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By email only: scrutiny@parliament.uk

Closing the "Jurisdictional Gap" in Schedule 1 of the Children Act 1989 by repealing paragraph 2(4) of Schedule 1 of Children Act 1989 through Courts and Tribunals Bill 2026

Dear Mr. Hook,

I would be grateful if you could please immediately send this important submission to the Public Bill Committee ("the Committee") who are presently considering the Courts and Tribunals Bill 2026 ("the Bill"). I would respectfully ask for this submission to be properly considered and published by the Committee with a view to a formal recommendation made by the Committee to Parliament to repeal paragraph 2(4) of Schedule 1 of the Children Act 1989 for the reasons provided in this submission.

1. EXECUTIVE SUMMARY

- This submission identifies a critical legislative conflict: while clause 17 of the Bill seeks to protect children by removing the presumption of parental involvement from the Children Act 1989, paragraph 2(4) of Schedule 1 to the Children Act 1989 continues to penalise children based on nothing more than their parents' cohabitation status. This discriminatory restriction means that whilst adult disabled children of separated parents can apply for financial relief against their parents, the adult disabled children of parents who live together cannot. This is contrary to both Article 14 of the European Convention on Human Rights and is also strikingly and concerningly inconsistent with the legislation and practice of

every other country in the world (see Table of Countries at Exhibit 2 prepared by our Counsel from Brick Court Chambers).

- **Human Rights:** The “living together” restriction is a form of status based discrimination which breaches Article 14 of the European Convention on Human Rights and is also inconsistent with the Bill’s Equalities Statement. It treats children of “together parents” as lesser in the eyes of the law regarding their financial security. This outdated form of discrimination has a particularly severe and unfair effect on adult disabled children with complex needs who lack the means to support themselves and are unable to apply for financial relief against their parents.
- **Coercive Control:** By restricting financial provision based on parents’ living arrangements, the law enables financial abuse. Repealing paragraph 2(4) of Schedule 1 to the Children Act 1989 is a necessary step to align with the Bill’s goal of protecting victims of financial abuse.
- **Court efficiency:** Removing this outdated restriction will streamline proceedings, moving the focus from parental status to child welfare, thereby supporting the Bill’s objective to reduce court delays and “modernise” justice.
- **Aligning our child maintenance laws with the rest of the world:** The Committee will respectfully note from the Table of countries at Exhibit 2 that the UK is the only country in the world which practices this outdated form of discrimination. In fact, even Scotland does not practise this outdated form of discrimination based on parents’ living and marital status. This is an extremely strong evidence based reason for the Committee to formally recommend that Parliament remove and repeal the discriminatory restriction in paragraph 2(4) of Schedule 1 to the Children Act 1989.

2. INTRODUCTION

1. I am writing to you as the solicitor who represented our client, Mr. Faiz Siddiqui, in the high profile and highly publicised Appeal to the Court of Appeal in 2021 (the Appeal was heard by Vice-President Underhill, Lord Justice Dingemans and Lord Justice Moylan) in the case of *Siddiqui v Siddiqui [2021] EWCA Civ 1572* which concerned the compatibility of Schedule 1 of the Children Act 1989 and the Matrimonial Causes Act 1973 with Article 14 of the European Convention on Human Rights, which relates to discrimination.
2. I understand that the Children Act 1989 is presently under review in the proposed Courts and Tribunals Bill 2026 with a broad mandate to reduce “unfairness” and “inequality” within the Children Act 1989 in accordance with the Law Commission Report published

in September 2025 which regarded it as being “out of date”, “unfair” and “requiring a unified framework”. We also understand that this matter has now been passed to the Public Bill Committee. We have an extraordinarily important issue which we wish to raise with you and respectfully ask for your support on.

3. THE ISSUE

3. As you may be aware, under Schedule 1 of the Children Act 1989, disabled adult children may – in some circumstances – apply for financial maintenance from their parents. However, the opportunity to apply for such support is subject to an unexplained and unjustifiable carve out. Under Schedule 1, Paragraph 2(4) of the Children Act 1989, adult disabled children are barred from applying for financial maintenance if their parents still live together. By way of contrast, where their parents are separated, they may apply for maintenance.
4. This creates a "jurisdictional gap" where the some of the most vulnerable—those with lifelong disabilities in families where the parents have not separated—have no legal recourse to seek parental support, whereas adult disabled children of separated parents do. This is quite remarkably the case even where the adult disabled child lives entirely separately from his parents, as our client does, such that his/her parents’ living arrangements with one another are completely irrelevant to his/her disability related needs. The discrimination concerned in Schedule 1 of the Children Act 1989 is highly deplorable, outdated and is inconsistent with adult child maintenance provisions of all of the countries we have researched, including all European Countries, North America and several other Asian and African states (see Table of Countries at Exhibit 2). You will respectfully note that the law in this country is also inconsistent with the law in Scotland where adult disabled children are entitled to apply for relief against their parents irrespective of their marital and/or living status.
5. The international comparison table with that list of countries which has been prepared by our Expert human rights Counsel from Brick Court Chambers is attached below at Exhibit 2 and makes for extremely concerning reading. This shows that England is very much the “odd man out” in terms of practicing this abhorrent and out of date discrimination based on parental marital and/or living status and urgent reform is now needed to bring Schedule 1 of the Children Act 1989 in line with other nations across the world.

4. THE LEGAL VACUUM (SIDDIQUI V SIDDIQUI [2021] EWCA CIV 1572)

6. The Court of Appeal’s judgment in *Siddiqui v Siddiqui [2021] EWCA Civ 1572* was extremely strange to say the least, according to all of the Leading Human Rights Counsel we have spoken to about this matter, including those who have previously and

successfully achieved section 4 Human Rights Act 1998 declarations of incompatibility under Article 14 of the European Convention on Human Rights in the High Court, Court of Appeal and UK Supreme Court. Top Leading Human Rights Counsel such as Hugh Southey KC, who personally led our case in the Court of Appeal, Helen Mountfield KC and Vikram Sachdeva KC have all understandably expressed incredulity and alacrity at the perverse judgment made by Lord Justice Moylan. Furthermore, our client recently attended a Justice event on Friday 7th November 2025 and met Supreme Court Justice Lord Briggs with whom he discussed his case. Lord Briggs was equally incredulous at the perverse result reached by the Court of Appeal and could not see any justification for the decision they had reached.

7. In his lead judgment Lord Justice Moylan (a judge with a family law background rather than a specialist Human Rights one, which is plainly what this Appeal required) quite remarkably failed to find that a child maintenance statute came within the ambit of the Article 8 right to respect for family life or Article 1 Protocol No. 1 right to property. That was a “very interesting” result to say the least given that UK statutes with much less connection to the Article 8 right to respect for family life, for example housing rent statutes, have been found to come within the ambit of Article 8 right to respect for family life. There was also no question that the right to maintenance represented a form of “property” which came within the ambit of Article 1 of Protocol no. 1 right to respect for property and/or personal possessions.
8. Furthermore, the Court of Appeal failed to find an Article 14 “status” as a basis for establishing the discrimination based on the fact that there was no personal and identifiable characteristic, even though it is well-established in the European Court’s caselaw that a status can be based on a “status in law” and in relation to another person such as being the adult disabled child of together/married parents as opposed to the adult disabled child of separated/divorced parents. The result was so perverse that even the other side’s human rights Counsel (Jennifer MacLeod of Brick Court Chambers) wrote an article shortly after the Court of Appeal’s judgment was handed down on 5 November 2021 to express her sheer incredulity at the result reached by the Court of Appeal (<https://www.brickcourt.co.uk/news/detail/court-of-appeal-upholds-limits-on-child-maintenance-for-adults>) which we quote from below:

*“The Court of Appeal upheld the judgment below, finding that there was no discrimination. **Unusually**, the Court dismissed the Claimant’s application on the ground that he did not have a relevant “status” under Article 14, that he was not in an analogous position to those adults who might receive child benefit, and that his claim did not fall within the ambit of a relevant right. As such, the judgments demonstrate that there are indeed limits to the engagement of Article 14, limits*

which are rarely found in the caselaw (our emphasis)."

9. It is our considered view that Lord Justice Moylan quite deliberately and unfairly took an unjustifiably narrow interpretation of the law with a view to depriving the Applicant and millions of other severely disabled people around the country vital access to life saving relief purely to preserve the "status-quo".
10. We also note that Lord Justice Moylan has made a number of previous judgments all of which have been in support of the institution against principles of natural justice and fairness, including a hospital's "right" to terminate life-saving support to a young baby, causing her death. We are content to provide these judgments upon request. You will note that some of these judgments have also resulted in complaints to the Judicial Conduct Investigations Office by the individuals involved in these lawsuits.
11. We believe that Lord Justice Moylan's views and judgment are completely out of sync with modern thinking, are completely out of date with the Human Rights Act 1998 and the much more progressive and egalitarian society in which we now live. It is our unequivocal view that Lord Justice Moylan should have been applying Article 14 of the ECHR correctly and respecting the rule of law. It is deeply regrettable and disgraceful that he has failed to do so.
12. However, the Court of Appeal in Siddiqui v Siddiqui [2021] EWCA Civ 1572 did at least acknowledge this anomaly. Lord Justice Moylan explicitly stated that if the law fails to provide for this group, it is a **matter for Parliament**, not the courts. Lord Justice Underhill also stated the same at paragraph 137 of the Court of Appeal's judgment where he described this state of affairs as being the "*considered policy of Parliament*" and at paragraph 138 of the same judgment where he stated that "*Judgments of that kind are peculiarly a matter for Parliament*". By introducing the **Courts and Tribunals Bill**, the government has now opened the door to the Children Act 1989 to tackle this anomaly.
13. It is important to note that no justification has ever been put forward for the discrimination in question either in the 1982 Law Commission Report or the Children Bill which introduced the Children Act 1989 into UK law. In 1982 the Law Commission considered the provisions which later became the relevant provisions of the CA 1989. It described the rationale for those provisions as to '*assimilat[e] the legal position of marital and non-marital children*' by '*confer[ring] on all children of 18 and over... a new right to apply at their own instance for financial provision if... there are special circumstances*': Law Commission Report, 'Family Law: Illegitimacy', 1982 (Law Com No 118) §6.30. The Law Commission recommended that this right "*should only be available if the parents relationship has broken down*". To the extent that any underlying rationale for this

conclusion can be discerned, the Law Commission noted that the changes it was recommending were “*primarily concerned to remove the legal disadvantages of illegitimacy*” (they were not concerned with the difference between the adult children of married or unmarried parents).

14. The Commission went onto conclude that the best evidence of the breakdown of a relationship between married parents would be the fact that the parents were no longer living together. Accordingly, it recommended that the right to apply for financial relief should turn on whether the parents were cohabiting. The Law Commission might well be right that the best evidence or proxy for marital breakdown is the fact that parents are no longer cohabiting. However, the Law Commission did not identify any clear rationale for the difference in treatment between adult disabled children of together/married parents and the adult disabled children of divorced/separated parents (the “Difference in Treatment”) since its role was to address the “*legal disadvantages of illegitimacy*” rather than consider the broader issues caused by the Difference in Treatment.
15. In summary, therefore, the Law Commission set out no reasons for the Difference in Treatment in either its 1969 or 1982 reports. It only noted that such differences existed and suggested that what became the Children Act 1989 was not the proper place to address them. Finally, no policy rationale for the Difference in Treatment was identified by the Lord Chancellor and Solicitor General when the Children Bill which became the Children Act 1989 was introduced into Parliament. They merely described the Difference in Treatment as providing for ‘applications by children over the age of 18 whose parents are separated and....who have special needs, such as would arise from some form of physical handicap’. This was stated by the Lord Chancellor on the Second Reading in the Lords on 27 November 1986 (Hansard, Vol 482, Col 651) and also by the Solicitor General on the Second Reading in the Commons on 7 April 1987 (Hansard, Vol 114, Col 257).
16. There are a number of important points which can be made in relation to the above background materials to the Children Act 1989:
17. *First*, at their highest, this background material: (i) describes the Difference in Treatment; and (ii) explains that the amendments which gave rise to the current state of the UK Legislation were not the proper vehicle by which to remedy that difference. They do not justify, explain or set out any underlying policy rationale for it.
18. *Second*, the needs of adult children with disabilities have no logical connection with whether their parents live together and/or are divorced. The adult child may live alone without either parent (as Mr. Siddiqui does). In such a case, the state of their parents’

relationship has no bearing on his or her needs arising from their disability. The same may well also be true of a child living with one or both of their parents.

19. *Third*, in the absence of any rationale for the Difference in Treatment, it appears to rest on antiquated perceptions of the consequences and greater needs that might follow from the fact that a child's parents are not cohabiting or are divorced. In the decades since the making of the UK Legislation, the range and diversity of living arrangements has expanded greatly. It has always been possible for parents who are married or in a relationship to live in separate households. Such arrangements have become more common since the Children Act 1989 was enacted. To the extent that the Difference in Treatment rests on historic views about what is 'normal' in family relationships, that provides no proper public policy rationale for it.
20. *Fourth*, it produces arbitrary distinctions. Why – at least one reading of Schedule 1 paragraph 2(4) should someone in the position of Mr. Siddiqui be better off just because one of his parents are dead such that he can apply for relief against the surviving parent?
21. *Fifth*, the Law Commission reports and enactment of the Children Act legislation in 1989 came before disability discrimination was banned under the Disability Discrimination Act 1995 which officially recognised disability as a basis for discrimination. This might explain why disability was never considered in relation to Schedule 1 of the Children Act 1989, just as it was not considered in relation to the Matrimonial Causes Act 1973.

5. PROPOSED AMENDMENT TO CHILDREN ACT 1989

22. The amendment needed to remove the outdated discrimination from Schedule 1 of the Children Act 1989 is extremely simple. All that needs to be done is to remove the exclusionary clause at paragraph 2(4) of the Children Act 1989 and to insert appropriate remedial wording to assist those who have been previously and adversely affected by this discriminatory paragraph:

Draft Amendment: Children Act 1989 (Schedule 1)

Amendment to Schedule 1, Paragraph 2 (Financial provision for persons over eighteen)

- "(1) In Schedule 1 to the Children Act 1989, paragraph 2, sub-paragraph (4) (restriction on orders where parents are living together) is hereby repealed.
- (2) This section has retrospective effect.
- (3) Any order for costs made in proceedings under Schedule 1 to the Children Act

1989 which were dismissed or otherwise unsuccessful solely by operation of paragraph 2(4) of that Schedule is hereby vacated.

(4) A person subjected to a costs order vacated by subsection (3) is entitled to the discharge of any remaining liability under that order.”

23. In our view and in the interests of fairness, the amendment should also apply retrospectively in relation to all litigants, including our client, who have previously and unfairly been denied relief and had adverse costs orders made against them on a purely jurisdictional basis. We have therefore suggested some specific wording above to address this point. The **Member’s Explanatory Statement** could be: “This new clause repeals the restriction in Schedule 1 of the Children Act 1989 that prevents financial orders being made while parents live together and provides a retrospective remedy to vacate costs orders previously made against applicants due to this restriction”.

6. STRATEGIC JUSTIFICATION

24. **Cost-Neutral for Taxpayers:** This reform does not require new government spending. It simply allows the court to order wealthy parents to support their adult disabled children, potentially **reducing the burden on the DWP and the benefits system.**

25. **Consistency:** The Bill is already amending Section 1 of the Children Act to protect vulnerable and disabled adult children from financial abandonment.

26. **Equality of Status:** Maintaining a bar based solely on the marital or cohabitation status of parents is an "accident of history" that fails the modern test of fairness. This is unequivocally demonstrated by the table of countries attached to this letter which do not practise this abhorrent and outdated form of discrimination.

7. NEXT STEPS IN LIGHT OF THIS LETTER

27. Our client has suffered abuse and neglect at the hands of his cruel and inhumane multimillionaire parents for many years. Most recently, they have completely cut off all communication with him for the past 2 years and have once again substantially reduced his financial support, thereby causing a grave and imminent danger to his health and life. There have also no doubt been millions of disabled children all over the country who have suffered financial abuse at the hands of their parents as a result of the unjust and discriminatory restriction in paragraph 2(4) of Schedule 1 of the Children Act 1989.

28. The Court and Tribunal Bill cannot simultaneously seek to promote equality and fairness

in the Children Act 1989 by removing the presumption of parental involvement and yet fail to address the financial abuse which arises from the very clearly discriminatory restriction in paragraph 2(4) of Schedule 1 of the Children Act 1989.

29. We would therefore now respectfully ask that the Public Bill Committee properly takes this submission into consideration, publishes this submission and makes a formal recommendation to Parliament that the discriminatory restriction in paragraph 2((4) of Schedule 1 of the Children Act 1989 be repealed.

In light of the obvious importance of this matter, we would be grateful if this submission could be shared with the Public Bill Committee as soon as possible.

Yours sincerely,



Dale Langley

Dale Langley Solicitors

Enclosures:

1. Hugh Southey KC's Grounds of Appeal and Skeleton for Court of Appeal hearing in 2021
2. Global international table of countries showing that the UK is a rogue outlier state in terms of discrimination against adult disabled children based on their parents' relationship and/or living status
3. Judgment in Canadian case of *Ryan v Pitchers*, 2019 ABQB 19 where precisely the same discrimination in question was found to be discriminatory
4. Commentary on *Ryan v Pitchers*, 2019 ABQB

EXHIBIT 1

In the Court of Appeal
Civil Division

B6/2020/1675

On appeal from:
High Court of Justice
Family Division

ZC20P04055

FZM

- v -

RAS and JDS

GROUND OFS OF APPEAL

1. In a judgment delivered on 30 September 2020 Sir James Munby concluded that he had no jurisdiction to consider an application made by an adult child to apply for financial support from parents who remain married and living together. The Appellant submits that Sir James erred when he concluded that the European Convention on Human Rights (“the Convention”) did not entitle him to make such an application. Without prejudice to the generality of that submission, the Appellant submits that Sir James 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.

HUGH SOUTHEY QC

MATRIX

21 October 2020

In the Court of Appeal
Civil Division

B6/2020/1675

On appeal from:
High Court of Justice
Family Division

ZC20P04055

FZM

- v -

RAS and JDS

**APPELLANT’S SKELETON ARGUMENT IN SUPPORT OF
SUBSTANTIVE APPEAL**

25 January 2021

References in square brackets are to the judgment of Sir James Munby unless the context makes it clear that the reference is to some other judgment.

Time estimate

Hearing: 1 day

Advanced reading 1 day

Essential reading:

Skeleton arguments

Judgment of Sir James Munby

Order of McCombe LJ dated 18 December 2020

Issues that arise

1. This appeal arises from a ‘novel’ application that raised issues that Sir James Munby appeared to accept were both complex and important [2]. That application argued that it was possible for an adult child to apply for financial support from parents who remain married and living together. The Appellant submits that Sir James erred when he concluded that the European

Convention on Human Rights ('the Convention') did not entitle him to make such an application. The issues that arise in this appeal are:

- a. Whether the subject matter comes within the ambit of a right protected by the Convention. (ground a.)
 - b. Whether any status comes within the scope of article 14 of the Convention ('article 14'). (ground b.)
 - c. Whether there is justification for the differential treatment. (an issue that arises if the Appellant succeeds with grounds a. and b. as Sir James left open this issue)
 - d. Whether relevant statutory provisions can be read compatibly with the Convention. (ground c.)
 - e. To the extent that the relevant statutory provisions cannot be read compatibly with the Convention, whether compatibility with article 14 can be achieved through the use of the courts' inherent powers. (ground d.)
2. On 18 December 2020 McCombe LJ ordered a rolled-up hearing in relation to grounds a. and b. (i.e. issues a, b and c). Permission to appeal was refused in relation to grounds c. and d. (i.e. issues d. and e.). The Appellant has applied to re-open that order and the arguments are set out below.

Factual background

3. The relevant factual background is set out by Sir James Munby in his judgment ([3] onwards). It is accepted that this was appropriately brief in light of the legal issues that arise. The Appellant highlights the following matters:
- a. The Appellant has 'mental health disabilities' and other difficulties [6]. Sir James Munby was willing to accept that the Appellant was vulnerable for the purposes of the Court's inherent jurisdiction [6].
 - b. The Appellant's parents are married and live together in Dubai [6].
 - c. The Appellant's parents have provided financial support. However, the relationship has deteriorated and support has significantly reduced [7].

Judgment

4. The Appellant highlights the following aspects of the judgment of Sir James Munby:
 - a. The subject matter does not fall with the ambit of the Convention as no Convention right is engaged [79].
 - b. Any discrimination is not on the basis of a status that engages article 14 [87].
 - c. It was unnecessary to determine whether any differential treatment is justified.
 - d. The relevant statutory provisions cannot not be read consistently with the Convention [60].
 - e. It was not open to the court to exercise its inherent jurisdiction [137].

Statutory framework

5. Section 23(1) of the Matrimonial Causes Act 1973 ('the 1973 Act') provides, so far as is relevant, that:

(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, that is to say - ...

(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; ... subject, however, in the case of an order under paragraph (d) ... to the restrictions imposed by section 29(1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen.

6. Section 29 of the 1973 Act provides, so far as is relevant that:

(1) Subject to subsection (3) below, no financial provision order ... shall be made in favour of a child who has attained the age of eighteen. ...

(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.*

7. Sections 23(1) and 29 of the 1973 Act enable adult children of divorced parents to apply for financial support if the conditions in section 29(3) are met (*Downing v Downing (Downing Intervening)* [1976] Fam 288 at 293E). They plainly do not apply to the Appellant.

8. Section 27 of the 1973 Act provides, so far as is relevant, that:

(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. [Emphasis added]

It is accepted that the natural meaning of the emphasised words means that the jurisdiction of this Court to consider applications by children aged over 16 years of age does not apply in this case because it only applies where there is an order that can be varied. As a consequence, the Appellant cannot rely on this provision unless he can rely on human rights arguments. However, had one of his parents successfully applied for an order under section 27(1), he could have applied for an order. He is worse off because his parents were able to agree financial provision for him and so did not need to apply under section 27(1).

9. Paragraph 2 of schedule 1 to the Children Act 1989 ('the 1989 Act') provides, so far as is relevant, that:

(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 sub-paragraph (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.*

(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.* [Emphasis added]

It is accepted that the natural meaning of the emphasised words means that the jurisdiction of this Court to consider applications by children aged over 18 years of age does not apply in this case because it only applies where the child's parents have separated.

10. The matters above demonstrate that the Appellant would be able to apply for financial support from his parents if:
 - a. His parents were divorced.
 - b. There was already an order for financial support that had been made under section 27 of the 1973 Act.
 - c. His parents were separated.

11. The analysis above is supported by The Family Court Practice ("The Red Book") 2020 Edition, which states that:

... the adult child whose parents are living together and for no valid reason are refusing to support him or her through university is in a markedly worse situation than an adult child whose parents have separated. [2.223]

The implication appears to be that this is an anomaly.

12. Obviously both the 1973 Act and the 1989 Act limit the circumstances in which an adult can apply for financial support from his parents. One context is if there is 'special circumstances'. 'Special circumstances' include disability (*C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1 at 3). Consistent with this, in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 Hale J held that:

There is a long line of authority, beginning with Chamberlain v Chamberlain [1973] 1 WLR 1557, and continuing with Lilford (Lord) v Glynn [1979] 1 WLR 78, (1978) FLR Rep 427 and Kiely v Kiely [1988] 1 FLR 248, that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be.
(p155)

This demonstrates that it is arguable that the Appellant's vulnerability means that he would be entitled to financial support if his parents were separated.

13. The origins of the limitations on children seeking maintenance from their parents was summarised by Sir James Munby. In essence:
- a. A Law Commission report published in July 1969 and entitled *Family Law: Report on Financial Provision in Matrimonial Proceedings* was the origin of the 1973 Act [27]. This report expressly concluded that it was not desirable to give a child a power to take his parents to court because, for example, he wanted to embark on studies that they were not prepared to support [28]. As a consequence, section 23(1) and 29 only enabled an adult child to seek support when his parents were seeking a divorce or had obtained a divorce and so had commenced litigation.
 - b. Section 27(6A) of the 1973 Act was enacted by the Domestic Proceedings and Magistrates' Courts Act 1978 ('the 1978 Act'). That recognised that children might have grounds to seek financial support. It enabled them to commence litigation.
 - c. A Law Commission report published in December 1982 and entitled *Family Law: Illegitimacy* was the origin of paragraph 2 of schedule 1 to the 1989 Act [29]. It essentially concluded that the 1973 Act only applied to children whose married parent's relationship had broken down. The law needed to be extended to cover the children whose parents were unmarried. However, in the context of reforms intended to 'remove the legal disadvantages of illegitimacy', legal reform should not go further [33].

Approach to article 14

14. There are five issues that arise when considering whether article 14 is violated (*R (S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196 at [42] – [43]). Those issues are:
- a) Do the matters complained about come within the ambit of a right protected by the Convention?
 - b) Whether there is a difference in treatment?
 - c) Is there differential treatment on a ground potentially prohibited by article 14? This requires consideration of whether the difference in

treatment is based upon a status that comes within the scope of article 14.

- d) Whether the others who are said to receive differential treatment are in a truly analogous situation?
- e) Is the differential treatment justified?

- 15. It is accepted that there is often some considerable overlap between these issues, particularly regarding the last three questions posed (*S* at [43] and *R (Stott) v Secretary of State for Justice* [2020] AC 51 at [137] and [148]).
- 16. In this case it appears that no issue was raised regarding whether there was a difference in treatment and whether the groups were analogous. As a consequence, it is the other 3 issues identified in *S* that are addressed below (although Sir James Munby did not rule on justification).

Ambit

- 17. The concept of ambit must be widely construed (*R (JCWI) v Secretary of State* [2020] EWCA Civ 542 at [100]). In *EB v France* app 43546/02 the Grand Chamber of the European Court of Human Rights (‘the ECtHR’) held:

The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. [48]

In *JCWI*, Hickinbottom LJ held:

... where a positive measure of the state is being considered, it is sufficient that that measure has more than a tenuous connection with the core values protected by the substantive article [104].

These matters mean that it is important to focus on cases where the subject matter has been found to come within the ambit of a Convention right rather than upon cases where the issue was whether a substantive Convention right has been engaged. That is contrary to the approach of the Respondents, which has generally and incorrectly been to focus on whether the substantive rights in issue are engaged.

18. The ECtHR has accepted that discrimination in the context of litigation comes within the ambit of article 6 of the Convention ('article 6') (*Schuler-Zgraggen v Switzerland* app 14518/89 at [64] onwards). This is true even where the subject matter would normally be outside the scope of article 6 because it would fall within states' competences [65].
19. In *Aldeguez Tomás v Spain* app 35214/09 the ECtHR held that the provision of survivor pensions to some but not all who enjoyed family life with a deceased came within the ambit of article 8 of the Convention ('article 8') [76]. That is presumably because the state has sought to address the financial need of some but not all family members.
20. In *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 the Court of Appeal applied *Aldeguez Tomás* (as well as other authorities) to hold that bereavement damages under the Fatal Accidents Act 1976 come within the ambit of article 8. That was because:
- ... it is apparent from the very fact that bereavement damages are limited in section 1A(2)(a) to the spouse or civil partner of the deceased that bereavement damages are specifically intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners. It inevitably follows that the scheme for bereavement damages is properly regarded as a positive measure, or modality, by which the State has shown respect for family life, a core value of Article 8 [72]*
21. In *Fabris v France* app 16574/08 the Grand Chamber of the ECtHR held that inheritance rights came within the ambit of article 1 of the first protocol to the Convention ('A1P1'). It stated:
- ... the applicant has been denied all or part of a particular asset on a discriminatory ground covered by Article 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 [52]*

22. The matters above all suggest that the subject matter of this claim comes within the ambit of a Convention right. In support of that submission, the Appellant relies on the following matters:
- a. The state has gone beyond what it is required to do by the Convention in circumstances in which there is a more than tenuous link with the Convention (*JCWI* and *EB*).
 - b. Although it is accepted that article 6 does not establish a right for someone such as the Appellant to seek financial support from his parents, where there is a right to bring such proceedings that right comes within the ambit of article 6 (*Schuler-Zgraggen*). As a consequence, differential rights to financial support come within the ambit of article 6.
 - c. The family life that some children enjoyed with their parents is recognised by enabling them to seek financial support. Respect is shown for family life by enabling children to turn to their parents for support in accordance with general expectations as to the continuing duties parents owe to children. Where others are unable to seek financial support, that comes within the ambit of article 8 (*Aldeguer Tomás* and *Smith*).
 - d. Sir James Munby did not rule on whether the Appellant would have been awarded financial support if he came within the terms of the 1973 Act and the 1989 Act. As jurisdiction was at issue, it has to be assumed he would have been. That implies that the matters come within the ambit of A1P1 (*Fabris*). If the Appellant is correct, he has been denied an asset he would have otherwise enjoyed on discriminatory grounds.
 - e. The Respondents place significant weight on the findings of Sir James Munby based on *JM v United Kingdom* app 37060/06. The fact that article 14 was engaged on a particular basis in *JM* is no answer to the Appellant's arguments. *JM* does not and could not purport to be an exhaustive statement of the circumstances in which article 14 applies. As a consequence, even if it can be distinguished, that is no answer to the Appellant's arguments. It is also no answer to the Appellant's arguments based on other Convention articles.

- f. Ultimately the critical point is that it is inconceivable that discrimination regarding financial relief for children on the basis of gender or race would not engage article 14 (*R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 at [66]). Given the potential importance of such rights to matters such as education that potentially depend upon financial support, it is inconceivable that financial support determined on the basis of race or gender would not violate article 14. Although this case is not about gender or race, if matters are within ‘ambit’ in a case where gender or race is raised (as they are), that implies that they are within ambit generally including in the context of this case (*Clift*).
23. It is unfortunate that the case law above appears not to have been cited to Sir James Munby. It is submitted that the approach he adopted was flawed and inconsistent with that case law. In particular, he concluded that the matters did not come within the ambit of any Convention right as no Convention right was engaged [79]. The submissions above demonstrate that this is the wrong approach because the approach to ambit is far wider.

Status

24. There is no case law directly on point. In particular, it is accepted that there are factual distinctions between the case law relied on by the Appellant and his case. As a consequence, the Appellant has sought to focus on the principles established by that case law.
25. The approach to ‘other status’ that engages article 14 was considered recently by the Supreme Court in *Stott*. The Supreme Court reached the following conclusions:
- a. A generous meaning ought to be given to ‘other status’ ([56(i)] and [81]).
 - b. Personal characteristics need not be innate [56(iii)].
 - c. It is unlikely to be helpful to focus on whether personal characteristic was defined by the differential treatment of which the person complained [75].

d. The characteristic need not be ‘analogous’ to those listed in article 14 [80].

26. Status can be defined by law (*Bab v UK* app 56328/07 at [45]). In *Clift v UK* app 7205/07 the ECtHR appeared to accept that there was an ‘other status’ present where:

... the distinction of which the applicants complained was between holders of outline planning permission who benefited from new legislation and holders of outline planning permission who did not [58]

It also noted that:

... a father whose paternity had been established by judicial determination, had a resulting “status” which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined. [58]

27. In this case, focusing on 1989 Act, the status in issue is that of an adult child whose parents continue to live together. In support of that submission, the Appellant relies on the following matters:

- a. The law has plainly drawn a line that distinguishes between those whose parents who live together and those whose parents have separated. Where the law draws such a line, it gives rise to a form of status (*Bab* and *Clift*).
- b. To the extent that the line defines the treatment, that does not prevent article 14 applying (*Stott*). In any event, the line exists independently of treatment. Society recognises that there is a distinction between couples who co-habit and those who separate.
- c. It should be remembered that a broad approach should be adopted to article 14 (*Stott*).

28. Alternatively, focusing on the 1973 Act, the status is that of an adult child whose parents have not divorced. The factors identified in the paragraph above apply. In particular, society recognises that there is a distinction between couples married and those who are divorced.

29. It is not surprising that legal status based on the marital status of parents comes within the scope of article 14. It is well established that discrimination based on legitimacy is objectionable (e.g. *R (Johnson) v Secretary of State for the Home Department* [2017] AC 365 at [30]). If discrimination based on the fact that a person's parents are unmarried comes within the scope of article 14, it is difficult to see why discrimination based on the fact that parents are cohabiting does not.
30. Indirect discrimination comes within the scope of article 14. In *DH v Czech Republic* app 57325/00 the Grand Chamber of the ECtHR held 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 [175]
31. Health status and disability are grounds of discrimination that come within the scope of 'other status' for the purposes of article 14 (e.g. *Kiyutin v Russia* app 2700/10 at [57]).
32. The provisions challenged amount to indirect discrimination on the grounds of health status and disability. As noted above, the provisions in question only permit application for financial support in limited circumstances. One of those is disability (*C v F*). As consequence, limiting access to that financial support so that some disabled children cannot access that support is likely to have 'disproportionately prejudicial effects' on that group.
33. Again, it is unfortunate that the case law above appears not to have been cited to Sir James Munby. It is submitted that the approach he adopted was flawed and inconsistent with that case law. For example, there was no consideration of the possibility of indirect discrimination.

Justification

34. In assessing any justification, it is the differential treatment that must be justified, and not the treatment itself (*Bank Mellat v HM Treasury (No 2)* [2014])

AC at [27]) (See also *R (DA) v Secretary of State for Work and Pensions* [2020] 1 All ER 573 at [54]).

35. In *DA* the Supreme Court held that challenges to benefit schemes based on article 14 need to demonstrate that the difference in treatment is ‘manifestly without reasonable foundation’ [58]. Despite strong dissents from Lord Kerr and Lady Hale on this issue, that approach was upheld by a majority of the Supreme Court in *DA*. However, Lord Wilson (with whom Lord Hodge and Lord Hughes agreed) also noted:

The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable. [66]

36. The Appellant is not seeking benefits. However, it might be said that what is in issue is a ‘social measure’. That would suggest that the ‘manifestly without reasonable foundation’ test applies [58]. In any event, the ‘manifestly without reasonable foundation’ test is likely to produce the same result as a balancing exercise (*JCWI* at [141]).

37. In *Re McLaughlin* [2018] 1 WLR 4250 the Supreme Court held that a benefits scheme that discriminated on the basis of parent’s marital status was a disproportionate interference with article 14 rights. Lady Hale noted that:

The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another. [39]

Similarly, Lord Mance noted that:

A policy in favour of marriage or civil partnership may constitute justification for differential treatment, when children are not involved. But it cannot do so in relation to a benefit targeted at the needs and well-being of children. [52]

38. Similarly, in *Johnson* it was held that ‘very weighty reasons’ are required to justify discrimination against children born outside of wedlock [30]. One reason for that must be that their needs and interests are no different.

39. In *Kiyutin* the ECtHR held in the context of discrimination based on health status that:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. [63]

40. The Appellant submits that there is no adequate justification for the measures in question. In support of this submission, the Appellant relies on the following matters:

- a. The issue here is whether a fair balance has been struck in enabling some adult children can obtain financial support from their parents but not others (*Bank Mellat, DA and JCWT*). In that context it is submitted that a particularly powerful justification is required. If that is required in contexts where there is discrimination against the children of unmarried parents, it is difficult to see why the same approach should not be applied in relation to the children of married parents (*Johnson*).
- b. Despite initial policy concerns that led to the enactment of the 1973 Act, it was plainly decided when the 1978 Act was enacted that certain children should be able to apply for support from their parents. As a consequence, those initial concerns about children not being able to bring proceedings against their parents no longer apply. That is hardly surprising. Exceptionally there may be good reason why adult children have a claim against their parents. For example, certain disabled children may struggle to maintain their lifestyle without support. In addition, adult children may need support to continue their education. It is reasonable to enable them to make a claim against their parents rather than the state.

- c. A right for adult children to apply for support when their parents did not divorce was first enacted in section 27(6A) of the 1973 Act by the 1978 Act. That only enabled a limited group of children to apply for support. It is unclear why that should have been the case. The Law Commission report entitled *Family Law: Illegitimacy* appeared to acknowledge that there were issues about the limitations of the 1973 Act. However, it did not wish to address all of those limitations as it was concerned with illegitimacy. This demonstrates that little consideration appears to have been given to the discrimination in issue. It is an accident of history.
- d. The Respondents submitted the legislative purpose in issue 'is to regulate financial provision on relationship breakdown or where there has been financial instability' [92]. That argument describes the statutory scheme but not its justification. In particular, the problem with the justification identified by the Respondents is that it does not explain why those whose parents' relationship has broken down are more likely to need financial support. 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. There is a need to focus on the needs of children in this context (*McLaughlin*).
- e. The absence of a justification becomes clearer when the 1973 Act and 1989 Act are read together. These provisions recognise that adults may need financial support from their parents. They provide a scheme for the provision of financial support for adult children in need that is only not available where a child's parents continue to live together and have not divorced. That means that it is appropriate to focus on whether there is any distinction between the needs of children who can obtain support and those who cannot. As noted, above there is no reason to believe that issues such as whether parents have separated have any implications for needs.
- f. A further matter that demonstrates a lack of justification is the fact that either of the Appellant's parents could apply for support for him under section 27(1) of the 1973 Act. It is difficult to see why the

Appellant is dependent upon his parents to apply for financial relief on his behalf when he has capacity to apply to the Court himself.

- g. The absence of a justification is also clear from the fact that the Appellant could apply for support if one of his parents died. They would no longer be living together. It is difficult to see why the Appellant would have a greater need for support in those sad circumstances.
- h. The final matter that demonstrates the absence of any justification is the fact that there is no justification for failing to order support no matter how great the Appellant's needs or how unreasonable his parents are. This is particularly important as the case law demonstrates that there is a need to focus on the needs of children rather than their parents' marital status when looking at justification for discrimination (*McLaughlin*).
- i. These matters mean that there is no justification for the differential treatment whatever the standard of review. However, the Appellant submits that his arguments are supported by the fact that a powerful justification is required as indirect discrimination on the grounds of disability is in issue (*Kiyutin*).

Procedure in relation to grounds c. and d.

41. The order of McCombe LJ dated 18 December 2020 refused permission to appeal in relation to grounds c. and d. The order stated:

In any event, it seems from the skeleton argument of 21 October 2020 that no argument is advanced in support of ground c or d.

42. The Civil Procedure Rule 1998 (1998/3132) ('CPR') part 52.30 can be relied upon where permission has been refused in relation to some but not all grounds (*White Book 2020* at [52.30.4]).

43. CPR part 52.30 provides that a final decision can be re-opened where:
- a. It is necessary to do so in order to avoid real injustice;
 - b. The circumstances are exceptional and make it appropriate to reopen the appeal; and

c. There is no alternative effective remedy.

44. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514 Sir Terence Etherton VC held that:

... The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. [65]

45. In *Singh v Secretary of State* [2019] EWCA Civ 1504 the appeal was reopened on the basis that the judge who initially refused permission did not have key submissions before him [24].

46. It is submitted that there are good reasons to reopen the application for permission to appeal in relation to grounds c. and d. The Appellant relies on the following matters:

- a. Grounds c. and d. are essentially grounds that relate to the relief that should be ordered if grounds a. and b. succeed. The Appellant submits that issues of relief should be left until after the merits of the appeal are determined. That is particularly important when the Crown was not a party when McCombe LJ made his order. Section 5 of the Human Rights Act 1998 requires notice to be given to the Crown before the appeal is finally determined. At the time of drafting it is not known what the Crown's approach to relief will be.
- b. The reasoning of McCombe LJ expressly stated that the Appellant had raised no arguments in his skeleton in support of grounds c. and d. In fact the submissions below demonstrate that there were arguments. Although this was not addressed in the reasoning of McCombe LJ, those arguments had merit. That is a ground for reopening the permission decision for which there is precedent (*Singh*).

- c. The need for finality in litigation is less pressing in this context where the litigation has not been concluded.
 - d. There will be real injustice if the Court cannot provide appropriate relief having found a violation of human rights. Where litigation is brought raising human rights issues, the concern should be to bring any violations to an end (*Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [53]).
 - e. There is no effective remedy for a failure to interpret the legislation consistently with article 14. The Appellant will be denied relief until the state amends legislation to ensure compatibility, a process which could take several years. That would cause his medical issues to continue. It should be remembered that Dr Beckett referred to a 'substantial and ongoing risk to [the Appellant's] health and life'.
47. It is accepted that CPR 52.30(7) provides that there is no right to an oral hearing when applying to reopen a final decision. It suggests that such hearings are exceptional. However, they clearly happen. The judgments in *Lawal* and *Singh* both appear to have been delivered following oral hearings. The Appellant submits that his application should be determined at the rolled up hearing ordered by McCombe LJ in his order dated 18 December 2020.
48. In support of this submission the Appellant relies on the following matters:
- a. The Court will hear full argument regarding grounds a. and b. As a consequence, it will be in the best position to determine grounds c. and d. There is an overlap between the grounds. For example, all grounds require consideration of Parliament's intent.
 - b. At this stage it is not possible to know the position of the Crown. That is potentially important since the Crown may wish to argue in support of grounds c. and d. and should be entitled to do so.
 - c. An oral hearing reflects the importance of what is in issue. The decision regarding CPR 52.30 will determine whether the Appellant can obtain any immediate relief for any violation of his Convention rights. The importance of the issues supports the argument that an

oral hearing should be held (*R (Osborn) v Parole Board* [2014] AC 1115 at [66] onwards).

- d. There will be an oral hearing in any event in this matter. As a consequence, the burden on the Court caused by determining issues at an oral hearing is significantly less than normal.

Arguments before McCombe LJ in support of grounds c. and d.

49. The arguments below were included in the skeleton argument before McCombe LJ. They have not been edited or expanded.

Statutory interpretation

50. Section 3(1) of the Human Rights Act 1998 ('the 1998 Act') provides that:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

51. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 Lord Nicholls held: *Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.* [33]

52. In *Gilham v Ministry of Justice* [2020] 1 All ER 1 Lady Hale warned against:

... attaching decisive importance to the precise adjustment needed to the language of the provisions [44].

53. Although it is not necessary for the Appellant to identify precise adjustments, he submits that the most obvious way in which compatibility can be achieved is by reading paragraph 2 of schedule 1 to the 1989 Act as applying without subparagraph 4. In support of this submission the Appellant relies on the following matters:

- a. The primary objective of the 1989 Act is to expand the jurisdiction of the courts to order financial provision for adult children. In particular, the objective is to eliminate unjustified inconsistencies in the jurisdiction of the courts. The proposed amendment furthers that objective by eliminating discrimination.
 - b. The 1989 Act was enacted long before the enactment of the 1998 Act. As a consequence, this is not a case where Parliament enacted legislation knowing that it was inconsistent with the Convention.
54. Sir James Munby essentially concluded that the Appellant's arguments are contrary to Parliamentary intent [59]. However, as the submissions above demonstrate, the objective of the 1989 Act was not to create discrimination. As the submissions regarding justification demonstrate, the cause of the discrimination is essentially historic mistake.

Inherent jurisdiction

55. In *Spencer v Spencer* [2019] Fam 66 the Court of Appeal concluded that the courts' inherent jurisdiction should be invoked and extended to a new area on a 'principled' basis where:
- a. Current statutory provisions provide no remedy [46].
 - b. It is in the interests of justice for the inherent jurisdiction to provide a remedy [47].
 - c. Public interest considerations support the exercise of the inherent jurisdiction [47].
56. If it is found that article 14 would be violated if the Appellant is unable to apply for financial support but the relevant provisions provide no jurisdiction, that suggests that the courts' inherent jurisdiction should be invoked as the criteria in *Spencer* are met. It is plainly in both the interests of justice and the public interest for there to be compliance with article 14. Parliament mandated compliance with article 14. Although the finding that the legislation cannot be read compatibly implies that Parliament has not established a jurisdiction that enables the Appellant to apply for financial support, the legislative history set

out above demonstrates that Parliament gave no thought to whether it was necessary to avoid violating article 14.

57. The reasoning of Sir James Munby regarding the inherent jurisdiction was based on a finding that there was no violation of article 14. As a consequence, it provides no reason to reject the arguments above.

Respondents' submissions regarding grounds c. and d.

58. The Respondents argue that the Appellant's submissions regarding statutory interpretation ignore Parliament's express intent. This appears to be a reference to the express language used in the relevant statutory provisions. However, the express language is not determinative. In *Ghaidan* Lord Nicholls commented that:

... the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. [32]

So it is possible to read in or read out words. The critical point in this case is that Parliament has plainly recognised the rights of children by gradually increasing their rights to maintenance. The reading down proposed by the Appellant is not inconsistent with a 'fundamental feature' of the statute because it is consistent with that gradual expansion of rights. Further, Parliament can be presumed not to have intended discrimination ((*R (Miller) v Secretary of State* [2018] AC 61 at [83]).

59. The Respondents argue that the inherent jurisdiction is ousted by the statutory scheme. The argument that inherent jurisdiction is ousted by legislation is inconsistent with *Spencer*, which acknowledges that the inherent jurisdiction operates side by side with legislation and provides a remedy in certain circumstances when legislation provides none. Parliament has demonstrated the importance of compliance with the Convention by imposing a powerful interpretative obligation (*Ghaidan* at [32]). That implies that the Court should be reluctant to conclude that its inherent jurisdiction cannot be exercised to ensure compliance with the Convention.

Conclusions

60. In light of the matters above, the Appellant submits that his appeal should be allowed. Either:
- a. It should be declared that the 1989 Act can be read as permitting him to make an application; or
 - b. It should be declared that the High Court's inherent jurisdiction should be invoked; or
 - c. A declaration of incompatibility should be made.
 - d. An urgent determination of the Appellant's application for interim relief should be made if either declaration a. or b. is made. Once it is established that there is arguable jurisdiction, interim relief can be ordered (*Moses-Taiga v Taiga* [2006] 1 FLR 1074 at [35]). Interim relief is obviously urgent in this case in light of the substantial risks to the Appellant's health. The Appellant's medical evidence demonstrates that those risks are ongoing and need to be addressed urgently.
 - e. The matter should be remitted to the High Court if either declaration a. or b. is made.
61. Sir James Munby made an order regarding proceedings under the Trusts of Land and Appointment of Trustees Act 1996. That order followed his judgment regarding article 14. King LJ stayed that order pending the determination of permission to appeal or further order in her order dated 11 November 2020. There has been no further order. To the extent that the appeal is allowed, the provisions of the order regarding the 1996 Act should be set aside. The Appellant should be permitted to decide whether to commence litigation under the 1996 Act on the basis of a correct understanding of his rights to apply for financial support.

Chronology

18 July 2020	Application comes before Mostyn J
20 July 2020	Mostyn J makes an order allocating matters to Sir James Munby. He directs a case management hearing on 28 July 2020.
27 July 2020	Written submissions from Appellant

27 July 2020	Written submissions from Respondents
28 July 2020	Case management hearing
4 August 2020	Written submissions from Appellant
10 August 2020	Written submissions from Respondents
12 August 2020	Hearing to determine jurisdiction
14 August 2020	Written submissions from Appellant
16 August 2020	Written submissions from Respondents
24 August 2020	Written submissions from Appellant
26 August 2020	Written submissions from Respondents
8 September 2020	Draft judgment handed down
10 September 2020	Written submissions from Respondents
15 September 2020	Written submissions from Appellant
16 September 2020	Written submissions from Respondents
21 September 2020	Written submissions from Appellant
22 September 2020	Written submissions from Appellant
30 September 2020	Judgment delivered

HUGH SOUTHEY QC

MATRIX

25 January 2021

EXHIBIT 2

IN SUBMISSION TO THE JUSTICE COMMITTEE

FAIZ SIDDIQUI

Author

- and -

**THE UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN IRELAND**

State party

FACTUAL ATTACHMENT

This factual attachment is primarily based on the author's Counsels' own research on the European e-Justice Portal. The debt for this international comparison table therefore goes to Expert human rights Counsel at Brick Court Chambers.

It appears from this factual information that the difference in treatment identified by the author's Counsel is not reflected in the law and practice of any other State Party in the world. This demonstrates the unjustified nature of that difference in treatment, which is discriminatory, as set out the author's solicitors' letter.

African State

State	Summary of legal position	Difference of treatment based on parental relationship status?
South Africa	Parents are ‘obliged to support or maintain’ their children, and ‘[n]o distinction is drawn between minor and major children in regard to the duty’, nor is there a distinction between ‘legitimate and illegitimate’ children: <i>Hoffmann v Herdan NO</i> 1982 (2) SA 274 (T), which was cited with approval in <i>Bursey v Bursey</i> 1999 (3) SA 33 (SCA), which was in turn recently quoted with approval at para 9 of the judgment of Acting Judge of Appeal Meyer in <i>Z v Z</i> [2022] ZASCA 113.	No.

Asia-Pacific State

State	Summary of legal position	Difference of treatment based on parental relationship status?
Cyprus	Parents owe adult children a maintenance obligation if they are unable to support themselves after reaching adulthood, for example due to physical or mental illness, military service or higher education. Adult children can submit an application to court for maintenance owed them.	No.

Eastern European States

State	Summary of legal position	Difference of treatment based on parental relationship status?

Bulgaria	Parents owe adult children a maintenance obligation if they are unfit for work and cannot subsist on their own property, if payment of that maintenance does not cause the parents particular difficulties. Adult children can bring personal actions for maintenance owed them.	No.
Croatia	Parents must support an adult child who is unfit for work due to severe and permanent illness, or disability for as long as such incapacity exists. Adult children can lodge a claim with the court for maintenance owed them.	No.
Czechia	Parents owe adult children a maintenance obligation unless and until they are realistically able to support themselves or the maintenance obligation transfers to another, eg through marriage. The amount of maintenance is to ensure the child's standard of living is substantially identical to that of their parents. Adult children may petition the court for maintenance owed them.	No.
Estonia	Parents owe adult children a maintenance obligation if the children are not capable of supporting themselves. This is part of a reciprocal maintenance obligation by which adult children, parents and grandparents are mutually bound to provide for each other. Adult children can file an action for maintenance owed them.	No.
Hungary	Parents owe adult children aged 25 or over a maintenance obligation where it is exceptionally justified, unless the adult child is regarded as undeserving of maintenance. Adult children may request a court decision on maintenance owed them.	No.
Latvia	Parents owe adult children a maintenance obligation until they are able to support themselves. Adult children can submit an application to court for maintenance owed them.	No.
Lithuania	Parents owe adult children a maintenance obligation until they are 24 years of age, if they are enrolled in certain types of education programmes. Adult children may file a court action for maintenance owed them.	No.
Poland	Parents owe adult children a maintenance obligation so long as they are unable to provide for themselves, eg due to illness or disability. Adult children may apply to the court for maintenance owed them.	No.
Romania	Parents owe adult children a maintenance obligation while they continue their studies, but not beyond the age of 26.	No.

	Adult children may apply to the court for maintenance owed them.	
Slovakia	Parents owe adult children a maintenance obligation so long as they are unable to support themselves. Adult children may apply to the court for maintenance owed them.	No.
Slovenia	Parents owe adult children a maintenance obligation while they continue their studies, but not beyond the age of 26. Adult children may apply to the court for maintenance owed them.	No.

Latin American and Caribbean State

State	Summary of legal position	Difference of treatment based on parental relationship status?
El Salvador	According to information provided to the Organization of American States Network of Hemispheric Legal Cooperation in the Area of Family and Child Law, and available on the website of the Network, the parental obligation to maintain children persists after the age of majority when the children are people with disabilities.	No.

Western European and other States

State	Summary of legal position	Difference of treatment based on parental relationship status?
Austria	Parents owe adult children a maintenance obligation so long as they are unable to support themselves. Adult children may apply to the guardianship court for	No.

	maintenance owed them.	
Belgium	Two types of obligations parents owe to adult children • Obligation 1: if adult child's education and training are still ongoing, parents have obligation to pay for housing, upkeep, health, supervision, education and training, and development (Art 203 Civil Code) • Obligation 2: irrespective of age, parents have a maintenance obligation based on parenthood (Arts 205, 207, 208 and 353-14 Civil Code) Adult children can bring personal actions for maintenance owed them.	No.
Canada	The Court of Queen's Bench of Alberta in <i>Ryan v Pitchers</i> 2019 ABQB 19 found the Alberta Family Law Act to be discriminatory on the basis of disability and parental relationship status in violation of section 15(1) of the Canadian Charter of Rights and Freedoms and remedied the violation. The Act had provided for parental maintenance for adult children who could not withdraw from their parents' charge due to being in full-time education. However, it contained no equivalent provision for adult children who could not withdraw from their parents' charge due to disability. Further, the Divorce Act provided for maintenance where the parents of adult children with disabilities were either married or divorced. There was no equivalent provision for children whose parents had never been married. The Alberta legislature enacted the Family Statutes Amendment Act 2018 to remove this discrimination. Note that the provisions of the Convention 'extend to all parts of federal States without any limitations or exceptions' under Article 4(5).	No.
Finland	Parents may be obliged to make provision for reasonable education costs where 'considered reasonable'.	No.
France	Parents owe adult children two types of maintenance obligation: • Where the adult child is not financially independent, parents have an obligation of upkeep and education to provide their child with the necessary conditions for their development and education • Once the obligation of upkeep and education has ceased, the general rules for maintenance obligations apply, by which family members with means to do so must meet the needs of other family members Adult children can apply to the court for maintenance owed them.	No.

Germany	Parents owe adult children two types of maintenance obligation: • Where the adult child is not financially independent, parents have an obligation of upkeep and education to provide their child with the necessary conditions for their development and education • Once the obligation of upkeep and education has ceased, the general rules for maintenance obligations apply, by which family members with means to do so must meet the needs of other family members Adult children can apply to the court for maintenance owed them.	No.
Greece	Parents owe adult children a maintenance obligation while they are studying or attending a higher education or vocational training course, and they are unable to work due to their studies, and have no personal assets from which they can meet their maintenance requirements. Adult children can apply to the court for maintenance owed them.	No.
Ireland	Parents owe a maintenance obligation to adult children of any age who are dependent due to disability. Usually the applicant in a maintenance case is the parent caring for a child, although applicants can include children in their own right.	No.
Italy	Parents owe adult children three types of maintenance obligation: - Adult children with serious disabilities: the rules for children who are minors apply, such that regular maintenance is ordered to be paid in accordance with <i>inter alia</i> the child's needs and standard of living, and the parents' financial resources - Adult children who are not financially independent: the judge may order one or both parents to pay regular maintenance. If a child who has reached majority becomes financially independent, then again experiences financial hardship later, this obligation does not re-arise. Other adult children: a duty of family solidarity to provide material assistance to persons unable to support themselves.	No.
Luxembourg	Parents owe children a maintenance obligation to contribute to their support and upbringing in proportion to their means, which obligation does not automatically stop when the child reaches adulthood. Adult children may apply to the family court for maintenance owed them.	No.

Malta	Parents owe adult children a maintenance obligation where it is not reasonably possible for the children to maintain themselves adequately on account, inter alia, of physical or mental disability. Adult children may file an application for maintenance owed them.	No.
Portugal	Adult children may apply to the court for maintenance owed to them in certain circumstances.	No.
Scotland	Adult children can apply for maintenance in two types of situations: - Age 18 to 25 – if the child is in higher education (e.g. University) or specialized training, they can personally raise an action for ailment in a Scottish Sheriff Court under the Family Law (Scotland) Act 1985. - Post-Education/Over 25 – In exceptional circumstances such as disability, the court can order support if “special circumstances” like a physical or mental disability create a continued need.	No.
Spain	Parents owe children a maintenance obligation so long as they are not financially independent, have not completed their education, or are out of work through no fault of their own.	No.
Sweden	Parents owe adult children a maintenance obligation generally until age 18 or to complete secondary education. Adult children may apply to the court for maintenance owed to them.	No.
The Netherlands	Parents owe adult children a maintenance obligation if they are in need and not able to take of themselves, for example due to mental or physical disability. Adult children may apply for a court ruling.	No.

EXHIBIT 3

Court of Queen's Bench of Alberta

Citation: Ryan v Pitchers, 2019 ABQB 19

Date: January 10, 2019

Docket: FL01 26413

Registry: Calgary

Between:

Christina Ryan

Applicant

- and -

Christopher Pitchers

Respondent

**Reasons for Decision
of the
Honourable Madam Justice C.S. Phillips**

Introduction

[1] The parties were involved in a relationship that ended in 2001. They never married and are the parents of a now adult daughter who is disabled. The father does not dispute that his daughter has very serious disabilities resulting from Down syndrome, cerebral palsy, and other issues.

[2] The mother brought an application challenging the constitutionality of the definition of child in section 46(b) and in particular section 46(b) (ii) of the Alberta *Family Law Act*, which disentitled her daughter to child support now that she was the age of majority and was not in full-time attendance at school. The mother argued that the definition of child infringed on her disabled adult child's right to equal protection and equal benefit of the law guaranteed by section 15(1) of the *Charter*. The Attorney General of Alberta elected not to appear at the hearing, since the government was in the process of amending the legislation to extend the definition of child to include children such as the one in this case.

[3] Given the pending legislative change, the father encouraged me to wait for the legislature to take action. I declined to do so, as there was no guarantee the legislation would be retrospective and thereby applicable to the disabled adult child in this case. The mother also applied for retroactive and ongoing child support for her disabled adult daughter, since the daughter's monthly expenses exceeded her AISH entitlements. I declared the definition of child unconstitutional and then awarded retroactive and prospective child support. I gave oral reasons with respect to the amount of child support awarded at the hearing. I said I would provide written reasons on the constitutional issue. These are the reasons for my decision on the unconstitutionality of section 46(b) (ii) of the Alberta *Family Law Act*, as it stood prior to December 11, 2018.

Legislative provisions and amendment

[4] At the time of the application, section 46(b) of the *Family Law Act*, SA 2003, c F-4.5 (the "Act") contained the following definition of child:

(b) "child" means a person

(i) who is under the age of 18 years, or

(ii) who is at least 18 years of age but not older than 22 years of age, and is unable to withdraw from his or her parents' charge **because he or she is a full-time student** as determined in accordance with the prescribed guidelines;

[5] The child in this case turned 18 in April 2017 and completed school in June 2017; however, she is unable to withdraw from her parents' charge on account of her disability. She is not a full-time student. If her parents had been married, she would continue to qualify for child support under the definition of "child of the marriage" in section 2(1) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp):

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge **but unable, by reason of illness, disability** or other cause, to withdraw from their charge or to obtain the necessities of life;

[6] The Alberta legislature recognized the inequities resulting from these different definitions. On December 11, 2018, the definition of child in the *Family Law Act* was amended by section 1(2) of Bill 28, the *Family Statutes Amendment Act 2018*. The definition of child now aligns with that found in the *Divorce Act*. The new definition reads as follows:

(b) "child" means

(i) a person who is under the age of 18 years, or

(ii) a person 18 years of age or older who is under his or her parents' charge and is unable by reason of

(A) illness,

(B) disability,

(C) being a full-time student as determined in accordance with the prescribed regulations, or

(D) other cause

to withdraw from his or her parents' charge or to obtain the necessities of life;

Equality analysis

[7] Section 15 of the *Canadian Charter of Rights and Freedoms* sets out the constitutional guarantee of equality before and under the law and equal protection and benefit of the law:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or **mental or physical disability**.

[8] The most recent section 15 case law, in particular the Supreme Court of Canada's decision in *Withler v Canada (Attorney General)*, 2011 SCC 12, explains that the section 15 analysis requires a substantive contextual approach that takes into account the full context of the claimant group's situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage or negative stereotypes about the group.

[9] The ultimate question is whether the impugned law violates the "animating norm" of section 15(1); that is, of substantive equality. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong.

[10] Discrimination may be established by showing that the impugned law, in purpose or in effect, perpetuates prejudice and disadvantage to members of a group on the basis of one of the personal characteristics in section 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. The contextual inquiry must consider the purpose of the provision that allegedly discriminates, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? The court must consider whether the lines drawn between groups that benefit and groups that do not are appropriate, having regard to those impacted and the objects of the scheme.

[11] In examining whether the effect of the law is negative, the focus of the inquiry is on the actual impact of the impugned law, taking into account social, political, economic and historical factors concerning the group. The differential treatment may be revealed as discriminatory because of the prejudicial impact of the impugned law.

[12] At paragraph 30, the court in *Withler* set out the two-part test for assessing a section 15(1) claim:

- 1) Does the law create a distinction based on an enumerated or analogous ground?
- 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[13] The court cautioned against an overly technical approach, quoting at para 51 from McLachlin CJ in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78:

Whatever framework is used, an overly technical approach to s. 15(1) is to be avoided. In *Andrews, supra*, at pp. 168-169, McIntyre J. warned against adopting a narrow, formalistic analytical approach, and stressed the need to look at equality issues substantively and contextually. The Court must look at the reality of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s. 15(1), which is to prevent the perpetuation of pre-existing disadvantage through unequal treatment.

[14] I accept this caution and reject the father's assertion that one must look only within the four corners of the legislation to assess the alleged discrimination. I adopt the reasoning and analysis of Justice Sullivan in *Coates v Watson*, 2017 ONCJ 454.

[15] Furthermore, I find the cases relied upon by the father are distinguishable. *LMM v WLK*, 2007 ABQB 764 and *Young v Smith*, 2013 ABQB 521 were not equality cases. In those decisions, the court considered the government's rationale for limiting child support to full-time students over the age of 18. The court concluded that the legislature assumed provincial support programs would meet the needs of disabled children. The question of whether the definition of child violated the equality guarantee under section 15(1) was not before the court in those cases.

[16] In *R v S(S)*, [1990] 2 SCR 254 the issue was the constitutionality of the Ontario government's decision not to implement an alternative measures programs (that is, measures other than judicial proceedings to deal with a young person alleged to have committed a criminal offence). The court rejected the argument that Ontario's failure to implement the discretionary program was discrimination based on province of residence. The court held that the division of powers permits differential treatment based upon province of residence. The unequal treatment stemmed solely from the exercise by the provincial legislature of its legitimate jurisdictional powers. Furthermore, the court found that province of residence was not a sufficiently personal characteristic upon which to base a discrimination claim. By contrast, the distinction that is alleged to be discriminatory in the case at bar is based upon a personal characteristic (disability) that is an enumerated ground under section 15(1) of the *Charter* and a further personal characteristic (marital status) that has been found to be an analogous ground.

[17] In *Penner v Danbrook*, [1992] 4 WWR 385 (Sask CA) the court considered the definition of child in the Saskatchewan *Family Maintenance Act*, which provided for support for children who could not withdraw from their parents' charge by reason of disability, but not for children who could not withdraw from their parents' charge for any other cause, including continuing education. The applicant mother argued that the provincial legislation was less generous than the *Divorce Act* provision for child support, resulting in discrimination based on marital status. The court rejected the mother's section 15 argument on the grounds that the unequal treatment stemmed solely from the legitimate exercise of the division of powers and explained that the *Charter* could not be used to challenge the proper exercise of provincial jurisdiction, even if that exercise of jurisdictional power resulted in distinctions between similar federal and provincial legislation. I note that the child in *Penner* was not a member of a historically disadvantaged group, namely people with disabilities, which significantly changes the analysis for our purposes.

1) Did section 46(b) and in particular section 46(b) (ii) of the Act, prior to its amendment, on its face or in its effect create a distinction based on an enumerated or analogous ground?

[18] In determining whether a law creates a distinction based on an enumerated or analogous ground, the focus must be on the effect of the law and the situation of the claimant group. In our case, up until December 11, 2018, the definition of child in the Act created a distinction between adult children whose dependency arose from continuing full-time education and adult children whose dependency arose from disability. If an adult child was unable to attend full-time school by reason of disability, that adult child was no longer eligible for support. While the definition of child may have been neutral on its face, it had a disproportionately negative impact on disabled adult children. The benefit of the law, namely child support, was not equally available to disabled adult children or their caregiver parent, based on the enumerated ground of disability.

[19] Furthermore, while the Act did not expressly differentiate between disabled adult children of previously-married parents and disabled adult children of never-married parents, the children of previously-married parents had separate recourse under the *Divorce Act*. Thus, in its effect on the group, the Act created a further distinction between disabled adult children of never-married parents and disabled adult children of previously-married parents; a distinction based on the analogous ground of marital status of the parents.

[20] The Respondent submits that I should not compare the *Family Law Act* and the *Divorce Act*, as each piece of legislation is valid within its respective sphere of authority. I find the provisions of the *Divorce Act* to be relevant in the analysis of the full context of the case, which is the proper means of assessing substantive equality. Until the legislative amendment on December 11, 2018, adult children in Alberta who could not withdraw from their parents' charge by reason of disability were ineligible for child support under the Act. The disabled adult children of previously-married parents, however, had recourse to the *Divorce Act*, resulting in an advantage over disabled adult children whose parents had never married.

[21] In 2010, the legislature amended section 7 of the Act, which sets out the rules of parentage. The amendment added section 7(6), abolishing all distinctions between the status of a child born inside marriage and a child born outside of marriage. This 2010 amendment suggests the Alberta legislature sought to ensure the same benefits and presumptions would be available to children of married parents as to children of unmarried parents. While the definition of child did not in itself make this distinction, the effect of the Act, as described above, has been to disadvantage the disabled adult children of unmarried parents, contrary to the stated intentions of the provincial legislature.

2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[22] In this case, the Act provided for child support for some adult children but not others. The underlying assumption behind the legislation, as explained by my colleagues in *LLM v WLK* and *Young v Smith*, was that a child would be financially independent at the age of 18 unless that child was in full-time school. The Act did not contemplate other reasons for failing to achieve financial independence by the age of majority. Thus, the effect of the Act for those adult children who could not attend school at all or who may have needed the accommodation of part-time schooling on account of their disability was to deny them the benefit of financial support. The impact of the Act was to exacerbate the economic difficulties faced by these disabled adult

children who were unable to withdraw from their parents' charge. Furthermore, the distinction between the provincial and federal regimes meant that a disabled adult child's access to support was governed by the parent's marital status.

[23] On the facts of this case, the evidence shows that provincial social assistance is insufficient to meet the needs of the parties' disabled adult daughter. She will suffer unless she can turn to her parents for support. If the mother supports her and the father does not, this imposes an unfair burden on the mother providing support - a further inequality arising from the parties' marital status.

[24] I find that prior to December 11, 2018 the effect of the Act was to widen the gap between the historically disadvantaged group of disabled adult children and able adult children who could pursue full-time education. It also widened the gap between disabled adult children who were born within marriages and those who were born outside of marriage, a formerly marginalized group.

[25] The former definition of child in the Act had the effect of reinforcing, perpetuating and exacerbating disadvantage on the basis of the enumerated ground of disability and based on the analogous ground of marital or family status. When state conduct widens the gap between a historically disadvantaged group and the rest of society, it discriminates. I repeat Justice Sullivan's comment at paragraph 185 of *Coates*: "The provincial child support regime does not need to mirror the federal law, but it cannot further disadvantage a whole host of vulnerable disadvantaged groups."

[26] The government bears the burden of showing that a breach of *Charter* rights is justified under section 1. In this case, the government elected not to appear since it was amending the legislation. As such, the section 1 justification has not been made out.

Conclusion

[27] For all of the foregoing reasons, I conclude that section 46(b), and in particular section 46(b) (ii) of the *Family Law Act*, as it stood prior to the December 11, 2018 amendment, discriminated against disabled adult children generally, and in particular, the disabled adult children of unmarried parents, thus violating section 15(1) of the *Charter*. Also, section 46(b) (ii) of the *Act* is not saved by section 1 of the *Charter*.

[28] For the purposes of this application, I apply the same remedy as Justice Sullivan at paragraphs 226 and 229 of *Coates* and read in, as appropriate, the language from the definition of "child of the marriage" in the *Divorce Act*. The Respondent father is obliged to pay child support for his disabled adult daughter in the amount set out in the reasons for my oral decision.

Heard on the 5th day of November, 2018.

Dated at Calgary, Alberta this 10th day of January, 2019.

C.S. Phillips
J.C.Q.B.A.

Appearances:

Janet E. Russell, QC
for the Applicant

Scott D. Armstrong
for the Respondent

EXHIBIT 4

The Right to Support for Adult Children with Disabilities

Posted on [February 22, 2019](#) by [Jennifer Koshan](#)

By: [Jennifer Koshan](#) and [Jonnette Watson Hamilton](#)

PDF Version: [The Right to Support for Adult Children with Disabilities](#)

Case and Bill Commented On: *Ryan v Pitchers*, [2019 ABQ B 19 \(CanLII\)](#); Bill 28, the [Family Statutes Amendment Act 2018](#)

As Laura Buckingham noted in an ABlawg [post](#) in December 2018, Alberta's Bill 28, the [Family Statutes Amendment Act 2018](#), made three key amendments:

- creating legislated rules for property division for separating common-law couples;
- closing a gap in child support legislation for adult children with disabilities; and
- repealing the *Married Women's Act*, [RSA 2000, c M-6](#).

The second of these amendments was recently considered in *Ryan v Pitchers*, [2019 ABQ B 19 \(CanLII\)](#). In this case, a mother brought a constitutional challenge to the pre-amendment version of the *Family Law Act*, [SA 2003, c F-4.5 \(FLA\)](#), which did not allow disabled children of unmarried parents to obtain child support once they turned 18 and were not attending school full-time. The mother's argument was that the definition of child in the *FLA* violated the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*. The government did not defend the case given the pending legislative amendment in Bill 28, and although the father raised constitutional counter-arguments, the mother's claim was successful.

Although the decision may seem like a foregone conclusion, the section 15 analysis of Madam Justice Carolyn Phillips has some interesting features that we will comment on in this post.

The *Ryan v Pitchers* Decision

Christina Ryan and Christopher Pitchers never married and are the parents of an adult daughter (not named) who has "very serious disabilities resulting from Down syndrome, cerebral palsy, and other issues" (at para 1). Ryan applied for retroactive and ongoing child support from Pitchers because their daughter's monthly expenses exceeded what she was entitled to under the *Assured Income for the Severely Handicapped Act*, [RSA 2000, c A-45 \(AISH\)](#). When the case was heard in November 2018, the father argued that the Court should simply await the pending change to the law. However, Justice Phillips noted that the legislation may not be retrospective and decided to proceed with the mother's constitutional challenge to the *FLA*.

Under the old version of the *FLA*, "child" was defined as follows under s 46(b):

(b) "child" means a person

(i) who is under the age of 18 years, or

(ii) who is at least 18 years of age but not older than 22 years of age, and is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the prescribed guidelines... (emphasis added)

The daughter of Ryan and Pitchers turned 18 in April 2017, completed high school that same year, and is no longer a full-time student. She was therefore not entitled to support based on the definition of “child” in the *FLA*.

If Ryan and Pitchers had been married and were divorcing, their daughter would have been entitled to child support under the *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), which defines “child” as follows in s 2(1):

“child of the marriage” means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life... (emphasis added)

Ryan argued that the definition of child in the *FLA* violated section 15 of the *Charter* in that it discriminated against her daughter on the basis of her disability and on the basis of her parents' marital status.

In assessing this claim, Justice Phillips relied heavily on the Supreme Court of Canada's 2011 decision in *Withler v Canada (Attorney General)*, [2011 SCC 12 \(CanLII\)](#). *Withler* is often seen as a companion case to *R v Kapp*, [2008 SCC 41 \(CanLII\)](#), where the Court established the following two-part test for section 15 claims:

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp* at para 17 and *Withler* at para 30).

While many lower courts have continued to use the *Kapp* / *Withler* test, the Supreme Court of Canada noted several problems with that test in its subsequent section 15 decisions. One of those problems is the focus on “creating a distinction” in the first step, which seems to overlook adverse effects discrimination: *Quebec (Attorney General) v A*, [2013 SCC 5 \(CanLII\)](#) at paras 323-333 (*Quebec v A*); *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30 \(CanLII\)](#) at paras 19-20 (*Taypotat*); *Quebec (Attorney general) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#) at para 25 (*APP*). The first step of the current test asks: “does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds” (*APP* at para 25, emphasis added), making it clear that adverse effects discrimination is caught by section 15.

Despite using an out-of-date formulation of the test for discrimination that focused attention on direct discrimination, Justice Phillips did remark on the need to pay attention to the impact of the challenged law. Indeed, she characterized the law as an example of adverse effects discrimination, recognizing its facial neutrality on characteristics other than age or student status, and its disproportionate negative effect on disabled adult children (at para 18).

Justice Phillips also noted that section 15 analysis should be contextual, with the context including “the law’s real impact on the claimants and members of the group to which they belong”, considering “social, political, economic and historical factors concerning the group” (at paras 9 and 11). Put another way, the court must determine “whether the lines drawn between groups that benefit and groups that do not are appropriate, having regard to those impacted and the objects of the scheme” (at para 10). Although Justice Phillips does not cite *Withler* in this part of her decision, it was *Withler* that emphasized line drawing between the intended beneficiaries and the excluded group (*Withler* at para 67).

Withler also revisited the approach to comparative analysis under the first step of the test for section 15 of the *Charter*, acknowledging some of the critiques that had been made of the so-called “mirror comparator” approach. Under that approach, in assessing whether there is a distinction based on a protected ground, the claimant is compared to the group that ““mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought” except for the personal characteristic on which the claim was based” (*Withler* at para 49, quoting from *Hodge v Canada (Minister of Human Resources Development)*, [2004 SCC 65 \(CanLII\)](#) at para 23). *Withler* advocated a more flexible approach to comparison, stating: “[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination” (at para 63).

Justice Phillips did not discuss *Withler*’s treatment of comparator groups in her analysis of the first step of the test from *Kapp / Withler*. However, she did use two different comparator groups, one within the *FLA* and one between the *FLA* and the *Divorce Act*, as part of her analysis of a direct discrimination claim.

First, she found that the definition of child in the *FLA* “created a distinction between adult children whose dependency arose from continuing full-time education and adult children whose dependency arose from disability. If an adult child was unable to attend full-time school by reason of disability, that adult child was no longer eligible for support” (at para 18). She also characterized the law as an example of adverse effects discrimination, as noted above – “[w]hile the definition of child may have been neutral on its face, it had a disproportionately negative impact on disabled adult children” (at para 18).

This analysis within the four corners of the challenged provisions is confusing in its melding of direct and adverse effects discrimination. It also points to the difficulties in using mirror comparators. Justice Phillips’ first point is that the *FLA* created a distinction between two groups that was indicative of direct discrimination, flowing from a mirror comparator analysis between adult children who are eligible for child support because they are full-time students and adult children who are not eligible because they are persons with disabilities. But the real problem with the *FLA* is the adverse effects discrimination; the *FLA* did not take disability and the possible resulting dependence on parents into account, regardless of whether adult children attending school full-time received benefits or not.

Second, Justice Phillips also found that the *FLA* “created a further distinction between disabled adult children of never-married parents and disabled adult children of previously-married parents; a distinction based on the analogous ground of marital status of the parents” (at para 19). Disabled adult children of never-married parents were ineligible for child support under the *FLA*, while disabled adult children of married parents were (and still are) eligible for support under the *Divorce Act*.

This is also an interesting aspect of the decision. Justice Phillips acknowledged previous case law where the

comparison between statutes at the provincial and federal level was found to be incapable of grounding a section 15 claim based on federalism principles. In *Penner v Danbrook*, [1992 CanLII 8274 \(SK CA\)](#), [1992] 4 WWR 385, the Saskatchewan Court of Appeal found that the failure of the child support regime in that province to include adult children who were full-time students was not discriminatory, even though those children would be eligible for support under the *Divorce Act*. Justice Phillips distinguished *Penner v Danbrook* on the basis that the child in question in that case was not a member of a historically disadvantaged group, as are adult children with disabilities. However, that is a question going to the second step of the test for discrimination, not the first. Nonetheless, Justice Phillips found support for her analysis in *Coates v Watson*, [2017 ONCJ 454 \(CanLII\)](#), which held that a legislative scheme in Ontario similar to the *FLA* discriminated against adult children with disabilities based in part on the argument that disabled children of divorced parents have the statutory right to child support. However, the decision in *Coates v Watson* was primarily an adverse effects discrimination decision, with the court holding that the impugned legislation in that case “discriminates because of its effects, in context, on groups already marginalized by systemic inequalities” (at para 187).

These cases present a challenge. Any distinction in eligibility for child support based on marital status flows from the fact that the *Divorce Act* only applies to previously married couples – the *FLA* applies to both married and unmarried couples as far as child support is concerned. And one cannot challenge the *Divorce Act*’s exclusion of unmarried couples without coming up against the *Constitution Act, 1867*, which gives exclusive jurisdiction over “Marriage and Divorce” to the federal government under section 91(26). *Penner v Danbrook* determined that federalism principles must prevail in this situation, while *Coates v. Watson* relied on the argument that “the Courts have repeatedly held that legislative distinctions which treat children of married and unmarried spouses differently violated the equality guarantee” (*Coates* at para 88).

Penner v Danbrook also reinforces the difficulty with Justice Phillips’ mirror comparator analysis of the distinction based on disability. That argument would not work in Saskatchewan. Adult children who are full-time students are not eligible for child support in that province, so adult children with disabilities cannot be compared to anyone who receives the benefit past age 18. To return to our point above, the better approach under the first step of the test for discrimination would be to find that the *FLA* created a differential and adverse impact in its effects by not taking disability and the resulting dependence on one’s parents into account in the eligibility criteria for child support.

At the second step of the test for discrimination, Justice Phillips found that the effect of the *FLA* was to deny adult children with disabilities “the benefit of financial support”, which had the impact of “exacerbat[ing] the economic difficulties faced by these disabled adult children who were unable to withdraw from their parents’ charge” (at para 22). This was particularly so because AISH benefits were insufficient to meet the financial needs of the child at the centre of the dispute. As noted by Justice Phillips, “[w]hen state conduct widens the gap between a historically disadvantaged group and the rest of society, it discriminates” (at para 25). Although she does not cite it here, that definition of discrimination comes from the judgment of Justice Rosalie Abella in *Quebec v A* (at para 332). The “widen the gap” metaphor has also been used in more recent section 15 *Charter* cases that are not referred to by Justice Phillips (see e.g. *APP* at para 106; *Centrale des syndicats du Québec v Québec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#)).

In the case at bar, Justice Phillips found that “the effect of the Act was to widen the gap between the historically disadvantaged group of disabled adult children and able adult children who could pursue full-time education. It also widened the gap between disabled adult children who were born within marriages and those who were born

outside of marriage, a formerly marginalized group” (at para 24). In light of our comments about these comparator groups and the better characterization of this case as an adverse effects discrimination case, we would have preferred to see an analysis at step 2 that focused on how the *FLA* widened the gap between adult children with disabilities and adults not requiring the ongoing financial support of their parents.

There was no section 1 analysis in the case as the government did not try to defend the legislation.

Conclusion

Although we agree with the conclusion reached by Justice Phillips, we believe it is important to note the errors and oversights in her analysis so that similar mistakes are not made in future cases where it might make more of a difference to the outcome. Lower courts’ difficulties with the analysis of adverse effects discrimination is exacerbated by using discarded formulations of the test for discrimination under section 15. The current test, put forward in *Quebec v A*, *Taypotat* and *APP*, explicitly acknowledges that disproportionate negative effects, and not only line drawing, can create discrimination.

The legislature has now corrected the discrimination in the *FLA*, but we cannot leave this issue without commenting on the public/private distinction inherent in this case. An application for child support in the private family law system is only necessary for adults with disabilities when government funded benefits are inadequate or cumbersome to obtain. In our view, responsibility for the financial security of adults with disabilities is a public duty rather than a private family matter, although this is a larger issue that goes beyond the scope of this post.

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