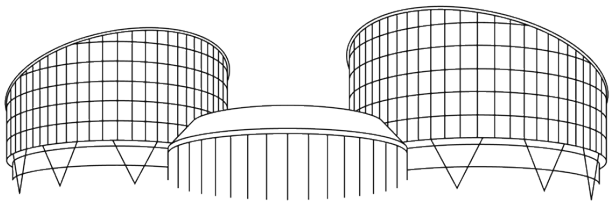

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF J.M. v. THE UNITED KINGDOM

(Application no. 37060/06)

JUDGMENT

STRASBOURG

28 September 2010

FINAL

28/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of J.M. v. the United Kingdom,

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

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 7 September 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37060/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, J. M. ("the applicant"), on 6 September 2006. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr James Welch of Liberty, a non-governmental civil rights organisation based in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms J. Gladstone, of the Foreign and Commonwealth Office.

3. The applicant alleged that she had been the victim of discrimination on the basis of sexual orientation in the assessment by the authorities of her financial liability under the regulations on child support.

4. The applicant, but not the Government, filed further written observations (Rule 59 § 1). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Equality and Human Rights Commission, London, which had been given leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The applicant replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is the divorced mother of two children, born in 1991 and 1993. Her children live mostly with their father (the "parent with care") spending two and a half days per week with her (the "non-resident" parent). Since 1998, the applicant has lived with a woman in what was described during the domestic proceedings as a "close, loving and monogamous relationship characterised by long-term sexual intimacy". She and her partner own the house they live in as joint tenants. They purchased the property with a joint mortgage, and have held a joint bank account since 2000.

6. The applicant is required to contribute to the cost of her children's upbringing in accordance with the applicable regulations on child maintenance (see paragraph 21 below). On 12 September 2001, the Secretary of State decided that the applicant's maintenance payment should be GBP 46.97 per week, with effect from the previous 13 August. The applicant disputed that decision on a number of grounds, including that it did not make full allowance for her housing costs. On 11 November 2001, the Secretary of State declined to revise his decision. On 18 February 2002, the maintenance assessment was reduced to GBP 12.67 per week, due to changed circumstances unrelated to the applicant's complaint of discrimination. Her complaint thus relates to the period that began on 13 August 2001 and ended on 18 February 2002.

7. The applicant appealed against the initial maintenance assessment. The Appeals Tribunal allowed the appeal on 8 November 2002. The Tribunal considered it appropriate to compare the applicant's situation to that of an individual who was part of a heterosexual couple (married or unmarried), and that there clearly was a difference in treatment in the determination of the child maintenance obligation. It held that the situation came within the ambit of Article 1 of Protocol No. 1, which was not confined to situations in which property was transferred to the State. The direct involvement of the Child Support Agency in the process and its powers of enforcement meant that the responsibility of the State was engaged. The Tribunal found that the Government had not advanced any specific explanation or justification for the difference in treatment, which it therefore held to be discriminatory. It further found that it was possible to provide a remedy to the applicant by re-interpreting the definition of an "unmarried couple" in the applicable regulations so that it included same-sex couples.

8. The Secretary of State appealed against this decision to the Child Support Commissioner, who rejected the appeal on 1 October 2003. The Commissioner held that "a gay relationship can be a family for the

purpose of [A]rticle 8". He saw no reason, in the context of child support legislation, to distinguish between families according to the sexual orientation of the partners. The purpose of the regulations was to determine the financial obligation of the absent parent, a matter on which his or her sexual orientation should have no bearing. Accordingly, the applicant's situation was within the ambit of the right to respect for family life. He rejected, however, the applicant's argument that the situation also came within the ambit of Article 1 of Protocol No. 1. Turning to Article 14, the Commissioner found that, in the context of child support payments, the applicant's situation was analogous to that of an absent parent living with a heterosexual partner, who, all other things being equal, would have been required to pay around GBP 14 per week instead of almost GBP 47. He considered that the Government had not advanced any justification for treating the applicant differently and therefore ruled that the child support scheme violated the applicant's Convention right under Article 14 read in conjunction with Article 8. Concerning the remedy, he disagreed with the approach of the Appeals Tribunal. Instead, since the regulations defined the various terms used by the regulations "unless the context otherwise requires", he considered that, with the entry into force of the Human Rights Act on 2 October 2000, the "context" now included the absent parent's Convention rights. Therefore, the definition of an unmarried couple ("a man and a woman who are not married to each other but are living together as husband and wife") did not apply in this situation.

9. The Secretary of State appealed against this decision to the Court of Appeal. By a judgment given on 15 October 2005, that court upheld the Commissioner's decision. Lord Justice Sedley considered that the applicant's previous family life (i.e. the relationship between herself, her former husband and her children) was not within the ambit of Article 8. As for her relationship with her partner, he read the decision of the European Court in *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI as establishing that the question whether same-sex relationships fall within Article 8 is a matter of domestic law. Citing a number of domestic precedents which treated same-sex couples as no different from heterosexual couples in certain contexts, he considered that the applicant's relationship constituted family life for the purposes of the case. Any discrimination against the applicant on the grounds of her sexual orientation called for compelling and proportionate justification. He found that the child support scheme impinged in some significant degree on the family life of the applicant and her partner, bringing their situation within the ambit of Article 8. As the scheme discriminated against the applicant on grounds of her sexual orientation, Article 14 was engaged. He rejected the argument that the scheme came within the ambit of the applicant's private life, since the scheme did not set out to recognise the applicant's sexual orientation. Regarding Article 1 of Protocol No. 1, he considered it

unnecessary to decide if it too was engaged, although he doubted that it was. He found that the Government had not provided any acceptable justification for the discrimination against the applicant. He rejected the arguments advanced on behalf of the Secretary of State about the difficulty of correcting a problem that was but one instance of a distinction applied throughout the wider social security system, observing that there was no doctrine of justification by the logistics of reform. As for a remedy, he considered that the appropriate course was to disapply (in effect delete) the definition in the regulations of an unmarried couple so as to eliminate the requirement of heterosexuality.

10. Lord Justice Neuberger held that the child support regulations did, in principle, come within the ambit of Article 8, since they were based on the relationship between the absent parent and his/her children. However, the applicant's complaint concerned a wholly different family unit, i.e. her relationship with her partner. He too rejected the argument that the situation came within the ambit of the applicant's private life, finding that this had not been interfered with. Regarding Article 1 of Protocol No. 1, he accepted that the situation came within the scope of that provision since a possession of the applicant's (money) was being taken away from her under rules that left her worse off than a person in a position identical to hers in all respects save for their sexual orientation. As for the applicant's argument that her relationship came within the concept of family life, he took the view that, the European Court having considered this issue to be within States' margin of appreciation, it was open to the domestic courts to decide the point for the United Kingdom. His conclusion was that, having regard to the relevant House of Lords case-law, same-sex relationships should be treated in the same way as heterosexual relationships for the purpose of Article 8. He further concluded that the relevant provision of the MASC regulations had been enacted out of respect for family life – in this case the relationship between the absent parent and his/her new partner. Accordingly, the applicant's situation came within the ambit of Article 8. He concurred with Lord Justice Sedley that the Government had not provided an adequate justification, and agreed with the proposed remedy.

11. Lord Justice Kennedy reviewed both domestic and Convention case-law and concluded that the applicant could not rely on the words "family life" in Article 8 in order to say that the facts of her case fell within the ambit of that Article. Nor did the situation come within the ambit of the applicant's right to respect for her private life. Though her relationship with her partner was an aspect of her private life, the applicant had not been penalised on account of it. Her real complaint was that she was unable to take advantage of a benefit that was available to a category of absent parents since she did not come within that category. As regards Article 1 of Protocol No. 1, he found that this provision was not engaged. The child support scheme was concerned with the allocation of assets to discharge an

existing obligation. To hold that any situation in which there was a net adverse financial impact on an individual constituted a *prima facie* deprivation of possessions would be an unacceptably broad interpretation. There would be almost no limit to the circumstances in which that provision would be sufficiently engaged for the purposes of Article 14.

12. The decision of the Court of Appeal was appealed by the Secretary of State to the House of Lords which, in a judgment of 8 March 2006, allowed the appeal, by a majority of four to one.

13. Addressing the question whether the application of the relevant regulations to the applicant came within the ambit of Article 8 of the Convention or Article 1 of Protocol No. 1, Lord Walker (with whom Lord Bingham agreed) observed that:

> "[t]he Strasbourg case-law does not, and could not, spell out any simple bright-line test for determining how close must be the link between the alleged discrimination and the rights granted by the substantive article."

He rejected the contention that since the concept of respect for private and family life was so wide and multifaceted, any alleged act of discrimination would be within the ambit of Article 8. He considered that, in relation to Article 8, the Strasbourg case-law revealed a more nuanced approach, reflecting the unique feature of Article 8 – the duty of the State to accord respect. Some measures were so intrusive that they plainly failed to respect an individual's private life, whereas less serious interferences would not merely not breach Article 8, they would not fall within its ambit at all. He further noted that the case-law concerning alleged discrimination in relation to the family life limb of Article 8 had concerned measures very closely connected to family life. He was prepared to assume that the applicant, her new partner and their children from their previous marriages should be regarded as a family for the purposes of Article 8. He also accepted that the regulations, inasmuch as they sought to strike a fair balance between the demands arising out of the raising of children and the running of the new household, were intended in a general sort of way to be a positive measure promoting family life. However, the link between them and respect for the applicant's family life was too tenuous to bring the situation within the ambit of the family life limb of Article 8. The link to respect for the applicant's private life was even more remote, in his view. As regards Article 1 of Protocol No. 1, he considered that the obligation to pay maintenance was very different to expropriation and therefore did not come within the ambit of this provision.

14. Lord Walker then considered whether the difference in treatment in same-sex couples in such circumstances was discriminatory. He held that Parliament had acted with reasonable promptness and within its margin of appreciation in the complex and time-consuming process of drafting, adopting and giving effect to the Civil Partnership Act 2004. The United Kingdom may have only followed the lead given by other Member States of

the Council of Europe, but it had not been so far behind as to go outside its margin of appreciation. While it could not be argued today that discrimination against homosexuals had ever been justifiable, he thought this a "deeply unrealistic" approach to the issue. For centuries, homosexual couples living together were regarded as quite different to married or unmarried heterosexual couples. Profound cultural changes took time.

15. Lord Bingham described the applicant's complaint about discrimination as "anachronistic":

> "By that I mean that she is applying the standards of today to criticise a regime which when it was established represented the accepted values of our society, which has now been brought to an end because it no longer does so but which could not, with the support of the public, have been brought to an end very much earlier. ... If such a regime were to be established today, Ms M. could with good reason stigmatise the regime as unjustifiably discriminatory. But it is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the overall task and the need to recruit the support of the public, could scarcely have been reformed sooner."

16. Lord Nicholls took the view that, while this was not its primary purpose, the statutory scheme did demonstrate the respect of the United Kingdom for the non-resident parent's new family life by means of the statutory scheme. It could therefore be said that this feature of the scheme was one of the modalities of the exercise of the right to respect for family life. This would be sufficient to bring the situation within the ambit of Article 8. He then considered the position of same-sex couples. In certain contexts, domestic case-law had established that a same-sex couple was as much capable of constituting a family as a heterosexual couple. In the context of Article 8 of the Convention, however, the concept of "family life" could only have one proper interpretation for all of the Contracting States. The Strasbourg case-law did not yet recognise that the guarantee of respect for family life applied to same-sex relationships and there was no good reason for the courts of the United Kingdom to depart from that position. He rejected the argument that the situation came within the ambit of respect for private life. The statutory formulae set out to respect the new family life of an absent parent who had entered into a heterosexual relationship, and not the private life of each party to that relationship. The statutory scheme was therefore not one of the modalities of the exercise of the guarantee of the right to respect for private life. The nature of the discrimination alleged was not sufficient to engage that provision; otherwise, every case of discrimination on the ground of sexual orientation would be within the ambit of Article 8. He further observed that the applicant had not pointed to any significant impact on her lifestyle. As regards Article 1 of Protocol No.1, he found that the statutory scheme was far outside this provision's scope. The duty to pay child maintenance was very distant from the type of interference the provision was aimed at.

While it was accordingly not necessary to consider the issue of justification, he indicated his agreement with the position of Lords Bingham and Walker.

17. For Lord Mance there were two critical issues: whether the applicant's same-sex relationship was to be regarded as family life for the purpose of Article 8; and whether the child support regime impinged sufficiently on that family life for it to be said to fall within its ambit. Regarding the latter issue, his view was that the regime did, "though only just". The MASC regulations sought to avoid any unduly adverse impact on the absent parent's new relationship and to achieve a fair balance between it and the children's needs.

As for the first issue, the European Court of Human Rights had made it clear in May 2001 that same-sex relationships did not fall within the scope of the right to respect for family life. As the applicant's appeal related to a period shortly after that decision (13 August 2001-18 February 2002), her relationship with her partner could not be regarded as a type of family life within the meaning of Article 8. He added that he had little doubt that the Strasbourg Court would see the position in 2006 as having changed very considerably, and that if the issue were to arise before it again, the applicant's relationship could very well be regarded as involving family life for the purpose of Article 8. Great change had taken place across Europe in the intervening time, of which any court would take most careful account. There was no basis for criticising the United Kingdom for delay either in reviewing the relevant laws or in moving to amend them in light of such review. Although from a moral viewpoint discrimination against same-sex couples had never been justified, it was the legal position that was at issue. Until quite recently neither the Strasbourg Court nor the domestic courts would have viewed such relationships as involving family life. It followed that discrimination between these and heterosexual couples did not contravene Article 14 taken with Article 8. In relation to the applicant's private life, he observed that the regulations were not directed at her private life. Any link between them would be as tenuous in the extreme. Regarding Article 1 of Protocol No. 1, he considered it artificial to view child support payments as a deprivation of the absent parent's possessions. The mere fact that there was a net adverse financial impact for the applicant was insufficient. While the scheme was undoubtedly introduced in pursuit of a legitimate social policy, there was no element of expropriation about it. The complaint did not fall within the ambit of Article 1, therefore Article 14 was not engaged.

18. Baroness Hale, dissenting, considered that the appeal should be rejected. She found that the child support scheme, which was one aspect of the State's support for family life, clearly fell within the ambit of the applicant's right to respect for her family life with her children. The scheme was the State's way of enforcing a parent's duty to support their children, which was an obligation in both private and public law. There were many

ways that the operation of the scheme could impact upon that family life. It did not have to have so severe an impact as to breach Article 8, but she considered it clear that the scheme fell within the reach of the applicant's right to respect for family life with her children. She observed that if, for example, the scheme treated absent mothers differently to absent fathers, this would be sufficient to engage Article 14. The lack of respect manifested by the scheme for the applicant's relationship did not have to reach such a level of severity as to constitute a breach of Article 8 for Article 14 to come into play. Although the Convention case-law had not yet recognised the relationship between two adult homosexuals as a form of family life within the meaning of Article 8, in this case the applicant and her partner enjoyed family life when their children were with them, and this did not cease when they were apart from them. She further considered that the situation also came within the ambit of the applicant's right to respect for her private life. It was therefore unnecessary to inquire whether Article 1 of Protocol No. 1 was engaged.

19. The only justification offered for the difference in treatment was the historical discrimination between the two types of relationship by social security and child maintenance rules. It was now recognised that there was no objective justification. While it had been taken for granted that the protection of the institution of marriage could justify less favourable treatment of the unmarried, it still had to be shown that in order to achieve that aim it was necessary to exclude same-sex couples. This had not been shown. With the Civil Partnership Act, the United Kingdom had moved ahead of many other European States, but this was not an objective justification for not doing so sooner. Racial and sex discrimination had always been wrong, long before this was recognised in law. In the area of gender, the historical and systematic character of discrimination against women could justify some continuing small adjustments in their favour in the benefits system. But this could not apply to sexual orientation – it would mean relying on historical disadvantage and exclusion to justify continued disadvantage and exclusion of the excluded group. It was to be welcomed that Parliament had legislated in this area, but that did not make right what had been done before. She concluded that the applicant had suffered discrimination in the enjoyment of the Convention right to respect for private and family life, and approved the remedy suggested by the Appeals Tribunal.

II. RELEVANT DOMESTIC LAW

20. The Child Support Act 1991 ("the 1991 Act") introduced a system intended to improve the assessment, collection and enforcement of payments for the maintenance of children whose parents are living apart. Until 1 November 2008, the system was administered by the Child Support

Agency ("the CSA"), which was part of the Department for Work and Pensions. All the relevant duties, powers and discretions were thus conferred on the Secretary of State responsible for this government department. The calculation of a parent's child maintenance obligation is determined by Section 11 of and Schedule 1 to the 1991 Act, and by the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 SI 1992/1815 (the "MASC regulations"), which have been subject to frequent and extensive amendment. In the domestic proceedings, the courts considered the regulations as they stood before 3 March 2003.

21. In the House of Lords, Lord Walker explained and cited the relevant provisions as follows:

> "The 1991 Act and the Regulations contain a multiplicity of special definitions: 'assessable income', 'net income', 'exempt income', 'disposable income' and 'protected income'. The non-resident parent's liability depends primarily on his or her assessable income, which is net income less exempt income (para 5 of Schedule 1 to the 1991 Act). There are complex provisions for determining net income (Regulation 7 of and Schedules 1 and 2 to the Regulations) and exempt income, which includes an amount in respect of housing costs (Regulations 9, 14, 15, 16 and 18 of and Schedule 3 to the Regulations). The higher the exempt income the smaller the maintenance assessment will be in respect of any particular level of assessable income. There is also a further mechanism (described by the Child Support Commissioner as a kind of long stop) securing that the non-resident parent's disposable income does not fall below the level of his or her protected income (para 6 of Schedule 1 to the Act and Regulations 11 and 12 of the Regulations).
>
> I now come to some definitions in regulation 1(2) of the Regulations which are of central importance to the appeal (all applicable unless the context otherwise requires):
>
> ''family' means—
>
> ...
>
> (a) a married or unmarried couple ... and any child or children living with them for whom at least one member of that couple has day to day care ...
>
> 'married couple' means a man and a woman who are married to each other and are members of the same household.
>
> 'partner' means—
>
> (a) in relation to a member of a married or unmarried couple who are living together, the other member of that couple . . .
>
> 'unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife.'
>
> These definitions are closely similar to, but not identical with, definitions of the same expressions in the Social Security Contributions and Benefits Act 1992, section 137(1).
>
> Paragraph 6 of Schedule 1 to the 1991 Act provides as follows:
>
> '(4) The amount which is to be taken for the purposes of this paragraph as an absent parent's disposable income shall be calculated, or estimated, in accordance with regulations made by the Secretary of State.

(5) Regulations made under sub-paragraph (4) may, in particular, provide that, in such circumstances and to such extent as may be prescribed—

(a) income of any child who is living in the same household with the absent parent;

and

(b) where the absent parent is living together in the same household with another adult of the opposite sex (regardless of whether or not they are married)income of that other adult,

is to be treated as the absent parent's income for the purposes of calculating his disposable income.'

Regulation 11 (made, the Child Support Commissioner observed, under regulation 6(5)) deals with protected income. Under Regulation 11(1)(a) it is material whether or not the non-resident parent has a partner. Under regulation 11(1)(b) housing costs come into the calculation of protected income. Under regulation 11(1)(g) it is material whether there is a child who is a member of the family of the non-resident parent.

Regulation 15 is one of the regulations dealing with housing costs. Regulation 15(3), so far as now relevant, provides as follows:

'Where a parent has eligible housing costs and another person who is not a member of his family is also liable to make payments in respect of the home, the amount of the parent's housing costs shall be his share of those costs ...'

Schedule 3 of the Regulations also relates to housing costs. Paragraph 4, so far as now relevant, provides as follows:

'(1) Subject to the following provisions of this paragraph the housing costs referred to in this Schedule shall be included as housing costs only where—

...

(b) the parent or, if he is one of a family, he or a member of his family, is responsible for those costs ...'

22. The Government in their observations have also referred to the Child Support Departure Direction and Consequential Amendments Regulations 1996 (the "Departure Direction Regulations"), the relevant provision of which reads as follows:

Partner's contribution to housing costs

27. A case shall constitute a case for the purposes of paragraph 5(1) of Schedule 4B to the Act where a partner of the non-applicant occupies the home with him and the Secretary of State considers that it is reasonable for that partner to contribute to the payment of the housing costs of the non-applicant.

23. Schedule 24 of the Civil Partnership Act 2004 amended paragraph 6(5)(b) of Schedule 1 of the 1991 Act as follows:

"(b) where the absent parent—

(i) is living together in the same household with another adult of the opposite sex (regardless of whether or not they are married),

(ii) is living together in the same household with another adult of the same sex who is his civil partner, or

(iii) is living together in the same household with another adult of the same sex as if they were civil partners,

income of that other adult,".

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION AND ADMISSIBILITY

A. The parties' observations

24. The Government stated that the figures quoted by the domestic courts were incorrect. The initial maintenance payment required of the applicant was slightly higher, at GBP 47.96. Similarly, the lower figure given by the Commissioner was incorrect (see paragraph 8 above). The assessment of the applicant on 26 February 2003 determined that she should pay GBP 22.78 per week. Thus the true differential was GBP 25.18 and not the GBP 33 mentioned in the judgments of the domestic courts.

25. In the view of the Government, the applicant lacked victim status because, when analysed on a proper factual footing, her complaint was academic. The success of her appeal to the Appeals Tribunal meant that she and her partner were treated as an unmarried couple for the purpose of calculating housing costs. This however brought the applicant within the scope of Regulation 27 of the Departure Direction Regulations. Her former husband duly applied to the Secretary of State, on 27 March 2003, for a departure direction. In a decision of 25 April 2003, the Secretary of State took the view that it would be just and equitable to attribute 51% of the applicant's housing costs to her partner. The effect of this was to bring the applicant's maintenance assessment up to GBP 49.56, i.e. slightly higher than the original figure, with effect from 13 August 2001 (see § 6). Therefore, the difference in treatment of which the applicant complained had not ultimately made any material difference to her. The Government sought to amplify this point by providing four hypothetical examples showing that at different points in time between 2001 and 2003 the making of a departure direction would in each case negative the financial advantage of having a same-sex relationship recognised. This fact had been noted during the domestic proceedings, but the parties had agreed that it should be disregarded in order to enable the point of principle to be determined (speech of Lord Walker, at paragraph 46). In the Government's view, however, the significance of the departure direction was highly relevant in the context of Article 34 of the Convention.

26. The applicant argued that it was unjust for the Government now to seek to rely on a point that they had agreed not to advance during the domestic proceedings, during which they had conceded it was irrelevant to the issues of principle at stake. She objected strenuously to the attempt to re-introduce the issue before the Court. The applicant further argued that the notion of victim under Article 34 of the Convention was without reference to detriment, prejudice or damage. This was a matter for consideration under Article 41, in the event of the Court holding that there had been a violation of Convention rights. Even supposing that the material disadvantage in her case had ultimately been reduced – which she did not concede – she argued that the basis for her complaint was that the child support system offended her dignity by ignoring a most important and intimate aspect of her private life and personality. This was not excused or justified by the operation of a mechanism that was entirely unconnected to the alleged discrimination.

B. The Court's assessment

27. According to the Court's established case-law, the word "victim" in the context of the Convention denotes the person directly affected by the act or omission in issue. The existence of a violation of the Convention is conceivable even in the absence of prejudice, which is relevant only in the context of just satisfaction (*Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III). The Court considers that during the period at issue the applicant was directly affected by the MASC regulations and therefore has victim status within the meaning of Article 34 of the Convention. Although the financial consequences of the alleged discrimination were neutralised by the subsequent departure direction, the applicant's complaint is essentially one of principle, i.e. that the State discriminated against her on the basis of her sexual orientation by failing to recognise the relationship she entered into after her divorce when setting the level of child maintenance she was required to pay. The importance of this issue of principle is amply demonstrated by the care with which it was examined by four levels of jurisdiction. Moreover, as Sedley LJ stated in his judgment, the departure direction is a palliative but not a cure. The Court would not be justified in rejecting the applicant's case on a ground that the superior domestic courts, with the agreement of the parties, chose to disregard. It therefore dismisses the Government's preliminary objection.

28. The Court concludes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

29. The applicant complained that the manner in which her financial liability with respect to the cost of her children's upbringing had been determined breached Article 14. She submitted that this provision applied to her situation either in conjunction with Article 8 or Article 1 of Protocol No. 1.

Article 8 provides:

> "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 provides:

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

Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Applicability of Article 14

30. The Court will first examine the parties' arguments in relation to the applicability of Article 14 to the applicant's situation.

1. The parties' observations

a. The applicant

31. The applicant submitted that the House of Lords judgment had defined the term "ambit" so narrowly as to render imperceptible the difference between interference with a Convention right and discrimination in the enjoyment of it. If the equality guarantee of Article 14 was to be practical and effective, that difference should be real and significant. In view of the importance of equality as a fundamental principle of democracy,

it was appropriate to give Article 14 an expansive meaning, and to construe "ambit" broadly, as it was the cornerstone of the protective scope of the provision. States were required simply to justify differences in treatment as between classes of persons that were based on one or more of the protected grounds. This was no greater an obligation on the State than could properly be expected in a modern liberal democracy. She refuted the Government's assumption that there had to be significant interference or impairment with a right in order to satisfy the ambit test. The threshold for the engagement of Article 14 was altogether different and less exacting than the threshold for interference. To fall within the general scope of Article 8, it was sufficient for the complaint in issue to relate in some material way to a person's private or family life, or home.

32. The applicant submitted that there were several different ways in which the situation could come within the ambit of Article 8.

First, it was clearly established in Convention case-law that sexual orientation was a most intimate aspect of the individual's private life. Differential treatment of a person on this ground by a public authority, causing them prejudice, demonstrated a lack of respect for an important component of their private life. The MASC regulations demonstrated respect for the family life of the new household of the absent parent, as long as they had entered into a relationship with a person of the opposite sex. By excluding same-sex relations, the MASC regulations sent a clear message that these were less worthy of respect and dignity than heterosexual relations. This was a matter that fell within the ambit of private life. The *Petrovic* judgment was relevant in this respect, since, as here, the point was not that the authorities had interfered with the applicant's family life, or had failed in a positive obligation, but that the means chosen by the public authorities to show respect for family and private life brought the case within the ambit of Article 8. The applicant drew attention to the fact that in that case the Court had not specified the amount of the parental leave allowance, nor had it stated how exactly the applicant's family life had been affected. Instead it had assumed that there had been some impact on the organisation of family life. In her case, there was both an exclusionary rule and actual evidence of disadvantage, which the House of Lords had put at about 33GBP per week, a non-negligible sum. Accordingly, if the situation in *Petrovic* attracted Article 14, it would be incorrect to reach the opposite conclusion in her case.

Furthermore, the treatment of the applicant could be seen as exerting a coercive effect on her to change her personal conduct.

33. The applicant referred to the Court's judgment in *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV as authority for the proposition that a difference of treatment that would not generally come within the scope of Article 14 may do so depending on the ground of discrimination alleged. She argued that by simple analogy differential treatment related to a

person's sexual orientation will almost always engage Article 14 and require the State to provide clear and cogent justification. The centrality of sexual orientation to the concept of private life was not dependent on either the extent of any interference or the severity of the consequences of such interference. The approach taken by the majority of the House of Lords was therefore incorrect. Any distinction based on sexual orientation should therefore be regarded with strong suspicion by the domestic courts and the European Court.

34. The second way in which the situation of the applicant could come within the ambit of respect for private life was on the basis of the right to establish and develop relationships with other human beings, which was part of private life and must include same-sex relationships. If, as established in the case-law of the Court, business relations came within the scope of Article 8, then it was beyond argument that the applicant's relationship with her partner did so too. It would be an unattractive conclusion if the Convention afforded heightened protection to an individual because of their sexual orientation but excluded from the very wide scope of the protection of Article 8 the relationship that was the natural consequence of that orientation. The treatment of the applicant disclosed a lack of respect for her right to develop and establish a relationship with her partner. It placed financial obstacles in the way of same-sex couples. This brought the situation within the ambit of Article 8, thereby engaging Article 14.

35. The third way in which the applicant's situation could attract the protection of Article 14 was on the basis of respect for the family life she enjoyed with her partner. In its *Mata Estevez* decision, the Court had left the issue of whether same-sex relations constituted "family life" for States to determine within their margin of appreciation. Such relations did not necessarily fall within the scope of that concept, but they did not necessarily fall outside either. The material scope of Article 8 in this respect was therefore a matter of domestic law. The United Kingdom courts had already and repeatedly affirmed that same-sex relationships could amount to family life, and so the House of Lords should not have relied on the *Mata Estevez* case to decline to recognise the applicant's relationship. Moreover, the margin of appreciation accorded to States in that case had been significantly narrowed by the Court's judgment in *Karner v. Austria*, no. 40016/98, ECHR 2003-IX. That judgment had not been limited to the right to respect for one's home, but contained a general statement of principle in relation to equality as between persons of heterosexual and homosexual orientation in relation to Convention rights. This was affirmed by the judgment in *E.B. v. France* [GC], no. 43546/02, ECHR 2008-..., in which the Court had not indicated whether it treated the situation as coming within the ambit of that applicant's private or family life; the applicant submitted that the circumstances in that case clearly related to both. Accordingly,

Mata Estevez could no longer be regarded as offering good guidance to the Court's approach either to the concept of family life, or to lesbian and gay equality more generally. In the applicant's view, this trend in the Court's recent case-law mirrored the trend that could be observed in the laws of many Contracting States and other States around the world. The international consensus in this area was now sufficiently clear to include same-sex relationships in the concept of family life in Article 8. The failure to take account of the income and expenses of the applicant's partner necessarily affected the way in which her family life with her partner was arranged or organised. It affected that family unit by reducing, in a discriminatory way, the disposable income available to it.

36. She further submitted that the facts of the case came within the ambit of respect for family life, the relevant family unit being the applicant and her children. In this respect the applicant endorsed the reasoning of Baroness Hale. The MASC regulations were intended to regulate and promote family life, and necessarily affected the way in which it was organised.

37. Lastly, the applicant argued that her situation came within the ambit of Article 1 of Protocol No. 1, which should be given a wide meaning. The State had interfered with a possession of hers, i.e. money, leaving her worse off than a person in a position identical in every respect save their sexual orientation. The fact that the case involved the transfer of assets to a private party did not take it outside the ambit of Article 1. She referred to the case of *Burrows v. the United Kingdom*, no. 27558/95, decision of 7 November 1996, in which the Commission assumed that the obligation to pay child maintenance constituted an interference with the applicant's peaceful enjoyment of his possessions.

b. The Government

38. The Government argued that Article 14 was inapplicable as the facts of the case did not disclose any appreciable impact on either her relationship with her children, or her relationship with her partner. In order for Article 14 to apply, it must be shown that the specific factual context in which the allegation of discrimination arises was within the ambit of one of the substantive rights of the Convention. The intended limited scope of Article 14 of the Convention stood in contrast to that of Article 1 of Protocol No. 12, which the United Kingdom had not ratified. If the criteria for the applicability of Article 14 were to be loosened and widened, it would occupy more and more of the area intended to be covered by the other provision. Instead, Article 14 should be kept within boundaries of application closely associated with and bearing directly upon the operation of other Convention rights. The Government contended that the approach taken by Lords Walker, Bingham and Nicholls to the applicability of Article 14 was consistent with the Strasbourg jurisprudence, and was now

accepted by the domestic courts as providing a practical framework for determining when a given situation came within the ambit of Article 8 of the Convention. While the applicant had likened her situation to that at issue in the case of *Petrovic v. Austria* (27 March 1998, *Reports of Judgments and Decisions* 1998-II), hers was quite different. In *Petrovic*, the Court had found that the parental leave allowance necessarily affected the way in which family life was organised, as it allowed one parent to stay at home to look after the children (§ 27). In contrast, the application of the formula in the MASC regulations was not intended to deter the applicant from pursuing her relationship, nor did it have that effect. The mere fact that liability to contribute towards the cost of her children's upbringing might have some effect on the financial situation of her new household was insufficient. Otherwise any financial liability, or benefit, would be deemed as coming within the ambit of the family life aspect of Article 8. Since the Convention did not confer a right to full protection of private or family life against all interference, but a right to respect for private or family life, it followed that a significant threshold of intrusion had to be crossed before there could be an interference that called for justification under Article 8 § 2. The Government drew a comparison with a number of cases in which applicants who had lost their employment had complained of interferences with their right to respect for private life: *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII; *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, 7 April 2005. In each of these cases, the applicants had been able to point to additional restrictions or intrusions. This strongly suggested that the merely incidental effect of the MASC regulations on the finances of the applicant's household was not sufficient to bring the situation within the scope or ambit of Article 8. The facts of this case were very remote from any identifiable impact on the applicant's family life.

39. The Government considered that the applicant's arguments to the effect that the difference of treatment of same-sex couples was demonstrative of a lack of respect by the State for a most intimate aspect of private life, and that it exerted a coercive effect on her freedom to make decisions about her sexual orientation, were theoretical constructs rather than factual observations. The implication of these arguments would be that any difference in treatment referable in any way to sexual orientation would engage Article 14 even in the absence of a link to substantive Convention rights. The correct approach was to have regard to the real factual implications of the circumstances of each given case and take account of how remote the facts were from the core value of the substantive right at issue. Here there was no discernible impact on the applicant's private life. She was effectively inviting the Court to dispense with any ambit threshold

and establish a free-standing prohibition on discrimination on grounds of sexual orientation.

40. The Government further argued that the concept of "family life" did not, at the material time in this case, extend to same-sex relations. During that same period the Court had very clearly held that Contracting States still enjoyed a wide margin of appreciation - *Mata Estevez* (cited above). This ruling had not been departed from in the intervening time. While the Government no longer wished to argue against an evolution in the Court's case-law on this point, any such change should have prospective effect only. The applicant could not claim a retrospective declaration from the Court relating to a period when there clearly was little consensus in Europe over the official recognition of same-sex relationships. Even assuming the contrary, the Government reiterated that the differential level of payment at issue in this case had no identifiable impact, let alone direct impact, on the applicant's relationship such as would be necessary to bring her case within the ambit of Article 8. Similarly, insofar as the applicant referred to her "family life" with her children, the link between this and the differential in the maintenance formula had not been established on the facts of the case. The situation here was not remotely comparable with that in *Petrovic*.

41. In relation to Article 1 of Protocol No. 1, the Government argued that the facts of the case did not fall within the ambit of this provision since, as Lords Nicholls and Bingham had stated, the obligation to pay child support was very distant from the sort of interference that Article 1 of Protocol No. 1 was intended to guard against. The MASC Regulations merely determined the financial responsibilities of parents, which were inherent in law and should not be seen as an interference with property rights. Article 14 was not therefore engaged.

c. The third party

42. The Equality and Human Rights Commission contended that a narrow approach to the applicability of Article 14 would mean that in many instances of clear discrimination on "suspect" grounds, the State would not be required to justify the discrimination. This would seriously undermine the role of Article 14 in eliminating otherwise unacceptable discrimination in Contracting States. If the protection afforded by Article 14 was to be practical and effective, then the gateway into that provision should be set broadly, requiring the State to justify the alleged discriminatory treatment. Otherwise, Article 14 would be deprived of much of its purpose. It referred to the Court's broad approach to the ambit of Article 1 of Protocol No. 1 in the case of *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X. A narrow approach would have left the applicant in *Gaygusuz v. Austria*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV without redress. Taking a broad approach to ambit need not alter the ultimate result of the case, as the State

might succeed in persuading the Court that the difference in treatment did not constitute discrimination. The purpose of Article 14 would be achieved in all such cases by the State being obliged to justify the situation and the Court's scrutiny of the reasons put forward.

43. The third party considered that the *Petrovic* case was relevant to the present case, since there the Court had decided the ambit question on the basis of the nature and purpose of the scheme established by the State. The actual effect on his family life of the exclusion of the applicant from financial assistance was not relevant to that question. Similarly, in the *E.B.* case the Court had found that while Article 8 was silent on adoption, the fact that French law recognised a right to apply for authorisation to adopt was sufficient to bring the situation within the general scope of private life. There should be no doubt that the MASC regulations, which aimed to ensure parental responsibility for the financial maintenance of children, formed one of the modalities of the exercise of respect for family life. The fact that it concerned the financial rather than the emotional aspect did not prevent it from having a direct impact on family life. For the purpose of the ambit question, it was irrelevant which family unit was considered; the critical point was the aim of the MASC regulations. By focusing on the actual impact of these on the applicant, the approach of Lords Bingham and Walker was not in accordance with the relevant case-law of the Court and inconsistent with the need to give practical and real effect to Article 14. Its only relevance was to the issue of justification. To include it in the question of ambit was to materially restrict the scope of Article 14.

44. The third party further urged the Court to rule that same-sex couples can enjoy "family life" in the same way as opposite-sex couples, as the domestic courts of the United Kingdom had already done in a number of contexts. Given the Court's strong stance against discrimination on grounds of sexual orientation, it necessarily followed that the Court should accept in principle that a same-sex relationship is no less capable of constituting family life than a heterosexual relationship. Whether this was the case in practice would depend on the facts of the case, with the same relevant considerations applying to both types of relationship. Such an approach was necessary if the Convention was to be interpreted consistently. Although the Court had not accepted the point in the *Mata Estevez* case, in the *Karner* case it did extend the protection of Article 8 to a same-sex relationship, albeit under the "home" limb of that provision. To uphold the *Mata Estevez* decision would give rise to a wholly inconsistent and unprincipled distinction between housing provision and the most fundamental of human relationships, i.e. family life. Furthermore, in that decision the Court had noted that there was little common ground among the Contracting States at that point in time with respect to the recognition of homosexual relationships. Since then, however, there had been a clear and

well-documented movement across Europe towards such recognition. This was already reflected in the way the Court had departed from its judgment in the *Fretté* case in the recent *E.B*. judgment.

2. The Court's assessment

45. The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see among many other authorities *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, 29 April 2008). The Court has also explained that Article 14 comes into play whenever "the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed" (see the *National Union of Belgian Police v. Belgium* judgment of 27 October 1975, Series A no. 19, p. 20, § 45), or the measure complained of is "linked to the exercise of a right guaranteed" (see the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21, p. 17, § 39). Moreover, the prohibition of discrimination in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide (*Andrejeva v. Latvia* [GC], no. 55707/00, § 74, ECHR 2009-...).

46. In the domestic proceedings, the applicability of Article 14 was considered principally in relation to Article 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 Article 1 of Protocol No. 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 paragraphs 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 Article 1 of Protocol No. 1 so as to attract the protection of Article 14 of the 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. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X; *Carson and Others* [GC], no. 42184/05, § 63, ECHR 2010-).

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 paragraph 37 above). The applicant in that case complained, *inter alia*, under Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14. Regarding the former, the Commission observed that the second sentence of that provisions 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 Article 1 of Protocol No. 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 Article 1 of Protocol No. 1, but ultimately rejected it as disclosing no discriminatory treatment. The Court sees no reason to adopt a different approach to the applicability of Article 14 in the present case.

48. Moreover, the Court has also had occasion to consider another aspect of the United Kingdom's child maintenance system, in the case of *P.M. v. the United Kingdom*, no. 6638/03, 19 July 2005. At issue in that case was the tax allowance available under domestic tax legislation at that time that was granted to separated and divorced persons with maintenance liabilities. The Government accepted that the situation fell within the ambit of Article 1 of Protocol No. 1 (at § 24). While no issue of taxation arises here, 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 Article 1, payment of which was required by the relevant legislative provisions and enforced through the medium of the CSA (see, *mutatis*

mutandis, *Darby v. Sweden*, 23 October 1990, § 30, Series A no. 187, and *Van Raalte v. the Netherlands*, 21 February 1997, §§ 34-35, *Reports of Judgments and Decisions* 1997-I).

49. The Court therefore finds that the situation falls within the ambit of this provision and that Article 14 is applicable.

50. As regards Article 8, the Court takes note of the fact that in the House of Lords different views were expressed as to whether, having regard to the Court's *Mata Estevez* decision, the applicant could be said to have a family life with her partner and their respective children within the meaning of the Convention, whether at the material time in the present case, in 2001-2002, or at the time of the ruling of the House of Lords in 2006. The applicant and the third party submitted that the Court should depart from the view taken in *Mata Estevez*, relying *inter alia* on legislative changes in some of the Contracting Parties granting more or equal rights to same-sex relationships. The Government indicated that it did not wish to argue against such a development in the interpretation of Article 8, but submitted that any such change should have prospective effect only. The Court considers that, as was noted in the House of Lords, the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships has undoubtedly strengthened since it examined this issue in 2001 in the *Mata Estevez* decision. However, having regard to its conclusion that the case in any event falls within the ambit of Article 1 of Protocol No. 1 to which the Court considers that it most naturally belongs, the Court does not find it necessary to decide whether the facts of the case, which are virtually contemporaneous with those in the *Mata Estevez* case itself, also fall within the ambit of Article 8 of the Convention in its family life aspect. Nor does it find it necessary to decide whether the case falls within the ambit of that Article in its private life aspect.

B. Whether the applicant has suffered discrimination

1. The parties' observations

a. The applicant

51. The applicant argued that according to the Court's case-law, a difference in treatment based on sexual orientation required very weighty reasons if it was to be accepted as compatible with the Convention. The Government had not been able to point to any legitimate aim served by the different treatment of same-sex couples. The reasoning of the majority in the House of Lords did not constitute an objective justification for the purposes of the Convention. The fact that it took much time and effort to draft, discuss and implement the Civil Partnership Act could not justify the previous discriminatory situation. The applicant also criticised the

Government's reliance on the *Mata Estevez* decision. In her view, this had been superseded by the Court's judgment in *Karner*, which should be treated as a statement of general principle applicable to any comparisons between heterosexual and homosexual couples in analogous circumstances. Moreover, as that case arose out of a judgment of the Austrian Supreme Court of 1996, and since the Court did not attach any temporal limitation to the effects of its reasoning, it followed that equal treatment should have been secured as of that date. The applicant rejected the Government's argument that she could not complain of just one element of the child support system. Such an argument was repugnant to any modern equality law paradigm. The mere fact that, at the relevant time, the situation of heterosexual couples was subject to different principles did not explain why no comparison between the two groups was possible. Rather, the difference existed because of discrimination, and so could not be relied upon by the Government to defeat the applicant's claim.

b. The Government

52. The Government maintained that the applicant had not suffered discrimination. In the first place, it argued that the situation of same-sex couples at the material time had not been analogous to that of heterosexual couples since the child support legislation and the wider legislative regime for social security benefits treated the groups according to fundamentally different principles for all purposes. This entailed both beneficial and detrimental effects for the two groups. It was therefore artificial and inappropriate for the applicant to isolate just one element of a much wider interlocking set of rules governing entitlement to a variety of State benefits. In many respects, the situation before the entry into force of the Civil Partnership Act had been advantageous for same-sex couples. To properly assess the applicant's situation, it would be necessary to take account of the entirety of the benefits and burdens in the system as a whole. But as soon as the wider perspective was adopted, the applicant could no longer be regarded as being in a comparable or analogous situation for the purpose of analysis under Article 14. If the applicant's arguments were to be accepted, it would follow that heterosexual couples would be able in turn to complain of any provision of the child support and State welfare system that treated them less favourably than the members of a same-sex couple. This would create a "ratchet effect" whereby in the end everyone would have to be assessed on the best possible basis that anyone might have at any stage in the calculation. This would lead to a situation where everyone would receive every available benefit, and any burden would be disregarded altogether.

53. The Government further submitted that even if the analogy could be established, the difference in treatment was objectively justified by the fact that the child support and welfare systems established a completely different

set of benefits and burdens for same-sex partners and opposite-sex partners. Furthermore, there was at the relevant time, as the Court had said in the *Mata Estevez* case, a wide margin of appreciation for States regarding whether and how to afford formal recognition of same-sex relationships. There had been a progression in attitudes to same-sex couples in recent years in society and in European and domestic law. As had been acknowledged in the House of Lords, though, the whole issue of the recognition of same-sex relationships called for a wider consideration of how the disparate legal regimes should be amended. This culminated in the Civil Partnership Act, which introduced comprehensive and thoroughgoing reform, addressing the myriad of issues raised by the decision to recognise same-sex relationships in the United Kingdom. In the Government's view, this initiative had not been required by the Convention. While there was gathering momentum across Europe on this issue, it was still within the margin of appreciation of States when the United Kingdom introduced the relevant reforms. Even though it was not the first Contracting State to do so, it could not be said that it had lagged behind other Contracting States. It remained the case that most of these either provided a less comprehensive set of rights to same-sex couples, or did not recognise them at all. The scale of the change provided justification for the transitional period of one year between the adoption of the Act and its entry into force, during which time the necessary practical arrangements were made. There was a strong public interest in an orderly transition in relation to complex legal and administrative regimes. The Government concluded that the House of Lords had correctly held that the operation of the detailed child support rules prior to the coming into force of the Civil Partnership Act was objectively justified, and that the difference in treatment of which the applicant complained was within the United Kingdom's margin of appreciation.

2. The Court's assessment

54. As the Court's case-law establishes, for an issue to arise under Article 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. Such a difference in treatment is discriminatory if it lacks reasonable and objective justification, that is to say it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued. There is a margin of appreciation for States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide when it comes to general measures of economic or social strategy (see most recently *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, 16 March 2010). However, where the complaint is one of discrimination on grounds of sexual orientation, the margin of appreciation

of Contracting States is narrow (*Karner*, § 41, *Kozak v. Poland*, no. 13102/02, § 92, 2 March 2010). The State must be able to point to particularly convincing and weighty reasons to justify such a difference in treatment (*E.B.*, § 91).

55. The Court considers that the applicant can, for the purposes of Article 14, compare her situation to that of an absent parent who has formed a new relationship with a person of the opposite sex. The only point of difference between her and such persons is her sexual orientation; in all other relevant respects they are similar (see, *a contrario*, *Carson*, §§ 84-90). Her maintenance obligation towards her children was assessed differently on account of the nature of her new relationship. The difference in treatment at issue in the present case derives from sexual orientation, a ground that falls within the scope of Article 14 (*E.B.*, § 50). It remains to be determined whether particularly convincing and weighty reasons existed for this difference of treatment.

56. The Government have argued that the situation was justified by the differences that existed at the material time between the overall sets of benefits and burdens for same-sex and opposite-sex couples, married or unmarried. The Court considers this more an explanation of the situation in domestic law at that time than a weighty reason that would prevent the difference of treatment at issue in this case from falling foul of Article 14. Bearing in mind the purpose of the regulations, which is to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court perceives no reason for treating the applicant differently. It is not readily apparent why her housing costs should have been taken into account differently than would have been the case had she formed a relationship with a man (see *P.M.*, cited above, § 28).

57. The Government have also argued that the situation complained of fell within the United Kingdom's margin of appreciation at the time, and, as Lord Walker held, up until the passage of the Civil Partnership Act, which did away with the impugned difference in treatment. Since the Court has concluded that sufficient justification was lacking in 2001-2002, it follows that the reforms introduced by the Civil Partnership Act some years later, however laudable, have no bearing on the matter.

58. The Court therefore concludes that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 in this case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicant claimed GBP 5,000 for non-pecuniary damage, referring to the distress, damage and injury caused by the existence of the discriminatory rule and the Government's conduct of and in the proceedings before the Court. As regards pecuniary loss, she stated that she was not in a position to make a claim as the Government had presented new figures in their submissions to the Court, whose accuracy she was unable to assess.

61. The Government did not comment on the applicant's claim.

62. As already indicated above (paragraph 25), it was the Government's contention that the applicant's complaint of a difference in treatment did not ultimately entail any negative material consequences for her. This was because the lower level of maintenance that was applied to her after her successful appeal to the Appeal Tribunal was subsequently raised to an amount that was very close to the original assessment, by means of a departure direction. This direction was given by the Child Support Agency on 25 April 2003. The Secretary of State decided that 51% of the applicant's housing costs should be attributed to her partner, thereby reducing the applicant's exempt income and increasing her liability for maintenance. This took effect retrospectively from 13 August 2001.

63. The Court considers that, having regard to the discretionary element in the operation of the child maintenance system, the degree of pecuniary loss – if any - that may have been caused to the applicant by the discriminatory character of the child support system in the period under consideration is a matter of speculation (see, *a contrario*, *Weller v. Hungary*, no. 44399/05, § 44, 31 March 2009). It does recognise, however, that the applicant experienced a certain level of frustration and distress at the non-recognition of her relationship with her partner. It therefore awards her EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

64. The applicant claimed a total of GBP 16,631.30 for costs and expenses incurred in relation to the Strasbourg proceedings, made up of GBP 7,230.05 in respect of professional fees and GBP 9,401.25 in respect of counsel's fees.

65. The Government did not make any comment on these amounts.

66. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award EUR 18,000.

C. Default interest

67. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;
3. *Holds* that it is not necessary to consider the complaint under Article 14 taken in conjunction with Article 8 of the Convention;
4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage and EUR 18,000 (eighteen thousand euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into British Pounds at the rate applicable at the date of settlement;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 28 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judges Garlicki, Hirvelä and Vučinić is annexed to this judgment.

L.G.
F.A.

CONCURRING OPINION OF JUDGES GARLICKI, HIRVELÄ AND VUČINIĆ

We concur with the finding that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No 1. We also agree that it is not necessary to consider the complaint under Article 14 taken in conjunction with Article 8 of the Convention.

In our opinion, however, the Court's position as to the question how this case is situated within the ambit of Article 8 has not been expressed in sufficiently clear terms. This is not a case of an occasional cohabitation offering no resemblance to patterns of family life. The domestic courts described the relationship in question as a "close, loving and monogamous relationship characterised by long-term sexual intimacy" (§ 5).

One of the issues here is whether such a relationship within a same-sex couple is embraced by the "family life" aspect of Article 8. The traditional answer of this Court has always been negative – as recently as in 2001, the Court reiterated its earlier position that same-sex relations should be addressed only under the "private life" aspect of Article 8 (*Mata Estevez v. Spain*, dec.). Only this summer, in *Schalk and Kopf v. Austria* (judgment of 24.6.2010, § 96) and in *P.B. and J.S. v. Austria* (judgment of 22 July 2010, § 30 – not yet final), did the Court revise its position and, in the latter judgment, declare that "it considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy family life for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in *de facto* stable partnership, falls within the notion of family life, just as the relationship of a different-sex couple would".

J.M. offered a good opportunity to contribute to the emerging change in our case-law. Regrettably, the majority chose to avoid taking a clear position. In paragraph 50 the Court observes that the case is related to situations that took place in 2001-2002 and 2006. The Court confirms that "the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationship has undoubtedly strengthened since it examined the issue in 2001 in the Mata Estevez decision". However, the Court did not find it necessary to "decide whether the facts of the case, which are virtually contemporaneous with those of Mata Estevez case itself, also fall within the ambit of Article 8 in its family life aspect".

Judicial self-restraint is often a virtue, but not in cases in which courts should admit their own mistakes. It cannot be excluded that the Court was wrong already in Mata Estevez. In any case, we should not have refrained from unequivocal confirmation that today, in 2010, the notion of family life can no longer be restricted to heterosexual couples alone.