



# EQUALITY UNDER THE LAW?

## THE TREATMENT OF WIDOWERS BY THE INLAND REVENUE AND THE DEPARTMENT FOR WORK AND PENSIONS



## Equality Under the Law?

The treatment of widowers by the Inland Revenue  
and the Department for Work and Pensions

VOLUME 5

2nd REPORT – SESSION 2002-2003

Presented to Parliament Pursuant to Section 10(4)  
of the Parliamentary Commissioner Act 1967

Ordered by  
The House of Commons  
To be printed on  
9 December 2002

# Parliamentary Commissioner Act 1967

## Equality under the law?

### The treatment of widowers by the Inland Revenue and the Department for Work and Pensions

In November 1999 the Inland Revenue agreed to make Mr Christopher Crossland a payment equivalent to Widow's Bereavement Tax Allowance, to which widowers were not legally entitled, after he had taken his case to the European Court of Human Rights. In July 2000 the former Department of Social Security (now the Department for Work and Pensions which, for clarity, I refer to throughout) agreed to a similar settlement of Mr David Cornwell's claim for a payment equivalent to Widow's Benefits, to which widowers also were not legally entitled, after he had taken his case to the European Court.

My Office has to date received 66 complaints that the Inland Revenue acted unfairly by refusing to treat other claims in the same way as they had dealt with Mr Crossland's case and a further six complaints that the Department for Work and Pensions did not treat other cases in the same way as they had treated Mr Cornwell. Complaints have been referred by 65 different Members of Parliament.

My Office investigated two cases representative of those complaints - one against the Inland Revenue referred to my predecessor by Ms Elizabeth Blackman MP and one against the Department for Work and Pensions referred by the Rt Hon Douglas Hogg QC, MP.

At the time my predecessor initiated the investigation into the complaint against the Department for Work and Pensions, the matters complained about were the subject of judicial review proceedings brought by several other widowers. After he had initiated the investigation into the complaint against the Inland Revenue, the matters complained about also became subject to such proceedings. Those proceedings resulted in declarations of incompatibility between the European Convention on Human Rights and, in the Inland Revenue case, section 262 of the Income and Corporation Taxes Act 1988 and, in the Department for Work and Pensions case, sections 36 and 37 of the Social Security Contributions and Benefits Act 1992. Because of appeals, those domestic legal proceedings have not yet concluded.

In the meantime, legislative changes enacted by the Finance Act 1999 and the Welfare Reform and Pensions Act 1999 had removed any distinction between the way in which men and women are treated for tax and social security purposes when they are widowed.

In both investigations initiated my Office found that, insofar as there was injustice for the complainants, that injustice had derived from legislation rather than from maladministration by the departments concerned. We therefore discontinued those investigations.

As matters relating to the nature of legislation and its effects on individuals are not for me but are for Parliament to consider and, as I judge that it will be of assistance to Parliament and the public if I publish the facts that my Office has established, I have decided to lay this report before each House of Parliament in accordance with section 10(4) of the Parliamentary Commissioner Act 1967. The letters to the referring Members in relation to the individual cases are contained in the annex to this report.

**ANN ABRAHAM**  
**Parliamentary Commissioner For Administration**  
**(the Ombudsman)**

**December 2002**

# Annexes:

	Page
C.1288/01 <u>Inland Revenue and HM Treasury</u>	1
C.163/02 <u>Department for Work and Pensions</u>	5

# Inland Revenue and HM Treasury

## Jurisdiction

Case No. C.1288/01

---

1. Mr B complained that the Inland Revenue (the Revenue) and H M Treasury (the Treasury) had acted unfairly by failing to treat his claim (as a widower) for a payment equivalent to Widow's Bereavement Tax Allowance (the allowance) in the same way as they dealt with a claim by Mr Christopher Crossland (another widower)<sup>1</sup>. He complained that the Revenue and the Treasury had unfairly refused to apply their discretion in the circumstances of his case, despite the friendly settlement offered to Mr Crossland, whose circumstances, said Mr B, were comparable with his own.

2. On 18 June 2001 the Ombudsman decided to suspend the investigation in view of an application by Liberty (the National Council for Civil Liberties) for judicial review of the Revenue's refusal to grant another widower, Mr Wilkinson, a payment equivalent to the allowance: the Ombudsman saw Mr B's complaint as having raised technical and legal issues on which the outcome of Mr Wilkinson's judicial review would likely have a bearing.

## Statutory background

3. The allowance was introduced in 1980 to provide a deduction against income for tax purposes. According to section 23 of the Finance Act 1980 only a widow is entitled to such a reduction in arriving at her income tax liability. Initially, the allowance was provided to a widow in the year of the death of her husband. In 1982 the scope of the allowance was extended to afford relief in the tax year following the death of a husband, provided that his widow had not remarried. (Section 262(1) of the Income and Corporation Taxes Act 1988 says that when a married man whose wife is living with him dies, his widow shall be entitled to an income tax reduction in the year of her husband's death and in the following year.) For years up to the tax year 1994-1995 the allowance was deductible from income before tax rates were applied, which meant that it produced a saving equivalent to the highest rate or rates of tax applicable to the individual concerned. From 1994-1995 onwards the relevant provisions were changed so that the allowance produced a fixed rate of saving. As part of a policy of reform of personal income tax reliefs, the Finance Act 1999 abolished the allowance in respect of deaths occurring after 5 April 2000, thus removing any distinction between widows and widowers for tax purposes.

4. The Ombudsman's remit is to investigate the administrative actions of government departments such as the Revenue and the Treasury. The Ombudsman has no power to determine who should receive the allowance - that is a matter for the Revenue in the first instance, and on appeal for the Commissioners of Income Tax (the appeal commissioners). Under section 5(2)(a) of the Parliamentary Commissioner Act 1967 (the 1967 Act), the Ombudsman is generally debarred from investigating any matter in respect of which an aggrieved person has, or had, a right of appeal to an independent tribunal such as the appeal commissioners. Also, under section 5(2)(b) of the 1967 Act the Ombudsman is generally precluded from investigating a matter in respect of which a person has or had a remedy by way of proceedings in any court of law. Section 12(3) of the 1967 Act declares that the Ombudsman is precluded from questioning the merits of a decision taken without maladministration by a government department in the exercise of discretion vested in it. Section 5(5) of the 1967 Act provides that in determining whether to initiate, continue or discontinue an investigation under the Act, the Ombudsman shall, subject to the provisions of that section, act in accordance with her own discretion. Finally, section 10(4) of the 1967 Act provides that the Ombudsman may from time to time lay before Parliament such reports derived from the exercise of her functions as she thinks fit.

## Background to the complaint

5. On 24 April 1997 Mr Crossland, a widower, made an application to the European Court of Human Rights. He argued, following the death of his spouse, that the failure of the Revenue to grant him relief equal to what he would have received had he been a woman, constituted sex discrimination in breach of the European Convention on Human Rights (the Convention). The nub of his case was that the failure to grant him a payment equivalent to the allowance was a breach of Article 14 of the Convention (the prohibition of discrimination), read with Article 1 of Protocol 1 and Article 8 (the right to peaceful enjoyment of possessions and the right to respect for private and family life). On 9 November 1999 the Government resolved Mr Crossland's challenge through a friendly settlement, without a determination by the European Court of Human Rights. The Government agreed to pay Mr Crossland both an amount equivalent to what he would have been paid had the allowance been available to men at the date his wife died, and his legal costs. An element in the agreement was a recognition that the allowance would be abolished from 5 April 2000.

6. On 1 December 1999, following the Government's decision to settle Mr Crossland's claim, the Revenue submitted a policy document to the Paymaster General,

<sup>1</sup> It is the normal practice of the Ombudsman's office not to identify persons other than the complainant. However, in this case the names of those mentioned are public knowledge as a result of the litigation mentioned in paragraph 8 and following below.

detailing options for handling claims from widowers for the allowance. The Revenue's position was that widowers had no entitlement to the allowance in UK law. On 8 December the Paymaster General asked for further information. On 31 January 2000 the Revenue submitted a second policy document to the Paymaster General. The Revenue considered making an extra-statutory concession to widowers; but, based on their legal advice, they concluded that they had no authority in UK law to make such payments. The Paymaster General consented to the Revenue's proposal to refuse the allowance to widowers.

7. On 11 May 2000 the Revenue issued instruction to their staff to reject any claims from widowers for the allowance, on the basis that there was no entitlement in UK law for a man to receive it. On 12 October 2000 the Revenue advised staff not to settle claims from widowers requesting a payment equivalent to the allowance.

8. On 23 January 1995 Mr B's wife died. On 11 September 2000 Mr B told the Revenue he wished to claim a 'widower's bereavement payment', citing the Crossland case (paragraph 6). On 20 September 2000 the Revenue replied saying he had claimed a 'widow's bereavement allowance for the years 1994/95 to 1995/96'; despite the Crossland case (which the letter acknowledged had been resolved through a friendly settlement), the Revenue said there was no basis in law for widowers to receive the allowance - Mr B's claim was rejected.

## The Revenue's response to Mr B's complaint

9. The Chairman told the Ombudsman that the decision not to pay equivalent compensation to Mr B, following the friendly settlement with Mr Crossland, was a matter of law and policy and not an exercise of administrative discretion by the Revenue. He said that the primary legislation with regard to the entitlement to the allowance was unambiguous: according to section 262 of the Income and Corporation Taxes Act 1988 only widows were entitled to the allowance (paragraph 3). The Chairman said that the Revenue's care and management powers allowed them to make relaxations so as to give taxpayers a reduction in liability to which they were not entitled under the strict letter of the law; but most of those concessions were made to deal with minor or transitory anomalies, and their powers did not allow them to contradict unambiguous primary legislation.

10. The Chairman said that Mr B had asked for a payment (paragraph 8), which was not the same as a request for the allowance. The local tax office involved should have appreciated the difference in Mr B's request and responded with a different letter tailored more to Mr B's circumstances. The Chairman restated that the intentions of the legislation with regard to the allowance were clear: it was intended to help widows, not widowers. He did not therefore think it was appropriate to give a widower a bereavement payment, as the legislation clearly stated that the allowance was available only to widows.

11. With regard to Mr Crossland's case (paragraph 6), the Chairman said that the fact that the Government had agreed a friendly settlement with him did not override UK law. Having taken legal advice, Ministers had decided that the case should not be contested. The settlement of the litigation with Mr Crossland had not been an exercise in discretion by the Revenue, but a policy decision by Ministers. It did not inevitably follow that as the Government had reached a friendly settlement with Mr Crossland it would be right to do so in every other subsequent case.

12. The Chairman concluded that the Revenue could not use their discretion to override the terms of the legislation on the allowance or to override the intentions of Parliament. The only suggestion he could offer Mr B was to pursue the matter through the courts or to seek to persuade Ministers to take a different approach.

## The Treasury's response to Mr B's complaint

13. The Permanent Secretary believed that Mr B's complaint was against the Revenue rather than the Treasury. He said that he could not see what actions of the Treasury would bring the department within the scope of Mr B's complaint.

## Further developments

14. In June 2001 Liberty, acting for Mr Wilkinson, applied for judicial review of the Revenue's decision to refuse Mr Wilkinson a payment equivalent to the allowance. On 9 July Liberty were granted permission to proceed with their application. On 3 December the substantive hearing took place. On 14 February 2002 Mr Justice Moses delivered judgment. In brief, he held:

- a. that the refusal to grant an income tax reduction to men in a similar situation to women was a breach of Article 14 read with Article 1 of the First Protocol;
- b. that the Revenue had power under section 1 of the Taxes Management Act 1970 to grant an extra-statutory concession in order to rectify breaches of Convention law and, in particular, to afford a bereavement allowance to widowers; but
- c. that the Revenue was giving effect to primary legislation which could not be read in a way that was compatible with the Convention, and had not acted unlawfully by failing to introduce such an extra-statutory allowance.

Mr Justice Moses made a declaration of incompatibility between section 262 of the Income and Corporation Taxes Act 1988 and the Convention.

15. Mr Justice Moses also held that the Revenue had not acted with unfairness, or abused its power, by failing to treat Mr Wilkinson in the same manner as Mr Crossland. The fact that some widowers had litigated at the European Court of Human Rights while others had proceeded through the domestic courts established a material distinction between the two groups, making their situations not comparable: the Revenue was entitled to treat widowers who had not litigated at the European Court of Human Rights differently from those who had. Parliament had already been considering changing the law on the allowance when the Revenue had chosen to offer friendly settlements to Mr Crossland and other applicants. Neither the Government nor the Revenue had led widowers to believe that claims in the domestic courts would be settled. Widowers had not had an expectation, in the same way as widows, that they would receive the allowance or an equivalent payment.

16. Mr Justice Moses said that in this context no unlawful discrimination under Article 14 of the Convention had occurred. The absence of any personal characteristic founding the claim for discrimination under Article 14, afforded an additional ground for rejecting the contention that the two groups of litigant widowers were in an analogous situation. As a matter of domestic law, the Revenue was entitled to treat claimants who had made applications to the European Court of Human Rights differently from those who had not. The judge found that by reaching friendly settlements with the applicants to the European Court of Human Rights, the Revenue had not bound itself to accept similar claims from others. The Government was entitled to settle those claims, while maintaining a position to defend itself, in respect of major constitutional points in domestic law.

17. On 27 February 2002 Liberty and Mr Wilkinson asked for leave to appeal against the judgment, which was granted. (The hearing of the appeal took place between 7 and 10 October and judgment has been reserved.)

18. On 29 August 2002 the Chairman told the Ombudsman that he saw the issues Mr B had complained about as still under consideration through the judicial review proceedings in the domestic courts. The Chairman saw those issues as ones properly for the courts.

## My decision to discontinue the investigation

19. It is not for the Ombudsman to decide who is entitled to the allowance (paragraph 4). However, Mr B's complaint is not that the Revenue have denied him the allowance, but that they have denied him a payment equivalent to the allowance, even though they made such a payment to Mr Crossland (paragraph 6). The Revenue did not initially appreciate that distinction - their letter of 20 September 2000 referred to 'allowance' rather than 'payment' (paragraph 8). The Chairman has acknowledged that the tax office which sent that letter should have responded more appropriately. I agree; but it is plain that had the tax office recognised what Mr B was seeking the outcome would have

been the same - neither the allowance nor a payment equivalent to the allowance would have been extended to those in Mr B's position.

20. The Chairman explained the Revenue's reasoning. They saw the intention of the legislation as plain: the allowance was for widows, not widowers; and therefore they could not give an equivalent payment to widowers (paragraph 10). That raises the question why a payment equivalent to the allowance **was** paid to Mr Crossland (paragraph 6). The Revenue's answer to that is that what was agreed with him in respect of the Convention did not override UK law; Ministers had made the decision not to contest his case after having taken legal advice.

21. The Chairman said that the Revenue did not see the settlement reached with Mr Crossland as an exercise of discretion by them. They saw it as a policy decision by Ministers, following legal advice. Furthermore, the Revenue's view was that they **could not** make a general concession to widowers in Mr B's situation: they did not believe that they had that discretion under their care and management powers.

22. The decision in the Wilkinson case (paragraph 14b above), unless it is reversed on appeal, goes directly contrary to the Chairman's argument in the preceding paragraph. However, that does not mean that the decision which Ministers and the Revenue took was maladministrative: it is perfectly normal for decisions taken on one view of the law to be overturned by a court or tribunal which takes a different view. In any event, the Ombudsman's concern is not with the legal issues, which are for the courts to determine, but with whether the consideration not to grant widowers an extra-statutory payment equivalent to the benefit of the allowance was maladministrative. (The Chairman said that the Revenue still believe, on legal advice, they had no discretion to grant widowers an allowance or payment.) At this point I should observe that the common dictum that 'the Ombudsman may not question the merits of Government policy' is too simple. A policy of deliberate unfair discrimination, for example, would in my view be maladministrative and as such open to legitimate criticism from the Ombudsman.

23. It seems likely to me that if the European Court of Human Rights had heard a case brought by a taxpayer in Mr B's circumstances it would have found in his favour and awarded him appropriate compensation: that is the clear implication of the relevant part of Mr Justice Moses' judgment. Such a finding of the Court would have had to be honoured by the Government for that particular widower by virtue of its obligations under international law. So the effect of the Revenue's policy - or of the law, as they see it - was to require Mr B and others in like circumstances to vindicate their rights by the lengthy and inconvenient process of making an application to the European Court, since before the coming into force of the Human Rights Act 1998 there was effectively no possibility that they could do so through the domestic courts. There are obvious grounds for criticising such a situation as unfair and unreasonable.

24. However, as against that, I do not believe that I can find that it was maladministrative of Ministers and the Revenue to decide to continue to give effect to the clear and unambiguous intentions of Parliament. They had considered appropriate legal advice before taking that decision; and, as I have observed in paragraph 22 above, the fact that one element of that advice was not sustained in the Wilkinson case does not mean that it was maladministrative to rely on it. I am satisfied that the issues were properly laid out for consideration by the Minister who decided the policy. It is also relevant that the Government decided to remove the discrimination between widows and widowers, and that this has been done by the Finance Act 1999.

## Conclusion

25. I come to the conclusion that continuing my enquiries will not progress matters further and I propose, under authority delegated by the Ombudsman, to exercise her discretion under section 5(5) of the 1967 Act to discontinue her investigation (paragraph 4). Insofar as there is an injustice for Mr B I see it as derived from legislation rather than from maladministration. As such it is a matter for Parliament to consider. Given that the domestic legal proceedings following Mr Justice Moses' judgment have not yet concluded (paragraph 17), I see it as appropriate for the Ombudsman to draw the attention of Parliament to matters as they stand, by way of a report (of which this letter would form an annex) under section 10(4) of the 1967 Act (paragraph 4).

# Department for Work and Pensions

Case No. C.163/02

---

1. Mr A complained that the former Department of Social Security, now the Department for Work and Pensions (DWP) - for clarity I refer to DWP throughout - had acted unfairly by failing to treat his claim (as a widower) for widow's benefits in the same way as they dealt with a claim by Mr David Cornwell<sup>1</sup> (another widower). He also complained that DWP had unfairly refused to apply their discretion in the circumstances of his case despite a friendly settlement offered to Mr Cornwell whose circumstances, according to Mr A, were comparable to his own.

2. As you know, on 31 January 2002 the Ombudsman suspended the investigation in view of an application by several widowers for judicial review of DWP's refusal to grant them widow's benefits: the Ombudsman saw Mr A's complaint as having raised technical and legal issues on which the outcome of the other widowers' judicial review would be likely to have a bearing.

## Statutory background

3. Sections 36-38 of the Social Security Contributions and Benefits Act 1992 (the 1992 Act) provided three main benefits to widows: widow's payment was a lump sum of £1,000 payable only to women; widowed mother's allowance provided weekly payments to women with dependent children; and widow's pension provided weekly payments to women between the ages of 46 and 64 with no dependent children. The award of all three benefits was subject to conditions, including the adequacy of the late husband's National Insurance contributions, and restricted to those under pensionable age. The Welfare Reform and Pensions Act 1999 abolished widow's payment, widowed mother's allowance, and widow's pension for deaths occurring after 9 April 2001. The new legislation had the effect of no longer treating widows and widowers differently for social security purposes.

## Jurisdiction

4. The Ombudsman's remit is to investigate the administrative actions of Government departments such as DWP. The Ombudsman has no power to decide who receives widow's benefits - that is a matter for DWP in the first instance and on appeal (subject to conditions) for the relevant tribunal. Under section 5(2)(a) of the

Parliamentary Commissioner Act 1967 (the 1967 Act), the Ombudsman is generally debarred from investigating any matter in respect of which an aggrieved person has, or had, a right of appeal to an independent tribunal. Also under section 5(2)(b) of the 1967 Act, the Ombudsman is generally debarred from investigating a matter in respect of which a person has or had a remedy by way of proceedings in any court of law. Section 12(3) of the 1967 Act declares that the Ombudsman is precluded from questioning the merits of a decision taken without maladministration by a Government department in the exercise of discretion vested in it. Section 5(5) of the 1967 Act provides that in determining whether to initiate, continue or discontinue an investigation under that Act the Ombudsman shall, subject to the provisions of that section, act in accordance with her own discretion. Finally, section 10(4) of the 1967 Act provides that the Ombudsman may from time to time lay before Parliament such other reports derived from the exercise of her functions as she sees fit.

## Background to the complaint

5. On 30 May 1997 Mr David Cornwell, a widower, made a claim to the European Court of Human Rights (the European Court). He argued that the failure of DWP to grant relief to him, following the death of his spouse, equal to what would have been received had he been a woman, constituted sex discrimination in breach of the European Convention on Human Rights (the Convention). His case was that the failure to grant him a payment equivalent to widow's benefits was a breach of Article 14 of the Convention (the prohibition of discrimination) read with Article 1 of Protocol 1 and Article 8 (the right to peaceful enjoyment of possessions and the right to respect for private and family life). The UK Government contested admissibility in relation to the period before Mr Cornwell made a written claim for benefit - the European Court found that until Mr Cornwell had made such a claim he could not be declared to be a victim of a violation of the Convention. However, after having taken legal advice, Ministers decided that the part of Mr Cornwell's case that related to the period after he had made a written claim should not be contested. On 22 July 1999 and 18 January 2000 the Government resolved Mr Cornwell's challenge through a friendly settlement, without a determination by the European Court. The Government agreed to pay Mr Cornwell an amount equivalent to what he would have been paid had widow's benefits been available to men, from the date he had requested payments equivalent to widow's benefits, plus his legal costs.

6. On 5 May 2000 Mr A's wife died. By his own account, in May and August Mr A notified DWP that he wished to claim widow's benefits as a widower, but DWP refused his claim. DWP dispute that Mr A made a claim at that time. DWP accept that on 10 August 2001, after he was already in receipt of a Widowed Parent's Allowance, Mr A made a written claim for widow's benefits. Subsequently, when Mr A complained to the Ombudsman through the member,

<sup>1</sup> It is the normal practice of the Ombudsman's office not to identify persons other than the complainant. However, in this case the names of those mentioned are public knowledge as a result of the litigation mentioned in paragraph 8 and following below.

he referred to Mr Cornwell's case (paragraph 5), saying that DWP had unfairly refused to apply their discretion in the circumstances of his case despite the friendly settlement offered to Mr Cornwell.

## DWP's response to Mr A's complaint

7. The Chief Executive of the Benefits Agency (as it then was) said that there was no evidence that Mr A had made a written claim for widow's benefits before August 2001, and that the Agency saw the evidence of oral exchanges as conflicting. She said that the decision not to pay equivalent compensation to Mr A, following the friendly settlement with Mr Cornwell, was a matter of law and policy. She said that the primary legislation governing the entitlement of widow's benefits was unambiguous. There was no statutory basis to make payments of widow's benefits to men. Mr A had been advised that he had no entitlement to a payment of benefits under the 1992 Act. DWP's policy in such cases was to consider an extra-statutory payment only where proceedings to the European Court had been ruled admissible. That ensured that DWP offered friendly settlements only when there was a case to address - that is, when all the conditions for receiving widow's benefits were satisfied except that the applicant was a man, not a woman. The Chief Executive saw that policy as ensuring that DWP treated comparable cases fairly and consistently. She concluded that Mr A was aware of the action he needed to take to be considered for a payment equivalent to widow's benefits.

## Further developments

8. Between October 2000 and May 2001 several widowers applied for judicial review of DWP's decision to refuse them widow's benefits and were granted leave to proceed. On 14 February 2002 Mr Justice Moses delivered judgment. In brief and in part, he held:

- a. that sections 36 and 37 of the 1992 Act were contrary to Article 14 read with Article 8 of the Convention; section 38 (widow's pension) was not (because the objective justification defence was successful).
- b. that those sections could not be interpreted so as to entitle widowers to widow's payment, widowed mother's allowance, or widow's pension; and
- c. that there was no unjustifiable discrimination within the meaning of Article 14 between widowers who brought claims before the Court and those who did not, and that the policy of reaching friendly settlements with the former group while contesting the cases before him was not irrational.
- d. that there was a need to make a written claim.
- e. that the Secretary of State had not acted unlawfully under the Human Rights Act 1998.

Mr Justice Moses made a declaration of incompatibility between the Convention and sections 36 and 37 of the 1992 Act.

9. Thus Mr Justice Moses saw DWP as legally entitled to treat widowers who had not applied to the European Court differently from those who had. Parliament had already been considering changing the law on widow's benefits when DWP had chosen to offer friendly settlements to Mr Cornwell and the other litigants. Neither the Government nor DWP had led widowers to believe that claims in the domestic courts would be settled. Widowers had not had an expectation, in the same way as widows, that they would receive widow's benefits. As a matter of domestic law, DWP were entitled to treat claimants who made applications to the European Court differently from those who had not. Mr Justice Moses also ruled that by settling with the claimants at the European Court, the Government had not bound itself to accept similar claims. The Government was entitled to settle those claims whilst maintaining a position to defend itself, in respect of major constitutional points in domestic law.

10. The applicants for judicial review were granted leave to appeal against the judgment. The substantive hearing of the appeal took place between 7 and 10 October 2002 and judgment has been reserved.

11. On 21 August 2002 the Permanent Secretary of DWP told the Ombudsman that in his view Mr A, given that he had chosen not to make an application to the European Court as Mr Cornwell had done (paragraph 5), could have taken judicial proceedings in the domestic courts as other widowers had done (paragraph 8). He said that DWP had agreed not to take any point on limitation on those scheduled cases until the final outcome of the lead cases was known. He said that it remained open to Mr A to add his name to the schedules (at no cost) and that DWP would be happy to assist him in that process. The Permanent Secretary said he saw the issues Mr A complained about as ones properly for the courts, and the judicial review proceedings were current. He went on to question the Ombudsman's jurisdiction to investigate Mr A's complaint, citing among other things, section 5(2)(b) of the 1967 Act (paragraph 4).

## The Ombudsman's decision to discontinue the investigation

12. I do not share the Permanent Secretary's view that the initiation of an investigation into Mr A's complaint was outside the Ombudsman's jurisdiction. It was both within his remit, and appropriate, to initiate an investigation into Mr A's complaint - the nub of which was that DWP had acted unfairly in refusing to extend to him the benefit of the friendly settlement granted to Mr Cornwell (paragraph 5), short of Mr A himself taking proceedings before the European Court. I do not see the issue of the **legality** of the department's actions, which is being addressed through the judicial review proceedings in the domestic courts, as identical to that. No jurisdictional issue was raised when the Chief Executive of the then Benefits Agency responded

in July 2001 to the summary of Mr A's complaint the Ombudsman's staff had put to the Permanent Secretary's predecessor.

13. However, I readily accept that the eventual outcome of the litigation may well have a bearing on the position of Mr A and other widowers. Although the appeal against Mr Justice Moses' judgment came before the courts between 7 and 10 October 2002, the eventual outcome can only be a matter of speculation. Taking account of that - and of what I go on to say about the substantive issues - I conclude that, under authority delegated by the Ombudsman, I should exercise her discretion under section 5(5) of the 1967 Act (paragraph 4) to discontinue this investigation.

14. I would emphasise that it is not for the Ombudsman to make legal determinations, just as it is not for her to decide who is entitled to widow's benefits (paragraph 4). But DWP have made payments to Mr Cornwell (and others) who have initiated proceedings before the European Court (and had their applications declared admissible), while denying an equivalent payment to Mr A, others in his situation, and others who have made a written claim. Mr Justice Moses held, on the basis outlined in paragraph 8 above, that that was not discrimination contrary to the Convention. Whether or not that finding is upheld, it appears to me that there are good grounds for saying that Mr A, and others in an analogous position, have suffered an injustice. However the issue for me is whether that perceived injustice was the result of maladministration by DWP.

15. The Chief Executive has explained DWP's reasoning: they saw the intention of the legislation as unambiguous, that the benefits were for widows not widowers. They therefore did not consider that an extra-statutory payment was appropriate in the general run of cases. Their policy was to consider an extra-statutory payment only where proceedings had been initiated before the European Court and ruled admissible (paragraph 7).

16. There is no doubt that DWP were applying a policy that had been approved by Ministers. It is sometimes said that "the Ombudsman may not question the merits of Government policy". However, in my view that is too simple. A policy of deliberate unfair discrimination, for example, would in my judgment be maladministrative and as such open to legitimate criticism by the Ombudsman.

17. The issue of Mr A not having made a written claim apart, there is no reason to suppose otherwise than that if the European Court had heard a case brought by someone whose circumstances were similar to those of Mr A, it would have found in his favour and awarded him appropriate compensation: that is the clear implication of Mr Justice Moses' judgment. Such a finding of the European Court would have had to be honoured by the Government by virtue of its obligations under international law. So the effect of DWP's policy - or of the law, as they see it - was to require Mr A, and others in similar circumstances, to vindicate their rights by the lengthy and inconvenient process of making an application to the

European Court, since before the coming into force of the Human Rights Act 1998, there was effectively no possibility that they could do so through the domestic courts. Notwithstanding that the domestic courts did not find that discrimination illegal, I see obvious grounds for criticising such a policy as unfair and unreasonable.

18. On the other side, it could be argued that DWP had no power in law to adopt a policy of making extra-statutory payments to all who satisfied the conditions, other than that of being a woman, required for the award of widow's payment or widowed mother's allowance. Clearly it could not be maladministrative of DWP to have rejected a policy which it was beyond their legal powers to implement. It is clear that the provisions of sections 36 to 38 of the 1992 Act could be interpreted only as DWP did interpret them. As far as I am aware, DWP took appropriate legal advice and laid out the issues for consideration by the Minister who decided the policy. It is also relevant that the Government had decided to remove the discrimination between widows and widowers, and that in effect that was achieved by the Welfare Reform and Pensions Act 1999.

## Conclusion

19. I have come to the conclusion that continuing my enquiries will not progress matters further; and I have exercised the Ombudsman's discretion to discontinue her investigation accordingly (paragraph 4). Insofar as there is an injustice for Mr A, or a difference of treatment as the Permanent Secretary would put it, I see it as derived from legislation rather than maladministration. As such, it is a matter for Parliament to consider. Given that the domestic legal proceedings following Mr Justice Moses' judgment have not yet concluded (paragraph 10), I see it as appropriate for the Ombudsman to draw the attention of Parliament to matters as they stand, by way of a report (of which this letter would form an annex) under section 10(4) of the 1967 Act (paragraph 4). If Mr A wishes to take up DWP's offer to add his name to the schedules, as outlined in paragraph 11, he should let them know.

**PARLIAMENTARY OMBUDSMAN  
(PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION)  
MILLBANK TOWER  
MILLBANK  
LONDON SW1P 4QP**

**TELEPHONE: 0845 015 4033  
FACSIMILE: 020 7217 4160  
EMAIL: [OPCA.Enquiries@ombudsman.gsi.gov.uk](mailto:OPCA.Enquiries@ombudsman.gsi.gov.uk)  
WEBSITE: [www.ombudsman.org.uk](http://www.ombudsman.org.uk)**