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Case Comment

Burden v Burden: the Grand Chamber of the ECtHR adopts a restrictive approach on the question of discrimination

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Case: Burden v United Kingdom (13378/05) [2008] S.T.C. 1305 (ECHR (Grand Chamber))

A full re-hearing of a tax case before the Grand Chamber of the European Court of Human Rights (ECtHR) is a rather special event[1] : that the case, *Burden v United Kingdom,*[2] came from the United Kingdom almost deserves some mark of celebration.[3] As this case note will suggest, however, the final judgment of the Grand Chamber may not have lived up to the occasion.

The facts

The case involved a challenge that provisions of the UK inheritance tax legislation were discriminatory, contrary to Article 14 of the Convention taken together with the right to enjoyment of possessions in Article 1 of the First Protocol. The case was brought by two sisters, both in their eighties at the time of the judgment. They had lived together in a "stable, committed and mutually supportive relationship" all their lives and, for the last 31 years, had lived together in a house built on land inherited from their parents.[4] They have made wills leaving their property to each other. Their concern was that, when one of them died (which was within their contemplation given their advanced age) inheritance tax would be payable on the estate passing to the survivor. They had an "awful fear" hanging over them that their house would have to be sold to pay the tax.[5] They contrasted their position with a married couple or the partners in a civil partnership registered under the Civil Partnership Act 2004 (CPA 2004); in both those scenarios there would be an exemption from inheritance tax on the death of the first to die. In effect, they complained of discrimination that they did not enjoy an exemption under section 18(1) of the Inheritance Tax Act 1984, particularly as that section had been extended to civil partners with effect from December 5, 2005. A significant element to their complaint was that they were prohibited by reasons of consanguinity from entering into a civil partnership and securing this exemption from tax.

The Fourth Section of the ECtHR had, by a majority of four judges to three, dismissed their complaint in a judgment of December 12, 2006, holding that there had been no violation of Article 14.[6] The Grand Chamber, after a rehearing, reached the same conclusion by a majority of 15 judges to two. There are, however, some important and subtle differences between the reasoning of the Fourth Section and the Grand Chamber which are discussed below.

If one looks a little further at the facts of the case, they disclose something of a puzzle. The sisters jointly owned a house valued at £550,000 if sold together with adjoining land.[7] The sisters also jointly owned two other properties, worth £325,000. In addition, each sister owned investments worth approximately £150,000 in her sole name. If one looks at those figures in the light of current inheritance tax legislation, it is hard to see why the sisters should have had an "awful fear" that the house would have to be sold. On those figures, each sister would have an estate of approximately £600,000. Assuming that they had the nil rate band fully intact, and that this was £300,000, then inheritance tax at 40 per cent would have been £120,000 or thereabouts. The survivor would have inherited the investments from the first to die, which would have been sufficient to pay the tax. In addition, the instalment option under section 227 IHTA 1984 would have been available with regard to the land. It seems extremely unlikely, therefore, that there would have been any realistic danger of the house having to be sold.

In fact, going slightly further, the sisters would have been worse off overall if the transfer to the survivor was exempt from tax and there was no provision for the nil rate band of the first to die to pass over to the survivor.[8] If the transfer to the survivor had been exempt, and the first to die had left all her assets to the survivor, then there would be a higher tax burden than £120,000 because the nil rate band of the first to die was not utilised.

That being said, the complaint of the sisters was not fundamentally that they might need to sell the house: that was simply an expression of their concern. Rather, their complaint was that they faced a discriminatory tax charge when compared with married couples and civil partners. The complaint was about the discriminatory nature of the tax charge, not that they might face a tax charge at all.

Two preliminary objections

Leaving the tax aspects aside for a moment, there were two very significant, general elements to the Grand Chamber's judgment.

First, the case proceeded direct to the Court in Strasbourg without any hearing in the United Kingdom. The UK government raised a preliminary objection to the admissibility of the complaint on grounds that the sisters had failed to exhaust domestic remedies: the domestic remedy which they should have sought being a *declaration of incompatibility* under section 4 of the Human Rights Act 1998.[9] For a complainant to be required to exhaust a remedy, however, that remedy must not only be effective but also independent of discretionary action by the government authorities. In a series of cases[10] the ECtHR has held that the declaration of incompatibility did not satisfy these requirements.

In this case, the government pointed out that, in practice, the United Kingdom had so far always acted to implement those declarations of incompatibility which had been issued, or the legislation in question had already been repealed or amended. In response, the ECtHR did not exclude the possibility that at some time in the future the practice of giving effect to declarations of incompatibility might make the amendment of legislation so certain as to render the declaration an effective remedy: however, it would be premature to reach that conclusion at this stage.

What this means in practice is that, if the only remedy available to a complainant from the United Kingdom is a declaration of incompatibility (and not, for example, any other claim for compensation), then it is unnecessary to bring an action in the UK courts to seek such a declaration and the complainant may instead proceed direct to Strasbourg.

The second, non-tax issue in the case also concerned a preliminary objection on the part of the UK Government to the hearing of the complaint on the grounds that the sisters were not "victims" of a breach of the Convention as neither had died and so no tax had been paid.[11] The ECtHR pointed out, however, that to be a victim a person must be directly affected by the measure. The Grand Chamber agreed with the Fourth Section that, given the applicants' ages, the wills they had made, and the value of the property each owned, they had established that there was a real risk that one of them would be required to pay substantial inheritance tax in the not-too-distant future. In those circumstances, the sisters could claim to be directly affected by the legislation and, in that sense, were victims.

Applying this in a tax context, it is not necessary for a complainant to prove that they have actually had to pay a charge to tax before bringing a complaint: so long as the risk of a tax charge is sufficiently high that they are directly affected by the legislation, the complainant can still allege that they are a victim. If the complainant was being driven to change their behaviour--by entering into a transaction or cancelling a transaction or varying a transaction, for example--because of the impugned tax rule, it seems likely that they would satisfy the requirements of victim status.

The judgment of the Grand Chamber rejecting these two preliminary objections could make it a little easier for complainants under the Convention to take tax cases either before the UK courts or from the United Kingdom to Strasbourg in the future.

The substance of the complaints

Having dismissed the two preliminary objections by the UK Government, the Grand Chamber went on to consider the substance of the sisters' complaint.[12]

It is not inappropriate to say that the complaint brought by the sisters was quite heavily coloured by the extension of the inter-spousal exemption for inheritance tax to civil partners under the CPA 2004. At the time that this legislation was passing through Parliament, an amendment was passed in the House of Lords to extend the facility for registering civil partnerships (and hence the tax exemption) more broadly to certain family circumstances that would have included the sisters. The Government forced the removal of the amendment, however, on the basis that--while there might be an argument in favour of extending the exemption to such family units--the CPA was not the appropriate place to make that change. In some respects, the sisters' complaint seemed to be perceived as a complaint that they could not enter into a civil partnership because of the restriction of consanguinity in the CPA. This focus on the restriction of consanguinity to the registration of civil partnerships may have pointed the Grand Chamber in the wrong direction in its judgment.

The Grand Chamber approached the substance of the complaint of discrimination by asking whether the sisters were in a relevantly similar situation to a married couple or to civil partners.[13] Only a difference in treatment of persons in a relevantly similar situation could constitute discrimination. The Grand Chamber commenced by remarking that the relationship

between siblings is qualitatively different in nature from that between married couples and homosexual civil partners.[14] The essence of the connection between the sisters was consanguinity, while the characteristics of a marriage or civil partnership was a relationship with legal consequences determined by a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of such a legally binding agreement between the sisters rendered their relationship fundamentally different from that of a married couple or civil partners. The conclusion of the Grand Chamber was that the relationship between the sisters was of a fundamentally different nature to that between married persons and civil partners, so that they could not be compared with one another, and the difference in treatment could not constitute discrimination.

With all due respect to the Grand Chamber, this approach seems misguided. While this might be said to oversimplify the approach of the Grand Chamber, in effect its approach could be characterised by saying: the law imposes certain legal consequences arising from the conclusion of a marriage or a civil partnership (one of these consequences being the exemption from inheritance tax); the relationship between the sisters did not have these legal consequences, therefore it could not be the same as a marriage or a civil partnership. This seems somewhat circular.

What seems lacking in the Grand Chamber's judgment, in particular, is any significant discussion of the underlying rationale behind the inheritance tax exemption for spouses and civil partners. The UK Government had stated that the policy underlying the inheritance concession for married couples was to provide the survivor with a measure of financial security, and thus promote marriage: the provisions for registering a civil partnership had the same aim.[15]

Assuming that this statement of the underlying policy is correct--and there is no reason to doubt it--then perhaps it needs to be broken into its two parts.

First, if the underlying policy is to give the survivor a measure of financial security, then that is exactly what the sisters were seeking. It is inherent in their argument that they accepted that inheritance tax would be payable, but sought for it to be payable only on the death of the survivor and not to impose that burden on the first death. One might put the sisters' argument in a slightly different form: they constituted a family and an economic unit. Just as in the case of a married couple or civil partners, it was only appropriate to impose inheritance tax when that unit ceased to exist on the death of the survivor, and not to impose a charge only on the first to die.

Had the Grand Chamber focused on the imposition of the tax when the family and economic unit ceased to exist, they should have accepted that the sisters (and other unmarried couples in a stable, committed and mutually supportive relationship) were in a relevantly similar situation to those to whom the inheritance tax exemption applied.

The second element of the government's explanation of the rationale for the tax exemption was that it promoted marriage and the registration of civil partnerships. In its judgment, while noting that States in principle remain free to devise different rules in the field of taxation policy, the Grand Chamber does not go so far as to state expressly that government may use tax measures to encourage marriage or the registration of civil partnerships.[16] More broadly, one may ask the question whether it is appropriate, in this day and age, to encourage marriage (or the registration of civil partnerships) through the tax system. Such encouragement must imply a better tax treatment for married couples and civil partners, with a corollary that other persons who form a family or economic unit in a stable, committed and mutually supportive relationship will suffer a comparatively adverse treatment.

Here lies the fundamental disappointment in this judgment of the Grand Chamber. No doubt this judgment will be taken as confirming that governments may apply different tax rules to married couples (and to civil partners where the national legislation permits such relationships) by comparison with unmarried family units in otherwise identical circumstances. The result may be a perpetuation of tax provisions which seek to encourage marriage and a correlative disadvantage to those who enter into stable relationships without the rite of marriage. To that extent, this decision is disappointing.

The contrast with the Fourth Section, and the dissenting judgments

Though the Fourth Section had reached the same conclusion as the Grand Chamber, the majority of the Section had done so for different reasons. Unlike the Grand Chamber, they had accepted that there was discrimination, but concluded that in this case the application of different tax rules to married couples (and civil partners)--as opposed to unmarried and unregistered family units--fell within the wide margin of appreciation enjoyed by States in tax

matters. The distinction between the approaches is subtle, but not insignificant. For the Grand Chamber, relationships of marriage and registered civil partnership, because they involve a public act with legal consequences, are fundamentally different from relationships that do not have that underlying agreement and legal result. Thus, it would seem, it can never be discrimination to apply different tax rules to unmarried and unregistered parties. By contrast, for the Fourth Section the issue was whether the state had overstepped the margin of appreciation in applying different rules to unmarried and unregistered family and economic units. In principle, therefore, for the Fourth Section there may be situations where it is beyond that margin of appreciation in applying different tax rules to married couples and civil partners.
It is worth noting that there were two concurring judgments and two dissenting judgments before the Grand Chamber. Sir Nicolas Bratza, the UK judge, concurred with the result but preferred the reasoning of the Fourth Section. Judge Björgvinsson--the Icelandic judge--considered that unmarried couples are comparable with married couples and civil partners. However, he agreed with the Fourth Section that the difference in treatment was reasonably and objectively justified.
Turning to the two dissenting judgments, Judge Zupan%24ci%24c--the Slovenian judge--was somewhat critical of the reasoning of the majority. He focused on the prohibition of siblings registering a civil partnership on grounds of consanguinity. He asked the penetrating question: "Is it having sex with one another that provides the rational relationship to a legitimate government interest?" Finally, Judge Borrego Borrego--the relatively new Spanish judge--wrote a dissenting judgment asking whether the failure to grant an inheritance tax exemption to the sisters was a measure proportionate to the legitimate aim pursued. He ends his judgment by quoting Horace: "*parturient montes, nascetur ridiculus mus* ".[17]

What is discrimination?

There is much that is persuasive in the dissenting judgments. This case really required a proper discussion of the concept of discrimination. While it is correct to say that discrimination exists in the application of different rules to relevantly similar situations, this only carries the matter half way. In assessing what are relevantly similar situations, it must be an essential part of the process to identify the underlying rationale for the legislative rule under consideration. Only when one understands that rationale is it really possible to decide if the situations are relevantly similar.
If, as the UK Government admitted, a policy underlying the inheritance tax exemption was to provide the survivor of a "couple" with a measure of financial security, then any two or more persons who form a "couple" should be regarded as objectively similar. Two situations would be comparable if they were both situations where it was appropriate to provide financial security to the survivor: that would include married couples, civil partners, but also unmarried couples, siblings forming a single family unit, or a parent and a child/carer who formed a single family unit.
This case could have afforded the Grand Chamber an opportunity to develop the concept of discrimination as a more rational and effective tool of analysis. Sadly, it focused on a more bland comparison of marriage (and registered civil partnerships) and unregistered/unregistrable relationships.[18]

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1.Under Article 43 of the European Convention on Human Rights, a judgment issued by a Chamber of the Court may be referred to the Grand Chamber for a re-hearing in "exceptional cases" where the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance. Only around twenty cases a year are referred for a re-hearing before the Grand Chamber.
2.[2008] STC 1305.
3.For those who are interested, there is a webcast of the public hearing before the Grand Chamber at: *http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts +of +public +hearings/webcastEN_media?&p_url=20070912-1/lang/* (accessed June 24, 2008). The webcast is well worth watching, particularly for the excellent advocacy of the Counsel involved on both sides.
4.[2008] STC 1305 at [10].
5.[2008] STC 1305 at [32].
6.The Chamber judgment is reported at (2006) 9 ITLR 535.
7.These figures are taken from the judgment at [11].
8.Clause 8 and Sched.4 of the Finance Bill 2008 currently before Parliament introduce provision for unused nil rate band to be transferred to a survivor, but only for spouses and civil partners. In a sense, this new provision would add to the complaint of discrimination by the Burden sisters.
9.This element of the decision is dealt with at [2008] STC 1305, [36] to [44].
10.Of which the most significant is *Hobbs v United Kingdom* (Application No.63684/00) of June 18, 2002.
11.This element is dealt with at [2008] STC 1305, [29] to [35].

12.[2008] STC 1305 at [46] et seq.
13.The assessment by the Court occupies a relatively short part of the judgment, at [2008] STC 1305 at [58] to [66].
14.See [2008] STC 1305 at [62].
15.See [2008] STC 1305 at [50].
16.See [2008] STC 1305 at [63] to [65] in particular.
17.Which Wikipedia translates as: "The mountains will be in labour, and a ridiculous mouse will be brought forth".
18.Discrimination; Family home; Human rights; Inheritance tax; Protection of property; Siblings
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