B) was inserted by the Family Law Reform Act 1987 (“the FLRA 1987”) is relevant because, as explained below (para 36), the preceding Law Commission Report made clear that the power to make orders on the application of an adult child “should only be available ... if the parents’ relationship has broken down”.

35. In respect of Schedule 1 of the 1989 Act, the judge started with the Law Commission's 1982 Report (Law Com. No 118) *Family Law – Illegitimacy* ("the 1982 Report") which led to the enactment of the FLRA 1987 which, as the judge said at [29], was "re-enacted in this respect as Schedule 1". As the 1982 Report stated (para 6.30), the legislation sought to implement "the basic policy of assimilating the legal position of marital and non-marital children". The judge quoted, at [30], the 1982 Report's recommendation at para 6.6:

"It seems to us ... that if unmarried parents separate it is only right that the court should be able to make any appropriate order in favour of a child of theirs, just as it could make an order if the child's parents were in the process of divorce or judicial separation".

The 1982 Report expressly addressed (paras 6.29-6.34), the issue of the court's power to make financial provision orders in favour of an adult child. The judge quoted extensively from para 6.30, which concluded by stating:

"The children of divorced or divorcing parents already in effect have rights to apply for financial orders ... and we can see no sufficient reason why this right should not be shared by other children whose parents' relationship has broken down".

36. The judge also quoted extensively from para 6.31 of the 1982 Report, which further addressed the question of when an adult child should have the right to apply for financial orders. I set out para 6.31 in full (emphasis added, save for *married* and *unmarried*):

*"We have said that the powers to make orders on the application of an adult child should only be available if the parents' relationship has broken down. This seems to be the policy of the present law; and we do not think it would be right, in the context of reforms primarily concerned to remove the legal disadvantages of illegitimacy, to seek to introduce a fundamental change. What method is to be adopted to achieve this result? One technique would be to make the right to apply contingent on there having already been other proceedings affecting the child or his parents; but we do not think this would be satisfactory. This is because the breakdown of the relationship between married parents will very often be evidenced by court proceedings; the breakdown of the relationship between unmarried parents is less likely to be so evidenced, because no formal legal proceedings are necessary to terminate the relationship or to enable the mother to obtain custody of any children. It seems to us that the best evidence of the breakdown of both married and unmarried relationships is provided by the parties separating; and we accordingly recommend that an adult child should only have a right to apply to the court for financial relief if at the time of the application his parents are not living with each other. Moreover, the court should not be empowered*

*to make orders at a time when the parents of the applicant are living with each other” (emphasis added).*

It is plain from these extracts that the legislation was expressly dealing with the power to make orders when “the parents’ relationship has broken down”. As a result, as the judge noted, at [35], the resulting legislation expressly provided that no order could be made when “the parents of the applicant are living with each other in the same household”, the wording which now appears in paragraph 2(4) of Schedule 1.

37. The judge also noted, at [34]:

“This crucial limitation was well understood by those promoting the Parliamentary passage of the Bill. Thus, the Lord Chancellor, on Second Reading in the Lords on 27 November 1986 (Hansard, Vol 482, Col 651), said that:

“provision is made for applications by children over the age of 18 whose parents are separated and who are undergoing further education or training, or who have special needs, such as would arise from some form of physical handicap.”

The Solicitor General, on Second Reading in the Commons on 7 April 1987 (Hansard, Vol 114, Col 257) used identical language.”

38. This analysis led the judge to conclude, at [40], in respect of section 27 of the MCA 1973:

“[40] So far as concerns section 27, there is in my judgment no legitimate process of construction by which, adopting an appropriately purposive approach though leaving aside “reading down”, it can be read as Mr Amos would have me agree. The statutory language is clear and means what it says. And if, which there is not, there was any ambiguity or other room for doubt, that would inexorably be determined against him by the Law Commission’s report. The simple fact, as Mr Warshaw and Mr Viney say, is that a child may apply for relief under section 27 only where there has already been an order in the child’s favour applied for by one of the parties to the marriage. More generally, as they correctly put it, there is no freestanding jurisdiction under the 1973 Act for a child to bring a claim for maintenance against a party to a subsisting marriage.”

39. In respect of Schedule 1, the submission made on behalf of the Appellant by his then counsel was that paragraph 2(4) should be construed as if the words “as the applicant” appeared after “in the same household”. The judge dealt with this submission and set out his conclusions in respect of paragraph 2(4):

“[45] In relation to paragraph 2(4), the matter, in my judgment, is equally clear. The statutory phrase “living with each other in the same household” means what it says, nothing less

and nothing more. One can test it this way. Who is, or are, the persons embraced in the words “each other” in the statutory language “living with each other”? The answer is supplied by the immediately preceding words “the parents of the applicant.” So, by adding in a reference, as Mr Amos would have it, to someone else - “the applicant” - one is not construing the statutory language; one is adding words so as to change its meaning.

[46] As Mr Warshaw and Mr Viney put it, the wording of paragraph 2(4) is explicit. There is no ambiguity. It is accepted by everyone that the respondents live in the same household. So, they say, the court has no power to make any award in the applicant’s favour. That is the end of the matter. I agree.

[47] So, with paragraph 2(4) as with section 27, the statutory language is clear and means what it says. And if, which there is not, there was any ambiguity or other room for doubt, that would again, as with section 27, inexorably be determined against the applicant by the Law Commission’s report.”

40. The judge, starting at [48], next addressed the submission that section 27 and paragraph 2(4) were inconsistent with the Appellant’s rights under Article 2, Article 6, Article 8 and A1P1 “on their own and, in any event ... read together with Article 14” and that they should be read down under section 3 of the HRA 1998.
41. The judge, at [50], proposed “to assume in the (Appellant’s) favour that without the reading down for which he contends there will be a breach of his rights on one or other of the grounds relied on”.
42. The reading down advanced on behalf of the Appellant was as follows:

“[24] Mr Amos ... (invites) me:

(i) To construe section 27(1) as if the words ‘or, in the case of subsection (b) below, a child of the family who has attained the age of 16’ appeared after “party to a marriage’ and before ‘may apply’.

(ii) To construe paragraph 2(4) as if the words ‘as the applicant’ appeared after ‘in the same household’.

He argues that the outcomes for which he contends can properly be arrived at both by a traditional approach to statutory construction and, if that is wrong, by a process of ‘reading down’ in accordance with section 3 of the Human Rights Act 1998.”

The judge decided, at [60], that this “would be fundamentally wrong and inconsistent with principle”. Applying the approach set out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557:

“... (it would) fly in the face of a ‘fundamental feature’, a ‘cardinal’ or ‘essential’ principle of the legislation. Putting the

same point the other way round, it would not be ‘compatible with the underlying thrust of the legislation’, nor would it ‘go with the grain of the legislation’ On the contrary, it would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation. Mr Amos submits that ‘grain’ of Schedule 1, as it now is, is the illegitimacy point, and nothing else. For reasons which will be apparent I do not agree.”

43. The key features of the legislation were set out by the judge, at [58]:

“[58] In each case it is clear that there was a very precise Parliamentary purpose or objective: in the case of section 27 that a child (particularly an adult child) should not be able to take his parents to court to obtain finance, and that accordingly applications could be made only by a party to the marriage; in the case of paragraph 2(4), that the legislation was to remove discrimination against the illegitimate but no more - any more fundamental change was explicitly disavowed and the policy explicitly adopted in consequence restricted provision to adults whose parents had separated or, as the legislation expressed the concept, were not ‘living with each other’.”

44. Accordingly, even if the legislation was incompatible with the Appellant’s rights under the ECHR, it could not be read down consistently with section 3 of the HRA 1998.

45. Although not necessary for his decision, the judge nevertheless went on to consider whether the Appellant’s rights under articles 2, 6 and 8 and A1P1 were engaged for the purposes of article 14. Article 2 is no longer relied on.

46. In respect of article 6, the judge decided that it was not engaged at all because, at [69], “nothing within the Convention requires contracting states to legislate for specific categories of claim, for example, as here, the maintenance of adult children”. The judge referred to *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 in which a mother had challenged the provisions of section 8 of the Child Support Act 1991 which excluded the jurisdiction of the court to make, vary or revive any child maintenance order. Her judicial review claim was dismissed by the House of Lords and her subsequent application to the ECtHR was also dismissed. The judge quoted from Lord Bingham’s speech, at [43], when he summarised why the mother’s claim failed:

“I would hold that Mrs Kehoe's argument that the system which prevents her from playing any part in the enforcement process is incompatible with article 6(1) fails at the first stage. This is because she has no substantive right to do this in domestic law which is capable in Convention law of engaging the guarantees that are afforded with regard to ‘civil rights and obligations’ by that article.”

And from the judgment of the ECtHR, *Kehoe v United Kingdom (Application No 2010/06)* [2008] 2 FLR 1014, at [47]:

“the court would note that the issue before it is whether the applicant has access to court to obtain payment of child support owing to her, not whether she has any enforceable 'civil right' to obtain damages from the authorities for their shortcomings in that respect, in which connection it would recall that Art 6 does not impose any requirements as to the content of domestic law.”

47. The judge likewise decided that the Appellant could not bring himself within article 8. In essence he rejected the argument advanced on behalf of the Appellant, at [71], that, because of the Appellant’s occupation of the flat owned by his parents, article 8 was “engaged on the basis that the 1973 Act and the 1989 Act both provide positive financial relief measures to assist one’s children and family”; and accepted the argument advanced on behalf of the Respondents, at [72], that the facts of this case do not “constitute an engagement of article 8 let alone a breach”. Article 8 did not give a right to require someone to have a relationship that they did not want.

48. The Appellant’s argument in respect of A1P1 was based, significantly, on *JM v United Kingdom (Application no. 37060/06)* [2011] 1 FLR 491. The judge decided that the Appellant could not rely on A1P1, as follows:

“[78] Article 1 of Protocol No 1 protects a person’s possessions. The applicant in *JM v United Kingdom* was the payer of maintenance. In that case, article 1 of Protocol No 1 was engaged because the state (or ex-partner, it makes no difference for this analysis) was, through the CSA, depriving her of her “possessions”. In the present case, the actions he seeks to bring do not deprive the applicant of his “possessions”. He has no article 1 Protocol 1 right to child maintenance. He is the payee, not the payer. The respondents, in contrast, may be able to pay in aid article 1 of Protocol 1, for any order that they pay child maintenance to the applicant is, as in *JM v United Kingdom*, an interference with their peaceful enjoyment of those possessions. But this is nothing to the point, for the fact that the respondents’ article 1 rights might be engaged is simply not relevant to the applicant’s case. He cannot rely upon article 1 of Protocol No 1 in support of his application.”

49. The judge, therefore, concluded, at [79], “that none of Articles 2, 6, 8 and Protocol 1, Article 1 is engaged and the applicant’s various claims do not fall within the ambit of any of them”. He, nonetheless, went on to deal with article 14.

50. The case under article 14, as advanced below, was summarised by the judge as follows:

“[86] So, in sum, it is, says Mr Amos, discriminatory under article 14 to allow adult (disabled) children of divorced parents (the 1973 Act) and of separated parents (the 1989 Act) access to relief, but not the children of married and/or together parents, especially when the adult (disabled) child is, as here, living separately from the parents and in an identical position to the applicant child of divorced and/or separated parents.”



The judge rejected the Appellant's case. In his view, the Appellant did not have a status within the scope of article 14. The judge explained his conclusion, at [89]:

“The asserted status here is being the child of parents who are either divorced (or not) and/or separated (or not). That is not a status included within the enumerated list, nor, in my judgment, is it an “other status” within the meaning of article 14. It is, to repeat, a matter of status as between the parents which has no impact in law on the status of the child. Mr Amos has been unable to point me to any authority to the contrary; his failure is unsurprising. I am not aware of any authority suggesting that whether an applicant's parents are cohabiting or not (or divorced or not) impacts upon the “status” of the applicant.”

51. He, further, accepted the submission made on behalf of the Respondents, at [95], that:

“there can be no discrimination because none of the categories of article 14 is relevant: the cohabitation of the applicant's parents (Schedule 1) or the requirement to be a party to the marriage (for an application under section 27) have nothing to do with his status. They add that the status in question is not the existence of “special circumstances” nor need for “higher education” or disability.”

52. The judge did not consider it necessary to address the issue of justification beyond recording, at [91]-[92], the arguments advanced on behalf of the Respondents.

53. The judge next addressed the Appellant's claim under the inherent jurisdiction which was advanced, at [3], “pursuant to that branch of the recently rediscovered inherent jurisdiction which applies in relation to adults who, though not lacking capacity, are ‘vulnerable’”. His case, as summarised by the judge, at [110], was:

“[110] In relation to the inherent jurisdiction, his “central proposition” is that the inherent jurisdiction, provided it exists and has not been superseded by statute, is unlimited. The applicant is a vulnerable adult who, without the court's protective help, will be immediately at risk of harm. In these circumstances, he says, the applicant throws himself on the court's protective function. He urges the court to say that the applicant is deserving of succour and that the court has power to order it, not least given that the court traditionally exercises a “paternal” or “parental” jurisdiction - doing what it concludes that a good parent should and would do - especially where, as here, what is sought is to restore the status quo ante which itself reflects a recognition by his parents of his very real needs.”

54. The judge rejected this argument for three reasons. First, at [113], because the asserted claim “lies far outside the accepted parameters of the branch of the inherent jurisdiction prayed in aid by the applicant”. The basis of the jurisdiction was, at [114], “to protect and facilitate” a vulnerable adult's exercise of autonomy.

55. Secondly, at [123]: “The second reason why the inherent jurisdiction is not available to assist the applicant is because of the fundamental principle that the inherent jurisdiction cannot be used to compel an unwilling third party to provide money or services”. In support of this reason, the judge cited from a number of authorities including *N v A Commissioning Group and other* [2017] AC 549, a case concerning an application under the Mental Capacity Act 2005, in which Baroness Hale said, at [35]:

“the court only has power to take a decision that P himself could have taken. It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the ‘available options’. In this respect, the Court of Protection’s powers do resemble the family court’s powers in relation to children. The family court ... cannot oblige an unwilling parent to have the child to live with him or even to have contact with him, any more than it can oblige an unwilling health service to provide a particular treatment for the child.”

56. Thirdly, at [132]:

“The third reason why the inherent jurisdiction is not available to assist the applicant is because of the fundamental principle which I summarised in *In re X (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam); [2017] Fam 80, where I referred at para 37 to:

“the well known and long-established principle that the exercise of the prerogative - and the inherent jurisdiction is an exercise of the prerogative, albeit the prerogative vested in the judges rather in ministers - is pro tanto ousted by any relevant statutory scheme.”

The judge set out, at [137], his assessment of the legislation:

“Between them, the 1973 Act and the 1989 Act provide a comprehensive statutory scheme dealing, along with much else, with the circumstances in which a child, including, as here, an adult child, can make a financial claim against a living parent (I put the point this way to make clear that I have not overlooked section 1(1)(c) of the Inheritance (Provision for Family and Dependents) Act 1975). More specifically, the legislation, in its general reach, applies to the applicant, as to every adult child, and is comprehensive in relation to cases falling within its ambit. Furthermore, as Mr Warshaw and Mr Viney point out, the legislation deals explicitly with the very claims the applicant seeks to make; indeed, in the case of the 1989 Act it explicitly prohibits the claim he seeks to pursue. There is accordingly, in my judgment, no scope for recourse to the inherent jurisdiction.”

57. The judge’s conclusion, at [139], was that the Appellant’s claims must be summarily dismissed: “The court has no jurisdiction to give him the relief he seeks under the 1973 Act or the 1989 Act and the inherent jurisdiction cannot be exercised as he would wish”.

*Appeal Submissions*

58. Mr Southey’s submissions focused on the issues of ambit, status and justification in support of his case that section 27 of the MCA 1973 and paragraph 2 of Schedule 1 of the CA 1989 are discriminatory.
59. Mr Southey referred to three routes by which an adult child can apply for periodical payments from a parent. Under section 23 of the MCA 1973, provided section 29(3) applies; under sections 27(6A) or (6B) of the MCA 1973; and under Schedule 1 of the 1989 Act. He accepted, as referred to above, that the Appellant does not come within any of these provisions. This is, in summary, respectively because: (i) his parents are not divorced; (ii) no order has been made under section 27; and (iii) his parents are not separated.
60. Mr Southey submitted that the legislation is focused on needs and is based on the recognition that there will be adult children whose circumstances are such that their needs should be met by their parents. In addition, although it is expressed in terms of giving the court a power, it is not an unlimited discretion. He pointed to the observation in *The Family Court Practice 2020*, at 2.233[1], that an adult whose parents are living together and “are refusing to support him or her through university is in a markedly worse situation than an adult whose parents have separated”.
61. Mr Southey addressed the nature of the power to make financial orders for the benefit of an adult child in “special circumstances”, as provided for in section 27(6B) and section 29(3)(b) of the MCA 1973 and under Schedule 1 of the Children Act 1989. Such circumstances have been recognised as including disability as demonstrated by the Court of Appeal decision of *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1. He submitted that it is, therefore, arguable that “the Appellant’s vulnerability means that he would be entitled to financial support if his parents were separated”.
62. As to the issue of ambit, Mr Southey relied on a number of authorities, including *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association and others intervening)* [2021] 1 WLR 1141 (“JCWI”), in support of the submission that ambit must be widely construed. He relied on passages from the judgment of Hickinbottom LJ, between [81] and [87], which deal with what is required for article 14 to be engaged, including, at [82], when “the facts of the case fall ‘within the ambit’ of one or more of the substantive rights set out in the ECHR”; and, at [87], that if the “state takes positive action which, while not required by art 8 ..., demonstrates its respect for private and family life etc., this will fall within the ambit of art 8”. Hickinbottom LJ gave the example of parental leave allowance: *Petrovic v Austria* (20458/92) (1998) 33 EHRR 307. Mr Southey also relied on Lord Brown’s comments in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, at [66], and submitted that what is required is that the subject matter must be sufficiently close to a substantive right protected by the ECHR that discrimination would be prohibited.

63. Mr Southey submitted that the Appellant's claims for financial support from his parents come within the ambit of articles 6 and 8 and A1P1 and that the judge was wrong to conclude otherwise. His overarching submission is that claims for financial support by children must come within the scope of article 14 because "it is inconceivable that discrimination regarding financial relief for children on the basis of gender or race would not engage article 14".
64. As to article 6, Mr Southey accepted that it does not create or establish a right for a child to seek financial support from their parents. However, he submitted that where there is a right to bring such proceedings, that right comes within the ambit of this article. This was because, he explained, once the State provides an entitlement to bring such proceedings, the issue becomes the right of access to a court and the entitlement to bring a claim must not be discriminatory.
65. This submission was said to be supported by the decision of *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405. That case concerned the right to a state invalidity pension. The Swiss Government argued, at [45], that article 6 did not apply because of the "public law features which clearly predominated". The court rejected that argument and applied "the general rule ... that Article 6(1) does apply in the field of social insurance". There were a number of features that supported this conclusion including because, at [46], the applicant "was claiming an individual economic right flowing from specific rules laid down in a federal statute". Mr Southey also relied on the court's conclusion that article 14, taken together with article 6(1), was breached because, at [67], of the national court's evidential assumption which formed the "sole basis" for the Swiss court's decision. This had been the discriminatory "assumption that women gave up work when they gave birth to a child"; this was "a difference of treatment based on the ground of sex only".
66. As to article 8, Mr Southey submitted that article 8 can incorporate financial responsibilities that family members owe to each other. He acknowledged that there is no case dealing with intra-family financial obligations in the context of article 8. He relied on *Aldeguer Tomás v Spain* 35214/09 (2017) EHRR 898 (entitlement of the surviving partner of a same sex couple to a surviving spouse's pension) and *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 (claim for bereavement damages by a surviving cohabitee) as demonstrating that, as set out in the former, if a State provides rights to family members, in that case "a survivor's pension", at [76], it "cannot, in the application of that right, take discriminatory measures within the meaning of Article 14". In providing a right for some adult children to apply, Mr Southey submitted that the State could not limit the scope of that right in a manner which was discriminatory.
67. Mr Southey also referred to what Lady Hale said in the Supreme Court decision of *In re McLaughlin* [2018] 1 WLR 4250 (entitlement of cohabiting mother, following partner's death, to a widowed parent's allowance), at [18], [19] and [22]. Lady Hale concluded, at [22], that:

"Widowed parent's allowance is a positive measure which, though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8. It has a more than tenuous connection with the core values protected by article 8; securing the life of children within their families is among the principal

values contained in respect for family life. There is no need for any adverse impact other than the denial of the benefit in question.”

Accordingly, Mr Southey submitted, this recognises that financial support for family members can come within article 8.

68. In respect of A1P1, Mr Southey relied on *Fabris v France* (16574/08) (2013) 57 EHRR 19, in which the applicant challenged the application of the French law of inheritance on the basis that it discriminated against him because, in the terminology of the case, at [52], he was “born of adultery”. The Grand Chamber determined that the case fell within article 14 in conjunction with A1P1:

“[52] In the present case the Court observes that it is purely on account of his status as a child “born of adultery” that the applicant was refused the right to request an abatement of the inter-vivos division signed by his mother, that status being the basis of the Court of Cassation’s decision—interpreting the transitional provisions of the 2001 Law - to exclude application in his case of the provisions relating to the new inheritance rights recognised by that Law. In cases, such as the present, concerning a complaint under art.14 in conjunction with art.1 of Protocol No.1 that the applicant has been denied all or part of a particular asset on a discriminatory ground covered by art.14, the relevant test is whether, but for the discriminatory ground about which the applicant complains, he or she would have had a right, enforceable under domestic law, in respect of the asset in question. That test is satisfied in the present case.”

69. Mr Southey also relied on *JM v UK*, a case in which a mother had challenged the child support legislation on the basis that the calculation of the maintenance she was required to pay did not make full allowance for her housing costs, as it would have done if she had been cohabiting with a man rather than a woman. Mr Southey specifically drew our attention to [46] and [47] (which I quote in full), and submitted that the present case is, similarly, about the “economic responsibilities of parents”:

“[46] In the domestic proceedings, the applicability of Art 14 was considered principally in relation to Art 8. In the House of Lords, the view of the majority was that the facts of this case did not come within the ambit of Art 1 of Protocol 1, which was primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal obligation of the absent parent and that it was artificial to view child support payments as a deprivation of the absent parent's possessions (see paras [13], [16] and [17] above). In the view of the court, such a reading of this provision, in the context of a complaint of discrimination, is too narrow. As is apparent from the case-law of the court, in particular in the context of entitlement to social security benefits, a claim may fall within the ambit of Art 1 of Protocol 1 so as to attract the protection of Art 14 of the European Convention even in the absence of any deprivation of,

or other interference with, the existing possessions of the applicant (see, for example, *Stec and Others v United Kingdom* (Application Nos 65731/01 and 65900/01) [2006] All ER (D) 215 (Apr), para 39; *Carson and Others v United Kingdom* (Application No 42184/05) (unreported) 16 March 2010, para 63).

[47] As the applicant noted in her submissions to the court, child maintenance payments were at issue in the Commission's decision in the Burrows case (see para [37] above). The applicant in that case complained, inter alia, under Art 1 of Protocol 1 taken alone and in conjunction with Art 14. Regarding the former, the Commission observed that the second sentence of that provision was:

'primarily concerned with formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the state lays hands – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest.'

It, therefore, doubted that there had been a deprivation of property. However, in light of the State's active role in the process, and the fact that Mr Burrows' former wife was required to seek child support from him or lose her entitlement to social security benefits, it assumed that there had been an interference with the applicant's right to peaceful enjoyment of his possessions. In that regard, the Commission observed that the legislation in question was a practical expression of a policy relating to the economic responsibilities of parents who did not have custody of their children and compelled an absent parent to pay money to the parent with such custody. It was an example of legislation governing private law relations between individuals, which determined the effects of these relations with respect to property and in some cases, compelled a person to surrender a possession to another. The Commission went on to declare inadmissible the complaint of a violation of Art 1 of Protocol 1 read on its own, on the grounds that the interference with the applicant's possessions was not disproportionate to the legitimate aim served.

As to the applicant's complaint of discrimination on the ground of his status as a separated parent, the Commission examined the complaint, accepting that it fell within the ambit of Art 1 of Protocol 1, but ultimately rejected it as disclosing no discriminatory treatment. The Court sees no reason to adopt a different approach to the applicability of Art 14 in the present case."

70. On the issue of status, Mr Southey acknowledged that there is no case directly on point and that there are factual distinctions between the cases relied on by the

Appellant and his situation. He sought to define the Appellant's status as being, in relation to the CA 1989, "an adult child whose parents continue to live together" and, in relation to the MCA 1973, "an adult child whose parents have not divorced".

71. Mr Southey pointed in particular to *R (Stott) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687 ("Stott") and *R (C and others) v Secretary of State for Work and Pensions and others (Equality and Human Rights Commission intervening)* [2019] 1 WLR 5687 ("R (C)") in support of his submission that a wide, generous approach is taken to the term "other status". The relevant characteristic need not be innate and can be defined by law.
72. He also submitted that, because a child's legal status based on the marital status of their parents comes within the scope of article 14 (for example, "birth outside wedlock is a 'status' for the purposes of article 14", *R (Johnson) v Secretary of State for the Home Department* [2017] AC 365 (citizenship), Lady Hale at [29]), it is "difficult to see why" discrimination based on the fact that a child's parents are cohabiting should not.
73. He further extended this submission to indirect discrimination, relying on the Grand Chamber's observation in *DH v Czech Republic* (2008) 47 EHRR 3, at [175], that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group". He submitted that the provisions challenged by the Appellant amount to indirect discrimination on the grounds of health status and disability, both of which come within the scope of "other status" for the purposes of article 14. Limiting access to financial support from parents so that some disabled children are excluded is, he submitted, likely to have "disproportionately prejudicial effects" on that group.
74. On the issue of justification, Mr Southey relied on *R (DA) v Secretary of State for Work and Pensions* [2020] 1 All ER 573 (welfare benefits cap) and submitted that there is no adequate justification for enabling some adult children to obtain financial provision from their parents but not others. In respect of this submission, he again relied on *In re McLaughlin* and *R (Johnson) v Secretary of State for the Home Department* and submitted that particularly powerful justification is required. He submitted that the current legislation is "an accident of history" rather than the result of considered policy decisions. Further, the focus should be on the needs of adult children, rather than on their parents' circumstances, and, Mr Southey submitted, there was no explanation why those adult children whose parents' relationship had broken down were more likely to need financial support. Rather, "matters such as disability are likely to be equally important and mean that a child has important needs whether or not his parents live together".
75. In further submissions addressing the recent Supreme Court decision of *R (SC and others) v Secretary of State for Work and Pensions and others (Equality and Human Rights Commission intervening)* [2021] 3 WLR 428 ("R (SC)"), Mr Southey relied on the Supreme Court's endorsement of Leggatt LJ's (as he then was) observations about status in the Court of Appeal decision in that case, *R (C)* at [67]. He submitted that these observations, which I set out below, support the Appellant's arguments that the following are statuses within article 14: (a) an adult child whose parents continue to live together; (b) an adult child whose parents have not divorced; (c)

health and disability. Mr Southey also relied on Lord Reed's comments on the issue of justification including, at [158], that "the intensity of the court's scrutiny can be influenced by a wide range of factors" and that "very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified".

76. In response, Mr Warshaw made the general submission that the Appellant's case "would overturn over a century of carefully calculated statutory provisions" and would fundamentally alter the law affecting the parent/child relationship. By parity of reasoning, he submitted that the Appellant's submissions would apply equally to *minor* children of unseparated parents.
77. There are, he submitted, two key principles underlying the statutory structure in England and Wales, namely: (i) that there is a strict separate property regime and testamentary freedom with – unlike many other countries – no system of forced heirship; and (ii) that the State very rarely interferes horizontally in family life, as between parents and as between parents and their child or children. This, he submitted, accords due and appropriate respect for family life and the article 8 and, from the perspective of this case, the A1P1 rights of parents.
78. This does not mean that adult children are left without support. Mr Warshaw pointed to the provision of funding (now by way of loans) which has long existed in respect of further education and to the provision by the State of welfare benefits for adults with disabilities.
79. Mr Warshaw relied on the comments made in the Law Commission Reports, as set out in the judgment below, and the structure of the legislation. He dealt with the development of the legislation during the 20<sup>th</sup> century, in particular the reforms effected so as to eliminate any differences in the treatment of children based on whether their parents were or were not married, including notably the amendments implemented by the FLRA 1987. He pointed to the fact that the FLRA 1987 expressly precluded the court from making an order when the parents of the applicant were living with each other in the same household, a provision now contained in paragraph 2(4) of Schedule 1 of the CA 1989.
80. Mr Warshaw acknowledged that, for the purposes of article 14, the issues of ambit and status each have a low bar but, he submitted, that low bar is not surmounted in this case.
81. On the issue of ambit, Mr Warshaw referred us to *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, at [4], and *R (C)*, at [44], in support of his submission that, although this is wider than the test for the direct engagement of a substantive right, it is not unlimited. Mr Warshaw submitted that the proper formulation of the facts in the present case is the capacity to bring a claim for a discretionary remedy under legislation designed to address the consequences of a child's parents either not living together or having divorced. They are limited claims and are not about meeting a child's needs more generally.
82. As to article 6, Mr Warshaw submitted that the Appellant's claims do not fall within the ambit of article 6 for two principal reasons. First, "what is engaged is not a *right* but the possibility of a *discretionary grant*". He relied on what Lord Carnwath said,



at [20], in *Poshteh v Kensington and Chelsea Royal London Borough Council (Secretary of State for Communities and Local Government intervening)* [2017] AC 624, a case which concerned the provision of accommodation to a refugee under the Housing Act 1996. Lord Carnwath distinguished between benefits “whose substance was defined precisely” and those “dependent upon the exercise of judgment by the relevant authority”. The former could “amount to an individual right of which the applicant could consider herself the holder” while the latter did not amount to a “civil right”.

83. Secondly, he submitted that article 6 does not guarantee any particular content but only the right to a court. He relied on *R (Kehoe) v Secretary of State for Work and Pensions* and *Kehoe v United Kingdom* in which the ECtHR reiterated, at [44], that article 6 does not “guarantee any particular content for (civil) ‘rights and obligations’ in the substantive law of the Contracting States”. Again, Mr Warshaw acknowledged that, for the purposes of article 14, the test is broader but, he submitted, the Appellant’s case is too broad as it would mean that any potential claim of substance could then arguably fall within the “penumbra” of article 6.
84. In respect of article 8, Mr Warshaw submitted that a claim for financial support from a parent does not fall within the ambit of this article. The Appellant’s asserted claims do not seek to recognise or support family life. Nor, adopting what Lady Hale said in *In re McLaughlin*, at [19], are they “one of the ways in which the state evinces respect for children and the life of the family of which they are part”. Rather, the Appellant seeks to obtain money from his parents and create a responsibility which does not exist. This is not an aspect of family life nor, Mr Warshaw submitted, within the ambit of respect for family life.
85. Mr Warshaw submitted that A1P1 might superficially appear to be the “natural home” for the Appellant’s claims. However, he again submitted that the Appellant does not have any possession or any right to any possession; what he is seeking is a right to bring a claim for a discretionary remedy, which does not fall within the ambit of A1P1. He relied again on *Posteh Kensington and Chelsea* as distinguishing between, what Mr Warshaw described as, “clear rights” and rights dependent on the exercise of a discretion.
86. On the issue of status, Mr Warshaw accepted that a broad meaning has been given to the words “other status” but submitted that, as noted by Leggatt LJ in *R (C)*, at [61], “some limitation on the forms of discrimination prohibited by article 14 is intended”. He referred to *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1207/1976) (1976) 1 EHRR 711, at [56], and *Clift v United Kingdom* (7205/07), 13 July 2010, at [58], to the effect that status involves a personal characteristic, by which persons or groups are distinguishable from each other, but it need not be innate or inherent. He submitted that being an adult child of parents who are not separated or have not divorced is not a personal or identifiable characteristic of the child’s which comes within the scope of “other status”. Whether a child’s parents are or are not living together is, he submitted, not part of the child’s status; it does not define or affect the child’s status.
87. Mr Warshaw acknowledged that the cases showed that, in certain circumstances, differential treatment in law may establish an “other status” but, in his submission, Mr Southey’s argument was over-simplistic. He relied on Leggatt LJ’s observations

in *R (C)*, at [67], based on Lady Hale, Lord Mance and Lady Black’s “valuable discussion” in *Stott*:

“It follows that the status cannot be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic or classification which is not merely a description of the difference in treatment itself (see paras 209-212) (from Lady Hale’s judgment). On the other hand, there seems no reason to impose a requirement that the status should exist independently in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. As Lord Mance put it, at para 231: “There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status.””

88. Mr Warshaw also relied on Rose LJ’s (as she then was) comments in *R (TP) v Secretary of State for Work and Pensions (Equality and Human Rights Commission Intervening)* [2020] EWCA Civ 37, [2020] PTSR 1785, at [209]:

“when determining whether a distinction which only has relevance because it is adopted as the criterion for conferring a benefit or imposing a burden thereby creates an “other status”, one must take into account all the circumstances, including whether, if it does not confer such status, it will run counter to the very purpose of the protection that the Convention article is intended to confer.”

Based on this analysis, Mr Warshaw submitted that it would not run counter to the purpose of article 14 to determine that the Appellant’s situation is not within the scope of “other status”.

89. Mr Warshaw also submitted that the Appellant is not in an analogous situation to an adult child who is able to make a claim either under the MCA 1973 or the CA 1989. The purpose of the legislation is directed to the needs of children in the context of “parental breakdown” not to the needs of children more generally.
90. Finally, Mr Warshaw submitted that the difference in treatment, arising from the grounds on which the court has power to make orders in favour of adult children under the MCA 1973 or the CA 1989, is justifiable. The extent of the powers was not “an accident of history” or of “piecemeal consideration”, as submitted by Mr Southey, but had the clear purpose of prohibiting claims by an adult child (or a minor child) litigating against parents who were not divorced or separated. In response to this submission and Mr Southey’s further submission that society has “moved on” from where it was 40 years ago, Mr Warshaw relied on the development of the legislation as set out in the judgment below.
91. He pointed to what was said in the Law Commission Reports in 1969 and 1982 and to what was said in Parliament during the passage of the Family Law Reform Act 1987. As set out in the judgment below, at [34], both the Lord Chancellor and the

Solicitor General expressly stated that provision was being made “for applications by children over the age of 18 whose parents are separated”. Mr Warshaw also referred to the fact that the Civil Partnership Act 2004 had replicated the financial remedy provisions of the MCA 1973 showing Parliament’s recent endorsement of the structure of those provisions.

92. In his further submissions addressing *R (SC)*, Mr Warshaw relied on Lord Reed’s observation, at [69], and reiterated his earlier submission that article 14 draws a distinction between relevant status and difference in treatment and the former cannot be defined solely by the latter. On the issue of justification, he submitted that the present case is one in which the court should apply, what Lord Reed described, at [158], as a “low intensity of review”.

#### *Determination*

93. Having set out the parties’ respective submissions and the judgment below at some length, I can give my reasons for my decision relatively shortly.
94. I would first note that, although not an issue raised in this appeal, Mr Southey was clearly right not to seek to challenge the judge’s determination as to the meaning and effect of section 27 of the MCA 1973 and Schedule 1 of the CA 1989. They plainly do not give the Appellant the right to make an application for a financial order.
95. It is worth repeating why this is so. Section 27 gives the right to initiate proceedings for a financial provision order *only* to: “Either party to a marriage” (there are similar provisions in the Civil Partnership Act 2004). There are, then, a number of further conditions before a child can apply. First, an order must have been made under section 27; second, it must be an order for periodical payments or secured periodical payments in respect of section 27(6A) or an order for periodical payments in respect of section 27(6B) because neither of these provisions applies to a lump sum order; and third it must be an order “in favour of a child”.
96. In summary, putting it in the negative, all children are unable to apply unless there has been an order made under section 27 for periodical/secured periodical payments in favour of them on the application of one of the parties to the marriage. Section 27 is a little used provision and, accordingly, nearly all children will not have the right to make an application pursuant either to section 27(6A) or section 27(6B).
97. The CA 1989 does give a direct right under paragraph 2 of Schedule 1 to a child aged over 18 to apply for financial relief and under paragraph 6 of Schedule 1 to a child aged over 16 to apply to vary an order for periodical payments. In both cases, the power only exists if the child will be, or would be, receiving education or undergoing training or if there are special circumstances. Paragraph 6(5) is to the same effect as section 27(6B). Paragraph 2(6) prohibits the making of an order when the child’s parents “are living with each other in the same household”.
98. I would also repeat that sections 23 and 24 of the MCA 1973 only apply if there has been a decree of divorce, nullity or judicial separation.
99. Accordingly, the legislative provisions, as Mr Warshaw submitted, are clearly directed towards the needs of children in the context of their parents’ relationship

having broken down, manifested by divorce or parental separation (which includes, for these purposes, when the child's parents have never lived together).

100. My next preliminary comment is that, although again not an issue in this appeal, I consider it appropriate to express my agreement with McCombe LJ and Stuart-Smith LJ's decisions to refuse the Appellant permission to appeal from the judge's determination that neither section 27 of the MCA 1973 nor Schedule 1 of the CA 1989 can be read down under section 3 of the HRA 1998 so as to permit an application to be made by the Appellant and/or for an order to be made in his favour. For the reasons given by the judge, such an interpretation would be "inconsistent with a fundamental feature of legislation", to quote Lord Nicholls from *Ghaidan v Godin-Mendoza*, at [33], as the judge set out, at [60].
101. The essence of the Appellant's case is that, because some adult children are entitled to apply for financial provision from their parents if there are "special circumstances", it is discriminatory that all adult children cannot apply if there are special circumstances. With all due respect to Mr Southey's submissions, in my view, they took a scattergun approach in that they appeared to comprise a general challenge to the absence of any route by which the Appellant could make a claim for financial provision against his parents and did not always articulate why the various claims available to adult children in certain circumstances were discriminatory in respect of the Appellant, or others who are also unable to make claims, because of the jurisdictional framework. As set out above, the reasons why the Appellant cannot apply are not the same in respect of each challenged provision.
102. The four questions which are typically addressed in article 14 cases are those set out by Lady Hale in *Stott*, at [207]:

"[207] In article 14 cases it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some "status"; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?"

Inevitably, there is often a significant degree of overlap, but I propose to consider each separately.

#### *Status*

103. I propose to start with the issue of status because, in my view, it provides a helpful basis from which to consider the other questions. It focuses on the basis of the difference in treatment for the purposes of analysing how it is said to be discriminatory.
104. In *JM v United Kingdom*, the ECtHR identified the relevant difference in treatment:
- "[54] As the court's case-law establishes, for an issue to arise under Art 14 there must be a difference in the treatment of persons in relevantly similar situations, such difference being

based on one of the grounds expressly or implicitly covered by that provision.”

This was recently reiterated by the Supreme Court in *R (SC)*. In Lord Reed’s judgment (with which the other six members of the court agreed), he summarised, at [37], the general approach to article 14. I quote the first two propositions:

“[37] The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 (“*Carson*”). For the sake of clarity, it is worth breaking down that paragraph into four propositions:

- (1) ‘The court has established in its case law that only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of article 14.’
- (2) ‘Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.’”

105. Status is a broad concept and deliberately applied broadly so as to ensure that, as explained by the ECtHR in *Clift v United Kingdom*, at [60], the rights protected by the Convention are “practical and effective” and that, “where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified”. However, although broad, the concept of status is not unlimited: see *Stott, Lady Black* at [56] (the “possible grounds for discrimination under article 14 are not unlimited but a generous meaning ought to be given to ‘other status’”) and *R (C)*, Leggatt LJ at [61] (“some limitation is intended”).
106. In the present case, the relevant status is said to be either an adult child whose parents live together; or an adult child whose parents have not divorced; or health and disability.
107. I, first, consider whether the difference in treatment in this case under section 27 of the MCA 1973 or Schedule 1 of the CA 1989 is “based on” any of these asserted statuses.
108. The clear answer in respect of section 27 is that it is not. The Appellant’s inability to make an application under section 27 is not based on his health or disability or the fact that his parents have not divorced. The difference in treatment of which he complains is also not based on the fact that his parents are living together. He cannot bring a claim under section 27 because none of the relevant requirements, as set out above, exist. Accordingly, his case in respect of section 27 does not begin to come within the scope of article 14.

109. In respect of paragraph 2 of Schedule 1, the difference in treatment is, again, not based on health or disability. The court has no jurisdiction to make an order because the Appellant's parents are living together. The question is whether this is a personal or identifiable characteristic of the Appellant, "taking into consideration all of the circumstances of the case and bearing in mind the aim of the Convention", as set out in *Clift v UK*, at [60].
110. In my view, it is clearly not. As Mr Warshaw submitted, not permitting an order to be made in favour of a child whose parents still live together does not run counter to the purposes of article 14 or the aim of the ECHR. I also agree with the judge, for the reasons he gave, when he said, at [88], that "the suggested analogy with 'birth status' is wholly false". Apart from the fact that birth status is expressly included in article 14, describing or defining a child as "legitimate" or "illegitimate", because of the marital status of their parents, is clearly an identifiable characteristic, or status, attributable to the child. There is no equivalence or correlation between a child's status being defined by whether their parents are or are not married, as relied on by Mr Southey, and the Appellant's position.
111. Being the child of parents who are living together in the same household is not a personal or identifiable characteristic any more than being the child of parents who have divorced is a personal characteristic. It is not something the child has or which, in any way, defines the child. Being the child of parents who are not separated is simply a bar to the court making an order under paragraph 2 of Schedule 1. In essence, the Appellant's complaint is, as Leggatt LJ said, "merely a description of the difference in treatment itself".

*Analogous Situation*

112. I also do not consider that a child of parents who are living together is in a comparable or analogous situation to a child whose parents are separated. As set out in *Clift v UK*, at [66], "the requirement to demonstrate an 'analogous position' does not require the comparator groups to be identical". What is required is that the "applicant must demonstrate that, having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently". This is sometimes said to require a specific and contextual analysis.
113. As set out in the judgment below, the whole history of the relevant statutory provisions show that they are giving the court powers to make financial orders "when the parents' relationship has broken down", as set out in the 1982 Report (para 6.31). That is their purpose and objective. They are not focused on needs, as Mr Southey submitted. Needs are clearly relevant to the court's determination of what, if any, order should be made but only in the context of the parents' relationship having broken down.
114. The fact that the jurisdiction to make orders under sections 23 and 24 of the MCA 1973 depends on the parents' relationship having broken down is self-evident. It is also clear from section 27 because it depends on the failure to provide reasonable maintenance. It is also clear from paragraph 2(4) of Schedule 1 which, as referred to above, was expressly included to ensure that orders could only be made in favour of children "over the age of 18 whose parents are separated", as made clear by the 1982 Report and as stated by the Lord Chancellor.

115. Mr Southey additionally submitted that the challenged provisions amount to indirect discrimination because, as set out in *DH v Czech Republic* at [175], “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group”. The present case is far removed from the facts of *DH v Czech Republic* which concerned racial discrimination in education in that a disproportionate number of Roma children went to special schools. I do not consider that the principle or approach referred to in that case applies to the circumstances of the present case. All children whose parents are not divorced or separated cannot obtain an order and I do not consider that the challenged provisions can be said to have *disproportionately prejudicial* effects on a particular group as set out in *DH v Czech Republic* or as submitted by Mr Southey.
116. Further, again, as set out in *DH v Czech Republic*, at [175], the difference in treatment must be between “persons in relevantly similar situations”. In the present case, as explained above, the Appellant is not in a relevantly similar situation to adult children whose parents have divorced or are not living together. As Lady Hale did in *R (Stott)*, at [213], I would quote what Lord Nicholls said in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at [3]:

“There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous.”

In my view, there is an obvious and relevant difference in the present case. The difference is obvious because the Appellant seeks to compare himself with children whose parents are divorced or separated. It is also relevant because, to repeat, the purpose of the legislation is specifically to address the consequences of parents either being divorced or separated or, to put it more broadly, the breakdown of the parents’ relationship.

117. I would repeat that the Appellant is not treated differently because of his health status or disability. They are not relevant features in the context of this case. Further, as explained above, the Appellant does not have a status which engages article 14 at all.

#### *Ambit*

118. As to whether the Appellant’s claims under the MCA 1973 and/or Schedule 1 of the 1989 Act fall within the ambit of any of the rights protected by the ECHR for the purposes of article 14, the parties agree, and it is settled law: (a) that it is not necessary for a breach of any substantive right to be established; and (b) that it is sufficient if the facts in issue bring the case within the “ambit” of one of the substantive rights, a concept which is broadly construed but is not without limit.
119. Looking first at article 6, it is clear that this case does not come within the substantive right protected by that article because it is agreed that the Appellant has no claim under either section 27 of the MCA 1973 or Schedule 1 of the CA 1989. Mr Southey relied on *Schuler-Zraggen v Switzerland*. That case concerned the determination of the applicant’s entitlement to a state invalidity pension and does not, therefore,

assist the Appellant in the present case because he does not even have an arguable right to bring a claim against his parents.

120. This can be seen from the Commission's analysis, at [66], of whether article 6 applied:

“The Commission has first examined whether there was a dispute concerning a right, as required for the applicability of Article 6(1) of the Convention. It considers that in the present case the Swiss courts were dealing with a genuine and serious dispute between the applicant and the social security authorities concerning her entitlement to an invalidity pension. Thus, the case involved a dispute over a right within the meaning of Article 6(1) of the Convention.”

The court also decided that article 6 applied. Of relevance to the present case, this was because, at [46], the applicant “was claiming an individual economic right flowing from specific rules laid down in a federal statute”. The court also could see “no convincing reason to distinguish between (the applicant's) right to an invalidity pension and the rights to social security benefits asserted” in the cases of *Feldbrugge v Netherlands (A/99)* (1986) 8 EHRR 425 and *Deumeland v Germany (A/100)* (1986) 8 EHRR 448.

121. As to article 8, in my view it is the Respondents who are able to rely on article 8 and not the Appellant. The Appellant's case, if successful, would constitute a very considerable invasion of the Respondents' right to respect for their private and family life. The creation of a right for all children to bring claims against their parents, if there are “special circumstances”, would be a very novel use of article 8 and a use which is unsupported by any authority or principle.
122. I accept that, as Mr Southey submitted, if a State creates a right, it cannot, as set out in *Aldeguer Tomás v Spain*, at [76], “take discriminatory measures” in the application of that right. For the reasons set out above, the application of the rights created under section 27 and Schedule 1 are not limited by discriminatory measures. It is no more discriminatory to limit the financial claims that one party to a marriage can make against another to those set out in the MCA 1973 than it is to confine the circumstances in which a child can bring a claim against their parents to those set out in section 27 and Schedule 1. In my view, the Appellant's case does not even establish a “tenuous connection” with article 8. It is, again, an attempt to create a new, different right for an adult child to make financial claims against their parents in circumstances which are very different to those in which a right to make a claim exists under our domestic law.
123. As to A1P1, it principally only applies to substantive interests or rights, which can include claims. Again, the obstacle which confronts the Appellant is that he has no claim, not even an arguable one. A1P1 does not create a right or claim when none exists. *Fabris v France* does not assist the Appellant. As the ECtHR said in that case, at [50], “‘possessions’ can ... (include) claims, in respect of which the applicant can argue that he or she has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right”. The court then added that a “legitimate



expectation must have a ‘sufficient basis in national law’”. The Appellant has no such expectation because it has no basis at all in national law.

124. Under A1P1, as set out in *Fabris v France*, at [50], “the concept of ‘possessions’ may extend to a particular benefit of which the persons concerned have been deprived on the basis of a discriminatory condition of entitlement”. However, as explained, at [51], “the issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1”. I would emphasise the expression “substantive interest” which obviously includes claims which have a legitimate expectation as described above.
125. In that case it was inheritance rights to which all children were entitled but from which the applicant was excluded, at [53], “on grounds of his status as a child ‘born of adultery’”. That is a very different situation from the present case because the Appellant has no interest or right let alone a substantive one.
126. *JM v UK*, heavily relied on by Mr Southey, is also very different. I note, in passing, that the relevant status in that case was “a separated parent”, at [48]. In that case, as explained at [46], a claim can fall within the ambit of A1P1 if it concerns entitlement to, say, social security benefits. As set out above, reference was made at [47], to the case of *Burrows v United Kingdom* (unreported), 7 November 1996, EComHR in which the mother had been required to seek child support from Mr Burrows or she would lose her entitlement to social security benefits. That constituted, it was assumed, “an interference with the applicant’s right to peaceful enjoyment of his possessions”. This has no connection with the circumstances of the present case because the Appellant has no claim and there is no interference with his possessions. Further, as explained in *JM v UK*, at [48], that case came within A1P1 because:

“the court considers that the sums which the applicant paid out of her own financial resources towards the upkeep of her children are to be considered as ‘contributions’ within the meaning of the second paragraph of Art 1, payment of which was required by the relevant legislative provisions and enforced through the medium of the CSA ...”

This analysis has no application to the present case and it also does not, therefore, assist the Appellant. This case would apply if the *Respondents* in this case were challenging the Appellant’s right to make a claim against them.

#### *Justification*

127. In *R (SC)*, Lord Reed described the approach to the issue of justification as being more nuanced than that set out in previous domestic authorities; see, for example, [2(7)(ii)] and [142].
128. Going back to basics, a difference in treatment of persons in analogous situations has to have to an objective and reasonable justification. This means that the challenged measure(s) must pursue a legitimate aim and that the means employed must be reasonably proportionate to the aim pursued.

129. The aim in the present case, in respect of claims by children but also claims by spouses or parents, is to address the financial consequences of a breakdown in the parents' relationship. In my view, this is clearly a legitimate aim because society has a clear interest in addressing the financial consequences of such a breakdown.
130. Secondly, it is also clear to me that the means employed is proportionate to that aim. The right to make an application for financial provision is limited as described above and, for example, excludes children whose parents have not separated, because to include them would be in pursuit of a completely different aim. That would not, in any sense, be proportionate to the aim pursued.
131. The Appellant argues that the exclusion of children whose parents are not separated is not justified. This, with respect, is to turn the argument on its head. Although this might seem to be the other side of the coin, it is not. It is the measures which exist which must be justified not the absence of some other private law right. As set out above, the limitation of the right to make a claim and of the court to make an order to children whose parents are divorced or separated is plainly justified.
132. Finally, as Dingemans LJ pointed out during the course of the hearing, the structure of the legislation provides parents generally with the freedom or autonomy to decide how to spend their money. That provides an additional justification for the line drawn by Parliament, a line which, as Mr Warshaw submitted, was relatively recently confirmed in the Civil Partnership Act 2004.

### *Conclusion*

133. Although this is a long judgment, for the reasons set out above, it is clear to me that the proposed appeal is completely without merit. The judge was right to conclude that the subject matter does not come within the ambit of any of the rights protected by the ECHR. He was also right to decide that article 14 does not apply. Further, and in any event, the relevant legislative provisions are clearly justified in the scope of their application and in not permitting a claim to be made by the Appellant. This leads me to conclude that the application for permission to appeal should be refused.

### **Lord Justice Dingemans:**

134. I agree with both judgments.

### **Lord Justice Underhill:**

135. For reasons which I understand, McCombe LJ directed an oral hearing of the Appellant's application for permission to appeal, and also directed that it be on a "rolled-up" basis. We therefore heard full argument from both parties; and, as explained at para. 13 above, Moylan LJ has thought it right to deal with aspects of this application in detail (which in turn contributed to the unfortunate delay in promulgating our decision – though the need to entertain post-hearing submissions on the effect of the decision in *R (SC)* was also a factor). However, none of that justifies our departing from the requirement in CPR 52.6 that we should give permission only if the appeal would have a real prospect of success or there is some other compelling reason for it to be heard. Neither is the case. In the light of Moylan LJ's full exposition I can state my reasons shortly.

136. Like Moylan LJ, I see the force of Mr Warshaw's submission that an appeal would be futile because the Appellant did not seek a declaration of incompatibility at the hearing before Sir James Munby; but if that were the only obstacle there might perhaps be a way round it. The more substantive and straightforward submission is that the claim based on article 14 of the Convention has no prospect of success.
137. As to that, what seems to me the decisive point is that, even if (contrary to my view) *prima facie* discrimination could be established, the Appellant's claim would be bound to fail on the issue of justification. The question of the circumstances in which parents may be ordered to provide financial support to their adult children has been the subject of legislation on two occasions. It is clear both from the terms of the legislation itself and from the materials quoted by Moylan LJ at paras. 33-38 above that it is the considered policy of Parliament that parents may only be ordered to provide support to their adult children in the context of relationship breakdown and that there should be no general discretionary power to require the provision of such support outside that context. Mr Southey questions the reasonableness of that distinction because, he says, there are other, albeit exceptional, situations other than relationship breakdown where adult children may suffer financial need which could and should be alleviated by their parents: the only example which he gave was of an adult child with a disability, but it is evidently his case that the duty might arise in other situations as well.
138. That submission assumes that the current legislative scheme is an instance of some more general principle that parents should in a sufficiently grave case be financially responsible for meeting the needs of their adult children. But that is not the case. The relevant provisions of the MCA 1973 and the CA 1989 are concerned only with situations of relationship breakdown, and their aim is simply that children – including, in some circumstances, adult children – should be protected from the loss of financial support when their parents' relationship breaks down (the paradigm case, as regards adult children, being where their education or training is jeopardised by financial disputes between their parents). That does not recognise or imply any more general principle of the kind relied on by Mr Southey. It does not call in question what was plainly Parliament's view, reflecting understood social norms, that (whatever the moral position might be) parents should be under no legal duty to support their adult children, however grave their need. Judgements of that kind are peculiarly a matter for Parliament, and this is a situation of the type identified by Lord Reed at para. 161 of his judgment in *R (SC)* where a particularly wide margin – corresponding to the “manifestly without reasonable foundation” formulation – must be accorded to the legislator. Mr Southey submitted that society had “moved on” in its understanding of the relationship between parents and their adult children since the 1973 and 1989 Acts. He offered no evidence in support of that submission; but even if there were some basis for it (which I doubt), I do not consider it remotely arguable that attitudes have changed in a way that would require us to hold that it was manifestly without reasonable foundation that adult children should be unable to claim financial support from their parents outside the parameters of that legislation.
139. Although that is the principal basis on which I believe that the Appellant's appeal has no prospect of success, I also agree with Moylan LJ's conclusions on the questions of status, analogous position and ambit. Indeed it is well-recognised that

there is substantial overlap between the four questions identified by Lady Hale in *Stott*, and what I have said about justification also has a bearing on the question of whether the Appellant is being treated differently from persons in an analogous situation.

140. Since there is no other compelling reason why the appeal should be heard, we are bound to refuse permission.

Sir James Munby's judgment was anonymised when published and the parties have requested that this court's decision should also be anonymised when published. Having considered the parties' respective submissions, we have concluded that there is no sufficient justification for the judgments above to be anonymised.