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Judgment: approved by the Court for handing down | *Delivered:* **01/10/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DENISE BREWSTER

Applicant/Respondent;

-and-

NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS' SUPERANNUATION COMMITTEE

Respondent/Appellant;

-and-

DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Notice Party/Appellant.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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Higgins LJ

[1] This is an appeal by the Northern Ireland Local Government Officers' Superannuation Committee ("the Committee") and the Department of the Environment for Northern Ireland ("the Department") from the decision of Treacy J whereby he allowed the respondent's application for judicial review of a decision by the Superannuation Committee not to pay a survivor's pension to the respondent following the death of her cohabiting partner. Mr Hanna QC and Mr Sayers appeared on behalf of the Committee; Mr McGleenan QC and Mr Lunny appeared on behalf of the Department and Mr Scoffield QC appeared on behalf of the respondent. Notice that the application for judicial review gave rise to a Devolution Issue was served under the Northern Ireland Act 1998. The Attorney General for Northern Ireland entered an appearance and appeared in the proceedings and on the appeal with Miss Cheshire.

[2] The respondent's partner was employed by Translink and had been for fifteen years. He and the respondent had been in a relationship for approximately ten years and lived together in a property purchased by them. They were engaged to be married. He died suddenly on 26 December 2009. During his employment with Translink he paid into an occupational Local Government Pension Scheme administered by the Committee. The respondent was also in public employment with a local Council and paid into a similar scheme which was administered by the Committee. Following the partner's death the Committee paid out a death grant in the sum of £68,000, fifty per cent of which was paid to the respondent. On 1 July 2011 the Committee decided not to pay the respondent a survivor's pension as the deceased had failed to nominate the respondent as the person to receive benefits under the Local Government Scheme. The application for judicial review proceeded on the agreed basis that a nomination form was not filled in or was not submitted. Consequently the respondent was deprived of a pension of approximately £4650 per year.

[3] The respondent issued proceedings for judicial review seeking a declaration that the decision of the Committee was unlawful and ultra vires and should be quashed and that the Committee should be compelled to pay the survivor's pension. The grounds advanced were that the decision was in breach of the respondent's rights under Article 14 of the European Convention on Human Rights (ECHR) taken in conjunction with Article 1 of the First Protocol of the Convention, that the decision discriminated against the respondent on the basis of her status as the unmarried partner of the deceased and that the Regulations requiring nomination and the absence of a discretion in the Committee were unlawful.

[4] Article 9 of and Schedule 3 to the Superannuation (NI) Order 1972 empower the Department by regulations to make provision with respect to pensions which may be paid to such persons and subject to the fulfilment of such requirements and conditions, as may be prescribed by the regulations. Following consultation with the Local Government Association, the Committee and other interested parties, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (NI) 2009 ("the 2009 Regulations") were made creating a new Local Government Pension Scheme which came into operation on 1 April 2009 replacing the 2002 Scheme. Regulation 24 provides for benefits to be paid to survivors of active members.

> "(1) If a member dies leaving a surviving spouse, nominated cohabiting partner or civil partner, that person is entitled to a pension payable from the day following the date of death.
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> (2) The pension is calculated by multiplying his total membership, augmented as if regulation 20(2) (early leavers: ill-health) applied, by his final pay and divided by 160.

(3) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1)."

The 'nominated cohabiting partner' is defined in Regulation 25:

"(1) 'Nominated cohabiting partner' means a person nominated by a member in accordance with the terms of this regulation.

(2) A member (A) may nominate another person (B) to receive benefits under the Scheme by giving the Committee a declaration signed by both A and B that the condition in paragraph (3) has been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.

(3) The condition is that —

(a) A is able to marry, or form a civil partnership with, B;

(b) A and B are living together as if they were husband and wife or as if they were civil partners;

(c) neither A nor B is living with a third person as if they were husband and wife or as if they were civil partners; and

(d) either B is financially dependent on A or A and B are financially interdependent.

(4) But a nomination has no effect if the condition in paragraph (3) has not been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed. [I interpose that it is not disputed that the substantive condition in (3) was satisfied in this case.]

(5) A nomination ceases to have effect if —

(a) either A or B gives written notice of revocation to the Committee;

(b) A makes a subsequent nomination under this regulation;

(c) either A or B marries, forms a civil partnership or lives with a third person as if they were husband and wife or as if they were civil partners; or

(d) B dies.

(6) B is A's surviving nominated partner if—

(a) the nomination has effect at the date of A's death; and

(b) B satisfies the Committee that the condition in paragraph (3) was satisfied for a continuous period of at least 2 years immediately prior to A's death; and

(c) B satisfies the Committee that the condition in paragraph 3 was satisfied for a continuous period of at least 2 years immediately prior to A's death.

(7) For the purposes of this regulation , 2 people of the same sex are to be regarded as living together as if they were civil partners if they would be regarded as living together as husband and wife if they were not of the same sex.

(8) In this regulation, 'member' means an active member or a former active member who has become a deferred or pensioner member in accordance with these Regulations or the Administrative Regulations."

Thus in order for a surviving cohabiting partner to benefit from the pension scheme the active member must give the Committee a declaration signed by himself and his nominee that the four conditions set out in Regulation 25(3) have been satisfied for a continuous period of at least two years including the day on which the declaration is signed.

[5] Regulation 23 makes provision for the payment of a death grant on the death of an active member and provides that the Committee may at its absolute discretion make death grant payments for the benefit to the member's nominee or personal representative or any person appearing to have been his relative or dependant.

[6] In his judgment Treacy J referred to a consultation paper entitled Facing the Future – Principles and propositions from affordable and sustainable Local Government Pension Scheme in England and Wales which was said to be the origins of the policy initiative which led to the inclusion of the 'nominated cohabiting partner' in the 2009 Regulations. Paragraph B8 of the consultation paper provided –

> "7. Certain considerations arise from the difference between cohabiting partners and married couples or civil partners. For married and civil partners, entitlement is easy to prove objectively and provisions should be simple to administer. For cohabiting partners, clear evidence would be necessary to show that they were living together as if they were husband and wife or civil partners. For the LGPS, as for other public service schemes, evidence of the following would be needed:
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> - cohabitation;
> - an exclusive, long-term relationship established for a minimum of 2 years;
> - financial dependence or interdependence; and
> - valid nomination of a partner with whom there would be no legal bar to marriage or civil registration.
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> 8. Administering authorities would need to satisfy themselves that the evidence demonstrates that the member and cohabiting partner were living together in a relationship akin to marriage or civil partnership."

This was followed by a further consultation paper entitled *Where next? – Options for a new-look Local Government Pension Scheme in England and Wales*. Nationally this was circulated to a wide range of consultees including the local government associations and the various trade unions. Locally this was circulated on 2 August 2006 to, inter alia, the Northern Ireland Local Government Association, the Committee, Northern Ireland Committee of the Irish Congress of Trade Unions and the Northern Ireland Public Service Alliance. The covering letter referred to four options each of which was to have the same additional benefit improvements which were set out. These included 'Partners' pensions for cohabitees (subject of overarching legal position)'. In their response to the consultation paper the Committee made various observations and recommendations as to improvements to the scheme and stated that "the unions have been pressing for the partners' pensions to reflect the increase in 'common law' partners".

The content of the Regulations follows the equivalent Regulations in England and Wales it being considered desirable that the pension schemes are similar. The source of the evidential requirements for cohabitation in the 2009 Regulations was the Principal Civil Service Pension Scheme in England and Wales which provides at E 2.3 –

> "A person is a surviving dependant in relation to a member for the purpose of this rule if –
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> (a) the person and the member jointly made and signed a declaration in such form as the Department may require, and
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> (b) the person satisfies the Department that at the time of the member's death -
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> (i) the person and the member were cohabiting as partners in an exclusive long term relationship,
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> (ii) the person and the member were not prevented from marrying (or would not have been so prevented apart from both being of the same sex), and
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> (iii) either the person was financially dependent on the member or they were financially interdependent."

[7] Notice of the application for judicial review was given to the Department and Marie Cochrane a Deputy Principal filed an affidavit in response. She outlined the history of the 2009 Regulations and the various consultation processes. At paragraph 15 of her affidavit she averred:

> "As appears from the foregoing, the procedural requirements for establishing an entitlement to a survivor's benefit under the 2009 Regulations is identical to that contained in other UK local government schemes and similar to that within the Principal Civil Service Scheme. It is the view of the Department that these requirements are reasonable and proportionate measures designed to establish in a formal manner, the intentions of the deceased about a matter which has testamentary significance. Furthermore, cohabiting relationships are different from marriage and civil partnerships insofar as they

> may be commenced and ended without legal formality and do not involve a change of an individual's legal status. The Department is of the view that if a Scheme member chooses to have a cohabiting relationship which is neither marriage nor civil partnership, the requirements of the 2009 Regulations are an appropriate means by which to determine the existence, formality and status of the relationship in addition to obtaining independent verification of the deceased's wishes."

[8] The 2009 Regulations were made on 25 February 2009 and the new Pension Scheme came into effect on 1 April 2009. Members of the Local Government Schemes are kept up to date by a Members' News which is issued regularly and sent to the homes of all active members. The changes introduced by the 2009 Regulations, in particular the extension of the survivors' pension to cohabiting partners and the requirement for nomination thereof, was brought to the attention of members through Members' News 2008 sent to the home addresses of all members in October 2008, a Revised Short Guide to the Local Government Pension Scheme (NI) sent to all members on 25 March 2009, and Members News 2009 sent to all members on 29 October 2009. In addition on 21 May 2009 the Committee's website Latest News section was updated to include a link to the LGS 21 form by which a nomination of a cohabiting partner could be made. The respondent averred in her first affidavit that she was certain that the deceased completed the nomination Form LGS 21. She could not remember signing it but remembered discussing it with the deceased and believed that he gave the Form to his employers. She also mentioned that the Committee and Translink had the wrong address for her partner. However she was also a member of the Scheme and in her second affidavit accepted that the Committee had the correct address for her and that she would have received the Members' News. She averred that she "would have skimmed these booklets but would not have read them in detail or in their entirety" and would have put them in a drawer. No Nomination Form was received by the Society from the deceased nor had the respondent made a nomination in favour of the deceased.

[9] At paragraphs 19 and 20 of his judgment the learned trial judge set out the case made by the respondent. This was that the requirement to complete the nomination form (described as "additional paperwork") was an unnecessary hurdle which ought not be imposed on a cohabiting partner, particularly when, apart from the nomination form, the surviving partner already has the burden of satisfying the Committee that the relevant conditions of entitlement (Regulation 25(3)) existed at the time of death and for two years before that date. It was submitted that this requirement was so disproportionate and/or so redundant as to be irrational and unjustified. Even where some difference in treatment can be justified the applicant submitted that the measure adopted has to be proportionate to the legitimate aim pursued – Article 14 ECHR requires an examination of whether the measure goes further than is necessary bearing in mind the objective in question. At paragraph 20

he identified the issue in the application as "the 'means employed' to differentiate between cases" rather than whether the differential treatment was itself justified. At paragraph 21 he commented that it was important that it was common case that the applicant satisfied the Regulation 25(3) conditions for eligibility. I doubt if the fact that this was common case in the judicial review proceedings was at all important in relation to the decision to be made by the Committee.

[10] Between paragraphs 22 and 46 he set out the respective submissions of the parties and then referred to the relevant case law.

> "Relevant Case Law
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> [47] The court was referred to Humphreys v The Commissioners for Her Majesty's Revenue and Customs [2012] UKSC 18 where the Supreme Court considered the question of whether the payment of Child Tax Credit to one person only in respect of each child (even where the care of the child is shared between separated parents) constituted an unjustified difference in treatment within the ambit of article 1 of the First Protocol ECHR. Lady Hale (with whom the other Justices agreed) referred to Stec v United Kingdom (2006) 43 EHRR 1017 and said that:
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> > 'The Court repeated the well-known general principle that "A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (para 51). However, it explained the margin of appreciation enjoyed by the contracting states in this context (para 52):
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> > > 'The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to

> general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect *the legislature's policy choice unless it is 'manifestly without reasonable foundation'."* [16] [Emphasis added]

[48] Applying such a test, the Supreme Court went on to note at [22] that it was dealing with a considered policy choice which could last indefinitely, and said at [26] that it was:

> "… well-established that bright line rules of entitlement to benefits can be justified, even if they involve hardship in some cases. Hence, this rule cannot be said to be unreasonable or 'manifestly without reasonable foundation'."

[49] The applicant argued that the respondent should have disapplied the 2009 Regulations notwithstanding the absence of a condition of entitlement and the absence of any statutory discretion. I agree with the respondent that such an approach would not be warranted unless the implementation of the 2009 Regulations would result in a Convention breach. Simor and Emmerson's Human Rights Practice states:

> "For a measure to be proportionate it must strike a fair balance between the rights and freedoms of the individual and the general interest, having regard to the requirements of a democratic society. States are not required to show that there was no alternative non-discriminatory means of achieving the same aim."

[50] In R (Wilson) v Wychavon District Council [2007] EWCA Civ 52 the Court of Appeal noted that the provision under consideration was:

> "… not automatically open to challenge on the basis that a less restrictive solution would have been possible. The 'less restrictive alternative' test is not an integral part of the analysis of proportionality under Art. 14 … *[T]he existence of a less restrictive alternative does not necessarily take a measure outside the margin of appreciation or discretionary area of judgment* … It does not follow that the existence of a less restrictive alternative is altogether irrelevant in the context of Art. 14. It seems to me that in an appropriate case it can properly be considered as one of the tools of analysis in examining the cogency of the reasons put forward in justification of a measure; and the narrower the margin of appreciation or discretionary area of judgment, or the more intense the degree of scrutiny required, the more significant it may be that a less restrictive alternative could have been adopted. It is not necessarily determinative, but it may help in answering the fundamental question whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

[51] In Ghaidan v Godin Mendoza [2004] 2 AC 557 at para 19 Lord Nicholls of Birkenhead said of the role of the Court in such applications:

> "Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion only when it is apparent that the legislature has attached insufficient importance to a

> person's convention rights. The readiness of the court to depart from the view of the legislature depends on the subject matter of the legislation and of the complaint."

[52] As has been stated, the margin of appreciation accorded to the Contracting States in areas of social or economic policy is a wide one. And clearly the scheme did make provision for unmarried cohabiting partners.

[53] Lord Hoffman said in R (ProLife Alliance) v British Broadcasting Corporation [2004] 1 AC 185 approved by Lord Walker in R(on the application of Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173]:

> "in any particular area the decision-making power of this or that branch of government may be greater or smaller, and where the power is possessed by the legislature or the executive, the role of the courts to constrain its exercise may correspondingly be smaller or greater. In the field of what may be called macroeconomic policy, certainly including the distribution of public funds upon retirement pensions, the decision making power of the elected arms of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest. I conceive this approach to be wholly in line with our responsibilities under the Human Rights Act 1998. In general terms I think it reflects a recurrent theme of the Strasbourg jurisprudence, the search for a fair balance between the demands of the general interest of the community and the protection of individual rights.""

[11] At paragraph 54 the learned trial judge posed the question – "Is the requirement for nomination in Reg 25 a proportionate and justified *means* of achieving a legitimate social policy aim?". He then commented that the means appear to be inconsistent with the legitimate aim which he identified as placing unmarried partners in a similar position to married couples and those in civil partnership. He noted that if pension is not paid to the respondent it would simply be lost [para 55]. He noted that the relationship of cohabitees lacked the legal definition and certainty of marriage but that that deficiency was addressed by the requirement of evidencing the Regulation 25(3) conditions [para 56]. He found the requirement to nominate to be an additional hurdle not required of married or civil partners and that the failure of the deceased to make a nomination appeared to be inconsistent with the nature of his relationship with the respondent. He commented that it made no sense for the deceased to wish to disentitle his partner. He then found that it was "irrational and disproportionate to impose a disqualifying hurdle of this kind on the applicant who was indisputably in a qualifying relationship in that it fulfilled the substantive conditions" [para57]. He commented that there was force in the submission that the requirement for nomination was more likely to give rise to problems as members of the scheme may be unaware of the need to do so or forms could be lost in the post or misfiled [para 58]. He then stated his conclusion in the remaining paragraphs of the judgment as follows:

> "[59] The imposition of the additional hurdle in respect of cohabiting partners has had an effect in this case which appears to run contrary to the legitimate aim of the legislative scheme which was to facilitate entitlement to pensions without discrimination on grounds of status. In fact, in this case, the additional requirement, unique to qualifying cohabitees, has become an instrument of disentitlement.
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> [60] I can quite understand the desirability of a marriage or civil partnership certificate as proof of the fact of the formal relationship. Equally a nomination is a form of [self-authenticating] certificate which will make the administration of the scheme easier. But if it is merely evidence of the fact of the requisite relationship (and that is accepted in this case as having been established) I fail to see how the absence of the requisite certificate can, proportionately, mandate refusal in all cases whatever the strength of the applicants claim. If, as the respondent has argued, the nomination is required as proof of intention the requirement is more obviously objectionable because on the grounds of status it is effectively being presumed that those in a comparator relationship would treat their partners (and family unit) less

> favourably – that is to say that they would wish to disentitle their partner. Such a presumption is irrational and likely in most cases to be contrary to the intentions of the scheme member. Yet it was the wishes of the scheme member which the respondent argued necessitated the imposition of the requirement. It seems more rational, once the quality of the relationship has been established to the legislative threshold, to treat the intention of the partner on a non-discriminatory footing and in a similar manner to those who are married or in a civil partnership.
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> [61] As *Stec* and *Humphreys* make clear very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. Equally it seems to me that where the means [nomination] is inconsistent with the legitimate aim [of eradicating status discrimination in pension provision] very weighty reasons would have to be put forward to justify the imposition of an additional hurdle, itself based on an adverse, status driven [and in most cases irrational] assumption about intention. I therefore conclude that whilst the impugned regulations pursue a legitimate aim there was not, for the reasons given, a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In this case the means defeated the aim.
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> [62] The judicial review is allowed and I will hear the parties as to whether, and if so what, further remedy is required."

[12] It seems clear from Paragraph 61 of the judgment that the learned trial judge considered that weighty reasons would have to be put forward to justify the imposition of a requirement that the deceased should nominate who was to be the beneficiary of the pension. Impliedly, at least, he equated the situation to a difference in treatment based exclusively on the ground of sex, one of the 'suspect grounds' or 'personal characteristics' which require weighty reasons for justification. He was of this view as the requirement for nomination (the means) was inconsistent with the legitimate aim of the Regulations, which he identified as the eradication of status discrimination in pension provision. He concluded that there was no reasonable relationship of proportionality between the means and the aim, as apparently the means in his view defeated the aim. The latter appears to be a reference back to

paragraph 59 in which he found the requirement for nomination to be an instrument of disentitlement to a pension.

[13] In a case based on Article 1 Protocol 1 and Article 14 ECHR three issues fall for determination. First, whether the facts of the case come within the ambit of Article 1 Protocol 1 in order to engage Article 14. Second, whether the respondent had 'other status' within the meaning of Article 14. It is common case that a survivor's pension is property for the purposes of Article 1 Protocol 1 and that as a cohabitee of the deceased the respondent had the requisite status for the purpose of Article 14. It was also common case that the respondent satisfied the requirements of Regulation 25(3) of the 2009 Regulations but that no nomination form had been received by the Committee. The third issue is whether the difference in treatment of the respondent (as opposed to married or civil couples) based on the requirement of a nomination by the deceased was objectively justified. This third issue gives rise to several different questions and considerations.

[14] The appellants supported by the Attorney General challenged the approach of the learned trial judge and his conclusions. Broadly speaking there was considerable overlapping in the submissions both oral and written put before the court. It is sufficient for the purposes of this judgment to summarise the main points relied upon. It was submitted that there is a significant distinction to be drawn between marriage and civil partnerships on the one hand and cohabitation as a couple on the other. The appellants challenged the Judge's finding that the requirement to complete a form nominating the beneficiary of the pension was an additional hurdle when in the case of married members or civil partnership members their entitlement to the pension was automatic. The appellants did not accept the judge's conclusion as to the aim of the Regulations. It was submitted that the aim was to make pension provision available to those not married or in civil partnership but who were in a permanent stable relationship and to do so by public affirmation. The purpose of nomination was to inform the Committee of the member's wish or intention and it both identified the person concerned and provided written verification of that person and did so in an objective manner. Furthermore it was wrong to consider that it would be irrational for a member to wish to disentitle his partner as there may be many reasons why he should wish to do so, in particular in order to increase a child's pension in accordance with the provisions relating to calculation of the pension contained in Articles 27, 28, 34 and 37 of the 2009 Regulations. It was submitted that this was not a case of discrimination on a 'suspect' ground, namely a personal characteristic of the respondent such as sex or race. This was a non-suspect ground involving social and economic policy and in those circumstances the proper approach was to allow a wide margin of appreciation to the legislature and to consider whether the requirement to nominate was without reasonable foundation in accordance with Stec v UK 2006 43 EHRR 1017. The learned trial judge did not apply this test but applied the test of 'weighty reasons' which is appropriate for a 'suspect' ground. To require a member who was cohabiting to complete a form of nomination was not onerous given the importance of doing so and was not disproportionate to the aim of the Regulations.

[15] It was submitted on behalf of the respondent that the Judge's approach and reasoning was unimpeachable. It was a clear case of a breach of her Article 1 Protocol 1 and Article 14 rights on the basis of her unmarried status and the procedure leading to entitlement was lacking in justification and proportionality. The additional paperwork involved in the completion of a nomination form was an unnecessary hurdle which ought not to be imposed as she was required to satisfy the Committee, independently of the nomination form, that the four conditions in Regulation 25(3) were met. The case did not involve questions of judgment or social or economic policy but the mere means devised by the state to achieve the aim of the Regulations namely the completion and signature of a 'piece of paper'. The test applied by the judge was correct. The requirement to submit a form of this nature was more likely to lead to problems and counsel highlighted various difficulties that might arise, for example, inter alia, the form could be lost in the post, misfiled, or members might be unaware of the requirement or confused as to its completion, or forget to return it to the Committee.

[16] It is undoubtedly correct that marriage retains a special status within society and that those who commit to it enjoy particular rights which flow from that commitment and status. Civil partnership attracts similar status and rights. Informal cohabitation arrangements whether of long or short duration do not. They lack the formal and public commitment which attends every marriage or civil partnership. This has been recognised in many cases –Lindsay v UK 1987 9 EHRR CD 555, Burden v UK 2007 44 EHRR 51 and X v Austria 2013 1FCR 387. In Van der Heijden v Netherlands 2013 57 EHRR 13 the European Court reiterated its views on this subject albeit in the context of testimonial privilege accorded to spouses and registered partners.

> "69. The Court does not accept the applicant's suggestion that her relationship with Mr A, being in societal terms equal to a marriage or a registered partnership, should attract the same legal consequences as such formalised unions. States are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage or registered partnerships. The legislature is entitled to confer a special status on marriage or registration and not to confer it on other de facto types of cohabitation. Marriage confers a special status on those who enter into it; the right to marry is protected by art.12 of the Convention and gives rise to social, personal and legal consequences. Likewise, the legal consequences of a registered partnership set it apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of 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 applicant and Mr A renders their relationship, however defined, fundamentally different from that of a married couple or a couple in a registered partnership. The Court would add that, were it to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of formality."

[17] At paragraphs 54 of his judgment the judge stated his view as to the aims of the Regulations. This is to place unmarried, stable, long-term partners in a similar position to married couples and those in civil partnership to facilitate entitlement to a pension without discrimination on the grounds of status. In paragraph 61 he described it as eradicating status discrimination in pension provision. I accept Mr McGleenan's analysis that this is not correct. The purpose of the Regulations is to permit some cohabitees in certain defined circumstances to obtain the same pension provision as those who are married or in civil partnership. Clearly they do not apply to all cohabitees nor do they equate cohabitees with married couples or those in civil partnership.

[18] I consider this case to have much in common with Swift v Secretary of State for Justice [2013] EWCA 193. That case concerned section 1(3)(b) of the Fatal Accidents Act 1976 which permits dependants to sue for damages following a death caused by any wrongful act. Dependants is defined in section 1(3) as meaning a husband or wife or civil partner or any person who was living with the deceased in the same household for at least two years before his death. The claimant had been living with the deceased for six months prior to his death. A child of the relationship born after his death was entitled to make a claim for dependency under Section 1(3)(b) of the Fatal Accidents Act 1976. As the claimant had been living together as husband and wife in the same household for less than two years immediately before his death she was unable to do so. The claimant's case was that section 1(3)(b) was incompatible with her rights under Article 14 ECHR in conjunction with Article 8 as it unjustifiably discriminated against persons cohabiting as husband and wife for less than two years. Her claim was dismissed on the basis that this was a matter of social policy in respect of which the legislature was entitled to a wide margin of appreciation in setting the two year limit which was neither disproportionate nor arbitrary. An appeal to the Court of Appeal was dismissed. It was held the decision as to which cohabitees should be able to claim damages for loss of dependency raised difficult issues of social and economic policy which were far removed from discrimination on grounds such as sex and race (the suspect grounds). Therefore the legislature was entitled to a generous margin of discretion. The legitimate aim of the legislation was to confine the right to recover damages to those who had

relationships of some degree of permanence and dependence. Parliament was entitled to the view that there cannot be a presumption in the case of short-term cohabitants that the relationship was likely to be one of permanence and constancy, unlike that of married couples. Equally it was entitled to decide that there had to be some way of proving the requisite degree of permanence and constancy and that the means of so doing was to require two years cohabitation which was a simple way of demonstrating a real relationship of constancy and permanence. In the judgment of the Court the Master of the Rolls, Lord Dyson, summarised the state of the law in relation to the circumstances in which a margin of appreciation should be afforded to the legislature and the approach to issues of justification and proportionality.

> "22. I would dismiss this appeal substantially for the reasons advanced by Mr Coppel and accepted by the judge. The test for justification under article 14 has been stated by the ECtHR on a number of occasions. It is similar in principle to the test that is adopted in relation to the interference with rights under other articles of the Convention. Thus, for example, in Serife Yigit v Turkey (Application No 39876/05), 2 November 2010, the Grand Chamber of the court said:
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> > '[D]iscrimination means treating differently, without an objective and reasonable justification……A difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'
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> Legitimate aim
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> 23. There is little, if any, disagreement between the parties about this. The legitimate aim that is sought to be pursued by section 1(3) as a whole is to confer a right of action on dependents of primary victims of fatal wrongdoing to recover damages in respect of their loss of dependency, but to confine the right to recover damages to those who had relationships of some degree of permanence and dependence. The real question is whether the means chosen by the legislature to pursue this aim are proportionate. I bear in mind the important point that the burden lies on

the Secretary of State to show that they are proportionate.

Margin of discretion

24. I accept the submission of Mr Coppel that a wide margin of discretion should be accorded to the legislature in this case. The difference in treatment based on the duration of cohabitation is not founded on what has been described in the case law as a 'suspect' ground of discrimination. In R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2006] 1 AC 173, Lord Walker explained at paras 55 to 60 that not all possible grounds of discrimination are equally potent. The United States Supreme Court has developed the doctrine of 'suspect' grounds of discrimination which the court will subject to particularly severe scrutiny. 'Suspect' grounds of discrimination are those based on personal characteristics (including sex, race and sexual orientation) which an individual cannot change. The same approach has been adopted in the Strasbourg jurisprudence. Thus, for example, in Stec v United Kingdom (2006) 43 EHRR 1017 at para 52 the court drew a distinction between (i) discrimination based exclusively on the ground of sex (requiring very weighty reasons in justification) and (ii) general measures of economic or social strategy (where a wide margin is usually allowed). In relation to the latter, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the ECtHR will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'. It is true that these observations were made in relation to the margin of appreciation accorded by the Strasbourg court to Member States. But the same approach was adopted by Lady Hale in a domestic context in Humphreys (FC) v HMRC [2012] UKSC 18 at paras 15 to 19: see also R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63, [2009] 1 AC 311.

25. I accept that, unlike Carson, RJM and Humphreys, the present case is not concerned with

> state benefits. Such cases are the most obvious examples of decisions by the legislature on questions of what is in the public interest on social or economic grounds. But the decision whether to give a statutory right of action to the dependent of a victim of a wrongful death for damages for loss of dependency also raises important and difficult issues of social and economic policy. It does not raise a technical legal question which has little or no social or economic consequences. That is no doubt why Lord Hailsham took extensive soundings at the Committee stage of the Administration of Justice Bill in 1982. He consulted not only the Bar and the Law Society (as one would expect with proposed legislation of this kind), but also the Trades Union Congress, the Confederation of British Industry and the British Insurance Association. In its turn, the Law Commission also consulted a number of different organisations. The list of those who responded to the consultation by the MoJ in 2007 is even more striking. It includes many insurers and defendant organisations, Trades Unions and organisations promoting the interests of business."

At p 102 of its consultation paper "The Law on Damages", the DCA identified the groups with an interest in the proposals as being claimants, defendants, insurers, taxpayers and Public Sector NHS.

[19] Social norms relating to marriage and cohabitation have changed significantly over recent years. The 2009 Regulations are a response to those changes in the area of pension provision for unmarried but cohabiting partners. I accept the submission of Mr McGleenan that the aim of the regulations is to make pension provision available to those involved in a permanent stable relationship based on public affirmation. It is not, as the trial judge found, to eradicate status discrimination in pension provision (paragraph 54) or to place unmarried long–term partners in a similar position to married or civil partnership (paragraph 61). The public affirmation, which is crucial, is the fact of nomination evidenced by the completion of the nomination form. While such pension provision is different from the allocation of state benefits, it has much in common with provision for dependency claims following fatal accidents. The difference in treatment between married/civil partners and unmarried partners in a stable relationship, is not based on what are referred to as personal characteristics ("suspect grounds") that cannot be changed such as sex and race. The decision whether to give a statutory right to pension provision to cohabitees following the death of a partner is clearly an important issue of social and economic policy. It was that which underpinned the extensive consultation which took place, principally with those most interested and affected, prior to the implementation of the

regulations. In my view Parliament is entitled to a wide margin of appreciation and discretion in relation to its decision as to which cohabitees should benefit and how they should be identified.

[20] No issue is taken with the requirement that cohabitees should fulfil the conditions set out in Regulation 25(3). Mr Scoffield submitted that it was the means, under Regulation 25(2), by which the Committee had to be satisfied that a person was a nominated cohabiting partner which were unjustified and disproportionate, namely the requirement that the member and the intended surviving dependant, sign a declaration that the conditions in paragraph 3 have been satisfied for a continuous period of at least two years. He submitted that this does not in any way further the aim of the Regulations (as found by the learned trial judge) nor is anything gained by the requirement of nomination by a signed declaration. It was submitted that the requirement for a completed form was redundant as there could only ever be one cohabitating partner and it was unlikely that the member would not wish his partner to benefit. The necessity for such a form could only lead to problems like the present case whereby a genuine cohabitating partner would be denied a pension simply because a form did not reach the Committee. Many reasons why a form might not reach the Committee were canvassed, not just failure to complete the form but also the vagaries of the postal service.

[21] The Regulations define 'nominated cohabiting partner' as a person nominated by a member of the scheme. It is also a declaration of the member's wishes. I do not think it can be presumed in every case that the member, absent a signed declaration, will want his partner to benefit. The signed form has the advantage of making it clear what the member's wishes are. Therefore the fact of nomination through completion of the form is an important element in the expression of the member's wishes and the identification of the person to benefit from the pension. It is not an onerous task. It requires merely the completion of a simple form and its communication to the Committee who provide a written receipt. Such a receipt would deal with many of the potential problems identified by counsel as arising from the requirement to submit the form to the Committee. The use of Member's News to publicise changes in pension arrangements would allay fears about a member not learning of the scheme. That does not arise in this case as the evidence demonstrates that both the deceased and the respondent were well aware of the scheme. In this instance the evidence tends to suggest that the deceased, for whatever reason, did not return the form. If he wished his partner to benefit it was his responsibility to do so. The chance of human frailty is not a reason for saying that the requirement to complete a form is unjustified and disproportionate. This is a matter of personal responsibility which has to be assumed in many spheres of life. Forgetting to post your motor tax renewal documents or your cheque to the Inland Revenue will not impress a magistrate or the tax inspector. If there is a lack of confidence in the postal system other means of communication with the Committee could be employed. It is significant that of the various problems that could arise as identified by counsel many involve a failure of the member to ensure that the Committee have received his declaration and wishes.

There may be other means of notifying the Committee of the member's wishes and the identification of the beneficiary but this is the method chosen by Parliament. As Lord Dyson observed in Swift when a line has been drawn like this some cases will fall on the wrong side. It does not mean the line or the scheme was unjustified or disproportionate.

[22] For all these reasons I am of the opinion that this scheme and the requirement to complete a declaration on the appropriate form signed by both parties and notified to the Committee is not unjustified or disproportionate and gives rise to no discrimination under Article 14 and Article 1 Protocol 1. In stating in paragraph 61 that weighty reasons would be required to justify such a requirement the learned trial judge applied the wrong test. I would allow the appeal and reverse the order of the court below.

Ref:	GIR8872

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN:

DENISE BREWSTER

Applicant/Respondent;

-and-

NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS' SUPERANNUATION COMMITTEE

Respondent/Appellant;

-and-

DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Notice Party/Appellant.

_____

Before: Higgins LJ, Girvan LJ and Coghlin LJ

_____

GIRVAN LJ

Introduction

[1] For the reasons set out in this judgment not without hesitation I have come to a different conclusion from that reached by the majority. I can gratefully adopt Higgins LJ's statement of the factual position and in his judgment he has set out the relevant statutory provisions which I do not need to repeat.

Observations on the case

[2] In the year 2009-2010 there were 44,022 contributing members in the relevant scheme. There were 25,311 pensioners and 19,223 deferred members. The take up rate in respect of the nomination of cohabitees is extremely low. The evidence indicates that only 53 nominations were received between 1 April 2009 and

26 December 2009. There were only 108 such nominations from April 2009 to the end of November 2010.

[3] There are a number of unsatisfactory features in relation to questions of fact and evidence in this case. Firstly, it is the respondent's case that a nomination form was filled in and sent to Mr McMullan's employer Translink. No finding of fact has been made on that issue. It is not the respondent's case that the form was sent to NILGOSC itself but rather that it was sent to Translink. If Regulation 25, insofar as it requires the nomination to be "given to the Committee" in the sense of being delivered into its possession before the death of the deceased member, gives rise to a directory rather than mandatory requirement the question of the existence of the alleged nomination would become important because the respondent might qualify for the survivor partner's pension under the Regulations. The present proceedings, however, are directed to a more general question, namely whether, assuming a completed nomination is required, that requirement gives rise to an unjustifiable condition in breach of Article 14 and Article 1 Protocol 1 in respect of the respondent. If the respondent could establish on a balance of probabilities that a declaration had been signed and that the failure to deliver it to NILGOSC before the deceased's death was not fatal, being only directory, she would qualify as a beneficiary and would thus not be a victim for the purposes of Section 7 of the Human Rights Act 1998. However Mr Scoffield QC for the respondent and the other parties were content to proceed in the presently constituted proceedings and leave for other proceedings the question whether or not there had been an inter vivos declaration for the purposes of Regulation 25(2). As the Attorney General pointed out, the ordinary principles of res judicata do not apply in respect of judicial review proceedings and it may be open to the respondent to bring such later proceedings. This is not an issue which falls to be addressed in these proceedings.

[4] The question whether Article 25(2) gives rise to a mandatory precondition or is directory only is not without significance in relation to the question whether the precondition of nomination was a justifiable or proportionate condition to impose on unmarried couples for it touches on the question of the purpose and aim behind the requirement for the signing of a nomination declaration. Although this point was raised by the court in the course of argument the parties did not really address the point. Mr Scoffield QC could see force in the Regulation being construed as requiring both the signing of a declaration and its delivery to the Committee but he focused his argument on the disproportionality of the conditions in Article 25(2) of signing a nomination and submitting to NILGOSC. Mr Hanna QC recognised that there might be an issue as to whether the requirement of giving the nomination to the Committee was directory but not mandatory. It may be of significance that no real thought appears to have been given by the draftsman or the sponsoring department as to what should happen if a nomination had been signed by a member and his partner during the lifetime of a member but the document had not been given to the Committee in time before his death, perhaps for some very good reason such as an intervening death or catastrophic injury.

[5] Another striking aspect of this case is the complete absence of any evidence as to the effect on the workability or unworkability on the effective administration of the Pension Scheme if nomination documents are or are not submitted. On a superficial level it is possible to imagine that the working of a well-run pension scheme would be enhanced by the Committee having up-to-date and accurate details of members' marital and cohabitational arrangements. One might think that forward planning in respect of the funding of the Scheme would be enhanced by knowing the potential pool of beneficiaries who may become entitled to survivors' pensions. On the other hand the Scheme may be entirely workable without such information being supplied. The Armed Forces Pension Scheme in which there is no nomination requirement and in which the qualifying conditions for unmarried partners are less closely defined clearly functions without any nomination requirement. It may well be that as and when qualifying partners are identified and become entitled to a survivor's pension administrators of a pension scheme will know its future on-going liability to pay that pension and can factor that into the actuarial projections necessary to establish the on-going level of contributions of employees and employers in succeeding years. It is not for the court to speculate on these issues in the absence of evidence. It must be recalled where issues of justification and proportionality arise the onus lies in this case upon the appellants.

[6] No evidential basis is laid by NILGOSC for the justification of the condition in the affidavit of Zena Kee. Having set out the terms of the Regulations and having provided evidence of the information supplied to members about the new scheme, she simply states that the Scheme provided for by the 2009 Regulations confers no discretion on NIGOSC to pay survivor benefits in respect of persons for whom no nomination has been made in contrast to the absolute discretion given to the Committee in respect of the payment of a death grant. NILGOSC has provided no evidential basis for the asserted need for advance notification of cohabitational arrangements in operating, administering or funding the scheme. In its argument NILGOSC seeks to rely on the evidence of Marie Cochrane, the Deputy Principal of the Department of Environment. In paragraph 13 of her affidavit she seeks to justify the requirement of the Regulations on the ground that they are "designed to ensure that the existence of a cohabiting relationship equivalent to marriage or civil partnership is established on an objective basis and also that the wishes of the scheme member has been identified through the execution of a valid nomination form during his lifetime". Ms Cochrane's affidavit relies on the fact that historically the Northern Ireland Scheme Regulations follow the Regulations of equivalent schemes in England and Wales and in Scotland. The benefit of this is to create parity among local government employees and to lead to efficiencies in preparing costings and funding projections for the schemes. She refers to "Facing the Future" a consultation paper produced in 2004 by the Office of the Deputy Prime Minister. Paragraph 8.7 thereof stated that:

> "For cohabiting partners clear evidence will be necessary to show that they were living together as if they were husband and wife or civil partners."

It then states that for the Local Government Pension Scheme amongst the evidence that would be necessary would be "a valid nomination of a partner with whom there would be no legal bar to marriage or civil partnership". It provides no further explanation as to why such a nomination would or should be evidentially required. The 2008 consultation paper on the future of local government pension schemes is also referred to by Ms Cochrane who states that it did not address the detail of what procedural requirements should be imposed in order to claim the pension. Paragraph 11 of her affidavit states that in the Northern Ireland consultation process the letter sent to all consultees dated 2 August 2006 referred expressly to that consultation paper which as noted did not address the detail of what procedural requirements should be imposed in order to claim a partner's pension. This part of the Northern Ireland consultation process, thus, did not meaningfully engage discussion on the pros and cons of a nomination system. The draft Regulations were the subject of further consultation and they did contain reference to a nomination system. Ms Cochrane's affidavit lays weight on the influence of the principal Civil Service scheme in respect of the use of a nomination system in respect of partners. The Department considers that the requirements of the 2009 Regulations "are an appropriate means by which to determine the existence, formality and status of the relationship in addition to obtaining independent verification of the deceased's wishes".

[7] In the course of argument Mr Hanna referred to the fact that NILGOSC did send out annual pension forecasts in which it made clear that members could update their personal information such as showing any change in marital status and would be required to nominate a partner in a cohabitational relationship if she was to benefit. NILGOSC also sought up to date information about the marital and other status of members. Ms Kee swore a further affidavit, which was thus not before the judge of first instance, in which she exhibited a number of standard letters and forms sent out to members. The 2010 and the 2011 Pension Forecast documents stated *inter alia*:

> "Your spouse, registered civil partner or nominated cohabiting partner and any eligible child will normally be entitled to receive pensions in the event of your death *(regardless of any expression of wish you have made).*
>
> If you wish to nominate a cohabiting partner to receive a pension in the event of your death you MUST have a valid nomination form on file prior to your death. You can download this form …LGS21…" (italics added)

NILGOSC cannot be criticised for not bringing to the attention of members the need to nominate cohabiting partners if they are to have the benefit from survivors' pensions. In the case of members marrying or entering into a civil partnership or

divorcing subsequent to their joining the Scheme, while they are invited to let the Committee know of any change in circumstances they do not appear to be obliged to do so and no penalty attaches to their spouse or civil partner if they fail to keep NILGOSC up to date with information about their marital or civil partnership status.

Identifying the relevant questions

[8] In Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 the Court of Appeal provided a framework setting out the questions to be addressed when the court is called on to consider an Article 14 claim. Firstly, do the facts fall within the ambit of one or more of the substantive Convention provisions? Secondly, if so, was there different treatment as respects that right between the claimant and other persons put forward for comparison ("the chosen comparator"). Thirdly, was that difference in treatment based on one or more of the grounds proscribed by Article 14? Fourthly, were the chosen comparators in an analogous situation to that of the complainant? Fifthly, did the differential treatment have an objective and reasonable justification? In other words did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved. The Michalak sequencing of questions has been described as a useful tool but a rigidly formulaic approach should be avoided (per Baroness Hale in Ghaidan v Goden-Mendoza [2004] AC 557.) Lord Nicholls in R (Carson) v Secretary of State for Work and Pensions [2003] 3 All ER 577 ("Carson") considered that the court's scrutiny may best be directed to considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim are appropriate and not disproportionate in their adverse impact. As Clayton and Tomlinson in the Law of Human Rights 2nd Edition Volume 1 paragraph 17.125 points out, each of the Michalak questions finds support in the jurisprudence. It is convenient to consider them in turn bearing in mind that they should not be regarded as a series of hurdles to be addressed explicitly in every case.

Article 14 and Article 1 of the First Protocol

[9] Article 14 is only engaged where the state legislates or acts in an area which falls within the ambit of one of the substantive rights in the Convention. It is not really in issue in the present case that Article 1 Protocol 1 and Article 14 are in play. As pointed out in Stec v UK [2005] 41 EHRR SE 295 in a complaint under Article 14 in conjunction with Article 1 of Protocol 1 that the complainant has been denied of all or part of a benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the conditions of entitlement about which the applicant complains, he or she would have the right enforceable under domestic law to receive the benefit in question. If a state decides to create a benefit scheme it must do so in a manner which is compatible with Article 14 (see Stec at paragraph 54). In this instance the Regulations governing the scheme made provision for survivors' pensions. It is in any event a scheme based on contributions and even before Stec it was not in dispute that contributory schemes fall clearly within the ambit of Article 1 Protocol 1 (Gaygusuz [1997] 23 EHRR 364).

Differential treatment

[10] The question whether there is a difference of treatment between those in a marriage/civil partnership and those in a committed cohabitational relationship is simply answered. In the former case the parties to the relationship need to take no step to identify themselves as qualifying for the payment of a survivor's pension. Neither the active member of the Scheme nor his spouse or civil partner needs to sign or give any document declaring the existence of the relationship or to inform the Committee of that relationship. In the case of a cohabitational couple the Regulation requires that both the active member of the Scheme and his partner must sign a declaration that their relationship qualifies and give that declaration to the Committee. The question arises as to the identification of relevant comparators. In fact there are two different sets of comparators these being:

(A) on the one hand, an active member of the Scheme who is married or in a civil partnership and, on the other hand, an active member who is unmarried but in a stable long term cohabitational relationship satisfying the conditions set out in Regulations 25(3) and (6)(b); and

(B) on the one hand, the spouse or civil partner of an active member and, on the other hand, an active member's partner satisfying the conditions in Regulation 25(3) and (6)(b).

The requirements of Regulation 25 give rise to a difference of treatment in relation to both the active member and his partner in a co-habitational relationship qualifying under Regulation 25(c).

[11] Differential treatment would be potentially unlawful under Article 14 if it is based on any of the grounds which are specifically listed in Article 14. In re G (Adoptions: Unmarried Couples) [2009] 1 AC 173 the House of Lords confirmed that the grounds prescribed by Article 14 include both married and therefore unmarried status (see for example Lord Hoffman at 180 paragraph 8).

Are the comparators in an analogous situation?

[12] As pointed out in Clayton and Tomlinson on The Law of Human Rights 2nd Edition at paragraph 17.138:

> "The concept of an analogous situation is a notoriously slippery one. There is no limit to either the analogies or disanalogies which might be drawn between two groups of individuals. Furthermore, this question is closely related to the next (did the differential treatment have an objective and reasonable justification: in order words did it pursue a legitimate aim and did the differential treatment bear

> a reasonable relationship of proportionality to the aims sought to be achieved). The justification of discrimination will often depend on showing that the position of the two comparators are not in truth analogous."

Laws LJ in the Court of Appeal in Carson [2003] 3 All ER 577 suggested that the test can be formulated thus:

> "Are the circumstances of X and Y so similar as to call (in the mind of a rational and fair minded person) for a positive justification for the less favourable treatment of Y in comparison with X?"

The House of Lords approached the Article 14 claim in a similar way with a single question broadly along the lines suggested by Laws LJ. Lord Nicholls stated that the essential question for the court is:

> "Whether the alleged discrimination, that is the difference in treatment of which the complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situation cannot be regarded as analogous. Sometimes, where the position is not so clear a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

Lord Hoffman defined discrimination as a failure to treat like cases alike. Likeness in his view is partly a matter of values and in part a question of rationality. Having accepted that characteristics such as race, cast, noble birth, membership of a political party and gender are seldom, if ever, acceptable grounds for differences in treatment he noted the wider approach of Article 14 to protected grounds. He concluded that this made it necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appeared to offend our notions of the respect due to the individual and those which merely require some rational justification. He said:

> "Discrimination in the first category cannot be justified merely on utilitarian grounds eg that it is rational to prefer to employ men rather than women because more women than men give up employment

> to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category decisions under the general public interest which underpin the differences in treatment in the second category are very much a matter for the democratically elected branches of government. *There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other …* but there usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of the human being is at stake, or merely a question of general social policy." (italics added)

[13] Carson concerned the difference in treatment between residents and non-residents in relation to the payment of state pensions. Lord Hoffman concluded that once it was conceded that people resident abroad are relevantly different and could be denied any pension at all Parliament did not have to justify the different treatment. Lord Walker concluded that in the field of macro-economic policy the decision making power of the elected arm of government is all but at its greatest and absence a florid violation of established legal principles the constraining role of the court is correspondingly modest.

[14] In Al (Serbia) v Secretary of State for the Home Department [2008] 4 All ER 1127 Baroness Hale stated at paragraphs [29] and [30] in the context of the condition impugned in that case:

> "[29] What does matter is whether this condition falls within the class for which "very weighty reasons" are required if a difference in treatment is to be justified. Thus, for example, Strasbourg has said that where a "difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible" (DH v Czech Republic [2007] ECHR 57325-00, judgment of 13 November 2007 (paragraph 196)), while "very convincing and weighty reasons" are required to justify a difference in treatment based on sex (Abdulaziz's case [1985] 7 EHRR 471) or sexual

> orientation (eg EB v France [2008] 1 FCR 235, 22 January 2008 (91), or birth or adopted status (Inza v Austria [1987] 10 EHRR 394 (paragraph 41). Pla v Andorra [2004] 2 FCR 630 (paragraph 61)), or nationality (eg Gaygusuz v Austria [1996] 23 EHRR 364 (paragraph 42)).
>
> [30] It is obvious that discrimination on some grounds is easier to justify than others. In Carson's case Lord Hoffman explained that some grounds of distinction are so offensive to our notions of respect due to the individual that they are seldom if ever acceptable grounds for differences in treatment. The mere fact that it might be rational to distinguish for example between a man and woman because women are not as strong as most men is not sufficient to justify assuming that all women are weaker than all men, and thus refusing to consider the individual woman on her merits. He went on to say that other grounds of distinction do not fall within this suspect category. They usually depend upon considerations of the general public interest and might only require some rational explanation. And some grounds of discrimination might fall on the borderline between the two."

[15] It is undoubtedly true that there are material and relevant differences between those in the married state and those who are unmarried. A co-habitational relationship differs from a married relationship in that in the latter case the parties are bound by a legally and publicly recognised commitment. As the European Court of Human Rights stated in Serife Yigit v Turkey (Application 3976) 05:

> "The court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it (see Burton and Shakell v United Kingdom …) the protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples (Quintanna Zapata v Spain …). Marriage is characterised by a corpus of rights and obligations that differentiated markedly from the situation of a man and woman who cohabit (see Nylund v Finland ECHR [1991] and Lindsay v United Kingdom 11 November 1986). Thus, states have a certain margin of appreciation to treat differently married

> and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security."

In that case the justification put forward for the differentiation between the pension rights of married women and those in an unmarried long term co-habitation relationship was twofold – the protection of women, particularly through efforts to combat polygamy, and the principles of secularism. No such justification arises in this case.

[16] In Stack v Dowden [2007] UKHL 17 at paragraphs [44] and [45] Baroness Hale gave an overview of the growth in the number of co-habitation opposed to married relationships in England and Wales. For example, the 2003 Census showed a 67% increase in co-habitation over the previous 10 years and a doubling of the numbers of such households with dependent children. Government's actuary departments predicted that the proportion of couples cohabitating would continue to grow from 1 in 6 of all couples to 1 in 4 by 2031. Nothing has happened since to show that cohabitational relations will not continue to increase in number. Baroness Hale stated:

> "Cohabitation comes in many different shapes and sizes and people embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short lived and childless but most people these days cohabit before marriage – in 2003 78.7% of spouses gave identical addresses before marriage and the figures are even higher for second marriages. So many couples are cohabiting with a view to marriage at some later date - as long ago as 1998 the British Household Panel Survey found that 75% of current co-habitants expected to marry although only a third had firm plans … Cohabitation is much more likely to end in separation than in marriage and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves as good as married anyway (Law Commission op.cit Part II Paragraph 2.45). There is evidence of a widespread myth of the common law marriage in which unmarried couples acquire the same rights as married couples after a period of cohabitation … there is also evidence that the legal implications of marriages are a long way

down the list of most couples considerations when deciding whether to marry."

[17] As Baroness Hale further points out in paragraph [46] of her speech the history of attempts at law reform illustrates the complexity of the problem created by the amorphous nature of the cohabitational relationship. The Law Commission in England and Wales in its discussion paper Sharing Homes 2002 considered that it was quite simply impossible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in shared homes which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered.

[18] In Chapter 4 of its Discussion Paper on Matrimonial Property, the Law Reform Advisory Committee in this jurisdiction considered the property implications as the law in relation to cohabitants. It drew attention to the fundamental differences between the courts powers to adjust property rights on divorce and its inability to do so in the case of co-habitants. At paragraphs 4.6 and 4.7 of the paper the Committee stated:

> "4.6 Relationships of cohabitation do not conform to an identical pattern. At one end of the spectrum is the case of the couple who live together effectively as husband and wife in a joint family home with a child or children. At the other end may be the case of a couple sharing a sexual relationship, perhaps sharing a base from which to conduct their relationship but primarily leading separate lives, possibly with spouses or children of their own.
>
> 4.7 In a case of the former example it would seem likely nowadays that society would regard such a committed relationship as equivalent or at least very close to a state of marriage. In the case of the latter example society would still consider such a relationship as irregular and that neither party needs or merits any special legal protection as far as their property rights are concerned."

The Committee recommended changes on the property rights of cohabiting couples but recognised that it would be necessary to define that relationship to justify the extra rights. It recommended that parties to the relationship should be able to show that they have lived together for a continuous period of at least two years within the last 3 years in the same household or have lived together in the same household and

have had a child of the relationship. To date that recommendation has not been accepted or acted upon.

[19] Other jurisdictions have dealt with cohabitational relationships in a more radical way, thus, for example, most Australian states have introduced legislation regulating the rights and obligations of those who are in so called de facto relationships. The powers applicable on the breakdown of de facto relationships are less wide ranging than those operated on divorce and the court does not take account of the parties future needs. Australian relationship law is still developing. In 1999 New South Wales widened the scope of de facto relationship legislation so that it would also apply to domestic relationships between two unmarried adults where one or both provide domestic support and personal care for the other but there is no sexual intimacy. In New Zealand de facto relationships are treated in the same way as married couples for the purposes of property division on separation or death. In most cases the relationship must have lasted for at least 3 years before these rights come into play.

[20] Within the existing law certain rights and obligations are conferred on persons living together as the equivalent of husband and wife. Thus cohabitants in common with married persons can apply for occupation orders and non-molestation orders, may claim to succeed to statutory tenancies, may claim damages under the Fatal Accidents legislation where the parties have lived together for two years, may apply for financial provision under the Inheritance (Provision for Family and Dependants (Northern Ireland) Order and may act as relatives for the purposes of the Mental Health Legislation.

[21] What this brief overview demonstrates is that there are functional and legal differences between parties living in a cohabitational relationship and married couples which make the relationship different in fact and in the eyes of the law. The overview also indicates the difficulties and sensitivities that exist in relation to formulation of law reform to deal with cohabitational relationships. In certain circumstances the relationship may be analogous to a marriage. In others it is not. Drawing the line when such relationships should be functionally equated to a marriage calls for a policy decision. In the absence of a mechanism for drawing that line the domestic law proceeds on the basis that the relationships are distinct and separate. The fundamental and central difference between the two relationships is that in the case of marriage the parties have committed themselves to a binding although not legally indissoluble commitment whereby the parties commit themselves to an exclusive relationship which has determined legal consequences in the event of dissolution on death or during life.

[22] In Swift v Secretary of State for Justice [2013] EWCA 193 the claimant claimed that Section 1(3)(b) of the Fatal Accidents Act 1976 was incompatible with the rights under Article 14 in conjunction with Article 8 or alternatively under Article 8 alone. That provision provided that a cohabitant will qualify as a dependent under the Act if she was living with the deceased in the same household as if she were the wife of

the deceased immediately before the death of the deceased and had been living in such a relationship for two years before the death. The claimant had been living with the deceased but only for a period of six months before the accident caused the death giving rise to the claim. The claimant argued that the two year requirement was unjustifiably discriminatory. Lord Dyson considered that the court was in territory far removed from the suspect categories of discrimination in cases involving, for example, sex or race. The legislature was entitled to a generous margin of appreciation. There was no consensus across member states as to the importance of the rights of action in question. Lord Dyson at paragraph [36] stated:

> "In my view, Parliament was entitled to decide that there had to be some way of providing the requisite degree of permanence and constancy in the relationship beyond the mere fact of living together as husband and wife. It was entitled to take the view that there cannot be a presumption on the case of short term cohabitants, unlike that of married couples (Section 1(3)(a)) or parents and their children (Section 1(3)(e)) that their relationship is or is likely to be one of permanence and constancy. It was entitled to decide that it was therefore necessary to have a mechanism for identifying those cases in which the relationship between cohabitance is sufficiently permanent to justify a protection under the Fatal Accidents Act."

He further went on to state at paragraph [39]:

> "Parliament was entitled to prefer a bright line distinction to an approach which depended on fact-sensitive decisions in each case as to whether the relationship was sufficiently constant or permanent to justify a right of claim under Section 1 of the Fatal Accidents Act. It is now well understood that where Parliament chooses to draw a line, it is inevitable that hard cases will fall on the wrong side of it. But that is not a sufficient reason for invalidating it if in the round it is beneficial and it produces a reasonable and workable solution: see Carson per Lord Hoffman at paragraph 41 and Lord Walker at paragraph 91; and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] 1 AC 1312 per Lord Bingham."

The court concluded in that case that Section 1(3)(b) of the Fatal Accidents Act was not incompatible with Article 14. It was a proportionate means of pursuing the

legitimate aim. The legitimate aim which the court concluded was sought to be pursued by section 1(3) as a whole was to confer a right of action on dependants of primary victims of fatal wrong doing to recover damages in respect of their loss of dependency but to confine the right to recover damages to those who had relationships of some degree of permanence and dependence. The decision as to which cohabitees should be able to claim damages for loss of dependency raises difficult issues of social and economic policy on which opinions may legitimately differ. There was no obviously right answer. The choice made by Parliament was not manifestly without reasonable foundation and was one which it was entitled to make. The court thus concluded that the difference in treatment of cohabitees on the basis of two years cohabitation was justified. (In the course of argument I posed the question whether if there had been an added condition in the legislation requiring a cohabitant to have been nominated in writing so as to qualify as a qualifying cohabitant whether such an added condition would stand up to scrutiny. Mr Hanna recognised that it might not.)

[23] It is clear that the definition of the conditions justifying treating a cohabitational relationship as having a status equivalent to marriage raises issues on which opinions may legitimately differ. Legitimate arguments can be made for requiring longer or shorter periods of cohabitation. The view could be taken, for example, that where a child is born to a relationship a shorter period would be justified. The choice of the conditions set out in Regulation 25(3) and (6)(b) represent the exercise of a judgment as to what should be required to be proved to establish the degree of permanence and constancy in the relationship to justify treating a partner in such relationship as meriting the kind of survivor's pension to which a spouse is entitled.

[24] The question is whether, as the appellants argue, the requirement in Regulation 25(2) essentially forms part of the definition of the characteristics to qualify as a qualifying cohabitant meriting a survivor's pension or whether, as the respondent argues, it is a condition imposed on cohabitants in a relationship satisfying the requisite characteristics of stability which must be satisfied before the survivor's pension becomes payable which is a supplementary condition not imposed on spouses or civil partners. If the former, on the basis of the approach adopted in Swift, it may very well represent a legitimate policy choice as to what cohabitants will fall to be treated as equivalent to spouses.

[25] Regulation 25(3) taken with the two year requirement spelt out in (6)(b) clearly defines the factual conditions to be satisfied to establish the requisite degree of permanence and constancy in the relationship beyond the mere fact of living together to establish equivalence with spousal or civil partners status. Regulation 25(2) which provides that members may "nominate" another person requires only a document declaring that the conditions in Regulation 25(3) and (6)(b) are satisfied. It is an evidential statement of compliance with the conditions. Such an evidential statement does not add to any of the factual conditions to be satisfied under Regulation 25(3) and (6)(b). Regulation 25(3) and (6)(b) creates a class of persons

who, by virtue of the fulfilment of the conditions, are factually functionally equated to spouses. The requirement to provide a nomination declaration is a step demanded of cohabitants before they qualify for payment of the pension. It requires of those in a relationship deemed to be functionally analogous to marriage a step not demanded of the comparator groupings. In my view this difference in treatment "can be justified only if it pursues a legitimate aim and there is a reasonable relationship or proportionality between the means employed and the aims sought to be realised" (Lord Nicholls in Ghaidan [2004] 2 AC 557).

[26] In the course of the argument there was considerable debate as to the appropriate level of scrutiny as to the proportionality of the requirement in Regulation 25(2) and as to the proper test to be applied. Treacy J at paragraph 61 of his judgment stated:

> [61] As Stec and Humphreys make clear very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the convention. Equally it seems to me that where the means (nomination) is inconsistent with the legitimate aim (of eradicating status discrimination and pension provision) very weighty reasons would have to be put forward to justify the imposition of an additional hurdle, itself based on an adverse status driven (and in most cases irrational) assumption about intention. I therefore conclude that whilst the impugned regulations pursue a legitimate aim there was not, for the reasons given, a reasonable relationship or proportionality between the means employed and the aims sought to be achieved. In this case the means defeated the aim."

[27] The respondent argued that the judge was right to approach the question in this way. The appellants and the Attorney General contended that this was a case which fell at the end of the spectrum of cases in which the true question was whether the requirement was manifestly without reasonable foundation.

[28] It is clear that in cases involving questions of general social policy, decisions about the general public interest are very much a matter for the executive (Lord Hoffman in Carson at paragraphs [16] and [17]). In cases involving personal characteristics such as sex, race, colour, sexual orientation and birth Strasbourg authorities require more than just a rational explanation (see Baroness Hale at AL Serbia at paragraph 31). As Lord Walker points out in R (RJM v Secretary of State for Work and Pensions [2008] UKHL 63 at paragraph [5]) the term "personal characteristics" is not a precise expression and a binary approach is unhelpful. He said at [5]:

> "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate largely immutable and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (although some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by Articles 8, 9 and 10 of the Convention. Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than who they are but they may still come within Article 14 (Lord Neuberger instances, military status, residence or domicile and past employment in the KGB. Like him I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or say can no longer cope. The more peripheral or debatable any suggested person or characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

[29] There is a clear recognition in the cases that individual cases may not fall neatly into what has been categorised as suspect or non-suspect grounds of discrimination. While there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy there may be borderline cases in which it is not easy to allocate the grounds of discrimination to one category or the other and there are shifts in societal values which must be recognised (see Lord Nicholls in Carson).

[30] The choice as to what evidences the level of commitment and constancy in a cohabitational relationship to justify payment of a survivor's pension is a question of social policy and thus would normally fall within the category of discrimination which could only be considered unlawful if it is manifestly without reasonable foundation. However, once that choice has been made and the decision has been made to consider cohabitational partners as satisfying the factual indicia of

commitment and constancy chosen, the imposition of discriminatory conditions on a category which is considered by the policy maker to be factually analogous to that of spouses and civil partners does not appear to me to involve the exercise of a judgment on a question of general or broad social policy.

[31] In Lord Walkers' analogy of the concentric circles, acquired characteristics concerned with what people do or what happens to them may still come within the Article 14 ambit. Being in a long term committed cohabitational relationship, arising as it does from an acquired status, does not involve the most personal characteristics such as race, gender or birth status but the status is one which is personal, life changing and important in the development of the individual personality. Once committed to such a relationship, the parties cannot simply go their separate ways without a profound impact on their personality and their life and, if they have children, the lives of the children. A marriage requires the willingness and desire of both parties to move from cohabitation to marriage. One party may be happy to contemplate and wish such a step but marriage depends on both parties being prepared to take that step. The societal pressure to marry which arose from attitudes, no longer prevailing, that sexual relations out of marriage were socially unacceptable has largely gone. In many such relationships one of the parties, often the female party, may wish to marry but cannot force the issue and may be afraid to imperil the relationship by overstressing the issue. Baroness Hale stated in re G [2009] 1 AC 173 at 211:

> "… These are not the olden days when the husband and wife where one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage. It is not expensive to get married. Marriage should not be confused with the wedding. The only rational reason to reject the legal consequences to marriage is the desire to avoid the financial responsibilities towards one another which it imposes on both husband and wife. Why should any couple who wish to take advantage of the law in order to become the legal parents of a child be anxious to avoid those responsibilities which could become so important to the child's welfare if things went wrong in the future?
>
> 110. But it is not difficult to think of circumstances in which that justification would not apply or would have much less force. There are couples who cannot marry. Strange though it may seem to some, there are people who have conscientious objections to divorce but who do not have conscientious objections to living together outside marriage."

A female partner may wish to have the financial security and commitment of marriage to her male partner but he may shy away from the prospect. It would be simplistic to suggest to the female partner, emotionally committed to her partner and perhaps with a child or children, that she should simply walk away. In same sex relationships the partners may not wish to draw public attention to their sexual relationship by undertaking a civil partnership. The cohabitational relationship, pending any marriage or civil partnership may have all the emotional content of a legal marriage. The relationship between the parties gives rise to a family relationship engaging Article 8 and with it the right for respect for the family unit. We are, thus, in territory involving the imposition of discriminatory conditions in relation to a relationship involving what Lord Walker considered would engage personal characteristics. Lord Walker's analysis points away from the choice and application of a hard and fast test in every given case (i.e. in suspect cases, the need to establish weighty reasons justifying the discriminatory treatment v. in non-suspect cases, validity arising unless manifestly the differential treatment is without reasonable foundation). Rather the concentric circles analysis suggests the application of what Laws LJ described in a different context as a sliding scale of review dependent on all the circumstances. In my opinion in this case we are in territory where the imposition of the discriminatory condition requires justification and the onus is on the appellants to establish rational and convincing grounds for the condition.

[32] As already noted, the justifications relied on by the appellants are the arguments that the system is designed to ensure that the existence of a cohabiting relationship equivalent to marriage/civil partnership is established on an objective basis and that the wishes of the Scheme member have been identified. Some reliance appears also to be based on the fact that the nomination condition follows what has happened in parallel schemes in England and Wales and in Scotland and that follows the format in the main Civil Service Scheme. The mere following of precedent cannot be a persuasive justification when the condition cannot itself be justified in a given case and it is in any event clear from the Ministry of Defence Pension Scheme that it is entirely possible to operate a pension scheme of this nature without a nomination requirement. One arm of the state appears to differentiate between unmarried relationships where employees are involved in the defence of the realm and unmarried relationships where employees are carrying out other state functions. It is difficult to discern the rational for such a differentiation.

[33] I find unpersuasive the proposition that the condition is justified as ensuring evidence of the relationship on an objective basis. Regulation 25(3) and (6) (b) require the production of objective evidence of the fulfilment of the conditions. A mere declaration by the partners that they satisfy the conditions could not in itself be *objective* evidence that the conditions are satisfied. Such a document has all the potential of being self-serving evidence which clearly cannot and does not avoid the need to produce truly objective evidence to show that the conditions in Regulation 25(3) are satisfied. It is possible that in certain circumstances the existence of a nomination declaration may assist the parties to establish satisfaction of the

conditions and its absence may in fact frustrate a survivor's claim to a pension. For example, in the case of two persons of the same sex living together and sharing household finances, the objective evidence may be neutral as to the nature of their relationship. The nomination declaration, if accepted as true, would lead to the surviving partner establishing his claim if, taken with the rest of the evidence, the objective material supports the cohabitational arrangements to justify the payment. Such a declaration would assist the partners. It has not been demonstrated that NILGOSC would be put to disadvantage by the absence of a declaration. Rather, as in the example given, the absence of such a declaration would disadvantage the survivor claiming a pension. In Re G the case involving the restriction of adoption by couples to married couples Lord Hoffman posed the question whether there was a rational basis for having a bright line rule excluding all unmarried couples from being eligible to adopt. Since in that case the fundamental question was whether adoption by particular persons would be in the best interests of the child a bright line rule could not be justified on the needs of administrative convenience or legal certainty because the law required the interests of the child to be examined on a case by case basis. In the present situation since the position of surviving unmarried cohabiting partners must be examined on a case by case basis to see if they fulfil the conditions the nomination requirement has not been shown to be necessary on the needs of legal certainty or administrative convenience.

[34] In relation to the argument that the condition is necessary and appropriate to establish the member partner's wish that his surviving partner should be entitled to the pension, a spouse/civil partner is not called on to express a wish that his spouse or partner should receive the pension. There may be cases in which, perhaps through estrangement, a member might wish to exclude his spouse or civil partner. The policy of the Scheme, however, does not confer on a spouse or civil partner a power to disentitle the survivor. Indeed, in the forms sent out with the annual pension statement it is spelt out clearly that the right of the survivor arises irrespective of the wish of the active member. NILGOSC has expressly no interest in knowing the wish of the member in relation to spouses, civil partner or nominated cohabitants once nominated. It is thus difficult to understand why the Department and NILGOSC lay weight on the issue of knowing the wishes of the active member. No doubt the view is taken that it would be entirely invidious for a spouse or civil partner to take steps to exclude someone in a committed relationship with him from the fruits of a pension scheme to which all members contribute on an equal footing which is designed to make financial provision in ease of the survivor. It is the nature of the relationship which is sufficient to trigger the right to the pension. Where cohabitational partners satisfy the specified conditions to make them functionally equivalent to a spouse or civil partner there is no persuasive reason why that relationship itself does not call for equal treatment with spouses and civil partners who are not dependant on their partner taking any steps to trigger the right to receive the pension.

[35] When one compares the position of the surviving spouse/civil partner with that of the surviving qualifying cohabitant one sees immediately the operational

difference and the serious disadvantage to the cohabitant partner. The former is in a *secure* position under the Regulation by virtue of that status. The latter, considered to be functionally equivalent and in a truly analogous situation, is in a *precarious* situation. She is dependent on her partner signing a document and on him getting her to sign a document which simply records the existence of their relationship. If the requirement to submit to the Committee is mandatory, she is also dependent on the member actually taking steps to submit the document to the Committee. If the requirement is directory and there may be good reasons why a nomination form does not reach the Committee before the death of the member the requirement of nomination is satisfied but the Committee is none the wiser during the lifetime of the member. The rigidity of the condition means that, for example, an elderly cohabitant who may have lived with the member for many years, may well have wanted to get married but could not stir her partner into action, has been entirely financially dependent on him, may have had a number of children and may have devoted her life to bringing up the family and looking after the member, would find herself without any pension entitlement after his death even if in his later years he has become in Yeats' phrase "old and grey and nodding by the fire," forgetful and unable to understand or call to mind his legal and financial affairs and obligations. NILGOSC has not in my view shown a persuasive justification for the differential treatment between surviving cohabitants and surviving spouse/civil partners which results in the former being in a precarious and the latter in a secure position when the intent of the Regulations was clearly to provide pensions for surviving partners, married or cohabitant when they satisfied the conditions of Regulation 25(3) and (6)(b).

[36] In Re G [2009] AC 173 the House of Lords had to consider article 14 of the Adoption (Northern Ireland) Order 1987 which provided that an adoption order could only be made on the application of more than one person if the applicants were married. The House of Lords held that a fixed rule which excluded unmarried couples at the outset from the process of being assessed as potential adopters was irrational. It contradicted one of the fundamental principles of adoption law that the best interests of the child were the overriding consideration to which regard had to be had on a case to case basis. The margin of appreciation available to member states in delicate matters of social policy was not automatically appropriated by the legislature. In that case the House concluded that it was free to give in the interpretation of the Human Rights Act 1998 what it considered to be a principled and rational interpretation of the concept of discrimination on grounds of marital status. The House concluded that it should declare that notwithstanding article 14 of the Adoption Order the applicants were entitled to apply to adopt the child in question. Baroness Hale stated at 212 para [112]:

> "If one were looking at this case from the point of view of a couple who could marry and chose not to do so I would be inclined to say the difference in treatment was not disproportionate. If they really wanted to they could get married. But if one looks at

> this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remained unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents."

This neatly demonstrates that in considering the proportionality of a measure it is proper to consider the impact of the measure on all parties concerned. That is why it is important to distinguish between the impact as between active members married and cohabiting on the one hand and on the other hand the impact as between spouses/civil partners and cohabiting partners. The impact arising from imposing a condition serving no demonstrated or evident purpose and certainly no demonstrated pressing purpose which in fact can often lead to depriving a cohabiting partner of a benefit which it is the policy of the Regulations to make available to spouses, civil partners and those in a factually analogous situation creates an unjustified disproportionality. At bottom the issue is whether a cohabitant satisfying the specified factual criteria should be deprived of a survivor's pension when the partner member has not got round to filling in and submitting a form that states that the relationship qualifies when that very fact has to be established by evidence apart from the mere assertion that it does. Applying the test of manifest unreasonableness, I conclude that the impugned condition fails the test of proportionality.

[37] As noted the appellants have not put any evidence before the court to show that without the nomination condition such as that contained in Regulation 25(2) the Scheme would be rendered unworkable nor have they shown that the nomination system is necessary for the administration of the Scheme in practical terms. Although such an argument was raised in argument there was no evidential foundation laid for it and as noted it appears that the Ministry of Defence Scheme functions satisfactorily without such a nomination system.

[38] In the course of argument reference was made to the provisions of the Scheme which provide that eligible children are entitled to a pension which is somewhat lower if a survivors pension is payable. It was argued that a member might logically conclude that he would have preferred children of a former relationship to receive a higher pension by deciding not to nominate his cohabitational partner. In this way he can opt out of the survival pension entitlement so as to benefit his children. At first sight this argument appears to show that there is at least one situation in which the nomination system has a justifiable basis. However, where a member A leaves children by first wife B and he marries wife C, C is entitled to the survivor's pension irrespective of the wishes of A. If instead of marrying C he cohabits in a relationship which satisfies the Regulation 25(3) and (6)(b) conditions allowing the cohabitant a survivor's pension is treating her in exactly the same way as wife C. Even if there is one situation, likely to arise in a limited number of cases, which might justify some

form of opt-out from the right to a survivors' pension, that would not render the impugned provision proportionate when the application of the condition can regularly work manifest unfairness to cohabitants in a much larger number of cases.

[39] For these reasons I agree with Treacy J's conclusion that the impugned condition was disproportionate and contrary to Article 14 and Article 1 Protocol 1. I have not found this an easy case to resolve nor have I reached my conclusion with the sense of certainty that I am clearly correct or that the opposite conclusion is clearly wrong. The whole area of where the law should stand in relation to the rights of cohabiting partners is fraught with difficulties and complexities. It is not difficult to disagree with Judge Rozakis' concluding remarks in his short concurring judgment in Serife Yigit v Turkey (Application 3976/05) in the ECtHR:

> "In view of the new social realities which are gradually emerging in today's Europe manifested in a gradual increase in the number of stable relationships outside marriage which are replacing the traditional institution of marriage without necessarily undermining the fabric of family life I wonder whether this Court should not begin to reconsider its stance on the justifiable distinctions that it accepts in certain matters between marriage on the one hand and other forms of family life on the other, even when it comes to social security and related benefits."

Ref:	COG8884

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DENISE BREWSTER

Applicant/Respondent;

-and-

NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS' SUPERANNUATION COMMITTEE

Respondent/Appellant;

-and-

DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Notice Party/Appellant.

_____

Before: Higgins LJ, Girvan LJ and Coghlin LJ

_____

COGHLIN LJ

[1] I am indebted to Higgins LJ for setting out the background facts and legal framework with an enviable degree of clarity.

[2] It is common case that being unmarried is a status that comes within the meaning of Article 14 of the European Convention on Human Rights ("the Convention") and that entitlement to a survivor's pension payable in accordance with Regulations 24 and 25 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 ("the 2009 Regulations") constitutes property for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). It is also common case that the respondent's cohabitation with her partner complied with the conditions specified in Regulation 25(3) of the 2009 Regulations. The sole basis for the failure of the respondent to obtain such a pension was the fact that the Northern Ireland Local Government Officers Committee ("the appellant") had not received form LGS21 from her deceased partner prior to his death nominating her as a "nominated

cohabiting partner" in accordance with Regulations 24 and 25 of the said Regulations. The fundamental question for the court is whether the inclusion of the requirement to furnish such a nomination/declaration form to the appellant constituted discrimination in respect of members cohabiting with their partners as opposed to those who had entered into marriage or a civil partnership.

Article 14 discrimination and the domestic court.

[3] In Michalak v London Borough of Wandsworth [2003] 1 WLR 617 Brooke LJ formulated a test, subsequently approved in Ghaidan v Godin Mendoza [2004] 2 AC 557, for the establishment of discrimination contrary to Article 14, in the following terms:

> "It appears to me that it will usually be convenient for a court, when invited to consider an Article 14 issue, to approach its task in a structured way … If a court follows this model it should ask itself the four questions I set out below. If the answer to any of these questions is `no', then the claim is likely to fail and it is generally unnecessary to proceed to the next question. These questions are:
>
> (i) Do the facts fall within the ambit of one or more of the substantive Convention provisions …?
>
> (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ('the chosen comparators') on the other?
>
> (iii) Were the chosen comparators in an analogous situation to the complainant's situation?
>
> (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

In Al (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434 Baroness Hale narrowed this approach in relation to questions (ii) and (iii) stating:

> "This suggests that, unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."

[4] In Stec v United Kingdom [2006] 43 EHRR 47 the European Court of Human Rights ("ECHR"), in the course of giving judgment, identified the following relevant general principles:

> "51. Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.
>
> 52. The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation.'"

[5] The "margin of appreciation" referred to by the ECHR is an important practical element in the relationship between the international court and the differing judicial systems of the national states over which it exercises supervision.

The Convention is conceived of as a "living instrument" and the court recognises that national public authorities will be much more familiar with the "vital forces of their countries".

[6] Such a lack of familiarity cannot exist in the case of domestic courts and tribunals. Nevertheless, for some time domestic courts have employed a somewhat similar approach in the course of determining questions of proportionality when being asked to implement Convention rights, especially in cases concerned with the interpretation of primary or subordinate legislation. Terms that have been used in such a context include "deference," "judicial restraint" and "discretionary area of judgment". In R v DPP ex parte Kebilene [2000] 2 AC 326 at 379 Lord Hope said:

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

[7] It is important to bear in mind that, when considering proportionality in the domestic context, the court is concerned not with a straightforward merits review but with a supervisory assessment of the balance struck by the decision-maker in the context of the particular circumstances of the case. However, such an assessment does remain the responsibility of the court. In R (on the application of Prolife Alliance) v British Broadcasting Corporation [2004] 1 AC 185 Lord Hoffman robustly rejected the term "deference" as inappropriate stating at paragraph 76 of the judgment:

> "76. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and the executive are, directly and indirectly, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised

> principles. The principle that the independence of the court is necessary for a proper decision of disputed legal rights or claims or violation of human rights is a legal principle. It is reflected in Article 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise when a court decides that a decision is within the proper competence of the legislature or executive it is not showing deference. It is deciding the law."

[8] In AXA Insurance v HM Advocate & Ors [2011] UKSC 46 Lord Hope, after referring to his judgment in Kebilene, went on to say at paragraph 32 of the judgment:

> "32. ….But in the hands of the national courts too the Convention should be seen as an expression of fundamental principles which will involve questions of balance between competing interests and the issue of proportionality. I suggested that in some circumstances, such as where the issues involved are questions of social or economic policy, the area in which these choices may arise is an area of discretionary judgment. It is not so much an attitude of deference, more a matter of respecting, on democratic grounds, the considered opinion of the elected body by which these choices are made."

In the same case, at paragraph 124, Lord Reed said:

> "124. An interference with possessions requires to be justified as being necessary in the public or general interest. In that regard, the Strasbourg Court allows national authorities a wide margin of appreciation in implementing social and economic policies, and will respect their judgment as to what is in the public or general interest unless that judgment is manifestly without reasonable justification: James v United Kingdom (1986) 8 EHRR 123, paragraph 46. At the domestic level, courts require to be similarly circumspect, since social and economic policies are properly a responsibility of the legislature, and policy-making of this nature is amendable to judicial scrutiny only to a limited degree."

At paragraph 131 the same member of the court, referring to the process of balancing individual and community interests, continued:

> "At the domestic level, the courts also recognise that, in certain circumstances, and to a certain extent, other public authorities are better placed to determine how those interests should be balanced. Although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion."

[9] A1P1 preserves the balance between the individual and the community inherent in the Convention by providing that every natural or legal person is entitled to the peaceful enjoyment of his or her possessions and no-one should be deprived of his/her possessions except in the public interest and subject to conditions of law. It is further qualified by the words;

> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[10] Questions of social/economic policy characteristically involve room for disagreement and different outcomes. In such a context the judicial principles quoted above require that the historical/policy background, the legislative history of the decision, including the intent and purpose thereof, together with the identity and expertise of the decision-maker and the nature of the specific right/s involved should be subjected to careful scrutiny and given appropriate weight by the court when assessing the balance reached by the decision maker. However, in applying such scrutiny to the facts and evidence in a particular case the court does not lose sight of its independent responsibility to ensure that the rights of the individual are fully and fairly considered in accordance with the democratic framework established by the Human Rights Act 1998 ("HRA"). I remind myself of the words of Lord Bingham in R (SB) v Governors of Denbigh High School [2007] 1 AC 100 when he said, at paragraph 30:

> "[30] Secondly, it is clear that the court's approach to an issue of proportionality under the convention must go beyond that traditionally adopted to judicial review in a domestic setting……There is no shift to a merits review, but the intensity of review is greater

> than was previously appropriate and greater even than the heightened scrutiny test adopted by the Court of Appeal in R v Ministry of Defence ex p Smith [1966] 1 ALL ER 257 at 263, [1996] QB 517 at 554. The domestic court must now make a value judgment, an evaluation by reference to the circumstances prevailing at the relevant time……Proportionality must be judged objectively, by the court. …"

The context of the decision

[11] The background to the 2009 Regulations has been helpfully set out in the affidavit provided by Ms Marie Cochrane, Deputy Principal in the Department of the Environment for Northern Ireland ("the Department"). The Department is the body within Northern Ireland responsible for promulgating the rules relating to membership, benefits and contribution levels for the Scheme. The 2009 Regulations were made on 25 February 2009 and came into operation on 1 April 2009 replacing the 2002 Regulations. The 2009 Regulations were established by way of delegated legislation made under Articles 9 and 14 and Schedule 3 to the Superannuation (Northern Ireland) Order 1972. The Scheme is administered on behalf of the members by the appellant in accordance with the current Regulations.

[12] It appears that, historically, the content of the 2009 Regulations in this jurisdiction has followed that contained in similar regulations governing equivalent schemes in England and Wales and Scotland. It has generally been considered desirable that such schemes should be similar enabling local government employees to enjoy equivalent pension benefits across the United Kingdom. According to Ms Cochrane this has the advantage of creating parity among such employees and also affords substantial efficiencies in preparing costings and funding projections for the schemes since there will be an overlap in the underlying actuarial assumptions.

[13] In 2004 the Office of the Deputy Prime Minister published a consultation paper on the reform of the local government pension scheme in England and Wales entitled "Facing the Future – Principles and Propositions from Affordable and Sustainable Local Government Pension Scheme in England and Wales". The consultation paper contained a series of wide-ranging reform proposals including extending the entitlement of a surviving spouse or child to Survivors Benefit to include a deceased member's civil partner and nominated cohabiting partner. Paragraph B8.4 of that paper contained the following explanation:

> "B8.4 There are no proposals which would require pension schemes to provide survivor pensions to partners who are neither married nor registered as civil partners. Government policy, however, is that public service schemes such as the LGPS may provide

> these benefits (referred to here as cohabiting partners' pensions) if the general membership wants them and pays any extra costs. The employers' representatives and trade unions put forward proposals to the OPDM in 2001 for introducing cohabiting partners' pensions. However the additional costs would have been funded not by members but by employers foregoing potential future savings; this was out of line with Government policy."

Paragraph B8.7 of the same paper continued:

> "B8.7 Certain considerations arise from the difference between cohabiting partners and married couples or civil partners. For married and civil partners, entitlement is easy to prove objectively and provision should be simple to administer. For cohabiting partners, clear evidence would be necessary to show that they were living together as if they were husband and wife or civil partners. For the LGPS, as for other public service schemes, evidence of the following would be needed:
>
> - Cohabitation;
> - An exclusive, long-term relationship established for a minimum of 2 years;
> - Financial dependence or interdependence and
> - Valid nomination of a partner with whom there would be no legal bar to marriage or civil registration."

This would seem to confirm that government policy contemplated that valid nomination would be an integral component of the qualifying relationship. The paper also established a Development Group to which representatives of relevant organisations were to be invited including, inter alia, Local Government Association, Employers' Organisation/LGPC, Trades Union Congress, Association of Consulting Actuaries, Local Authority Treasurers, England and Wales and Pension Practitioners in England and Wales.

[14] The 2004 paper was followed in June 2006 by a further consultation paper published by the Department for Communities and Local Government entitled "Where next? – Options for a new look local government pension scheme in England and Wales." That paper introduced partners' pensions for cohabitees as one of a number of additional benefit improvements and proposed four fully costed options for the future of the local government scheme each of which included the introduction of a new survivors benefit for a deceased member's cohabiting partner.

That concept was ultimately included in the reform of the local government pension scheme in England and Wales introduced by the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 [SI2007/1166]. Similar reforms were introduced in Scotland using almost identical legislation: Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Scotland) 2008 [SSI2008/230].

[15] In Northern Ireland a consultation exercise commenced on 2 August 2006 using the 2006 consultation paper employed in the consultation in England and Wales with the same four proposed options. The covering letter to consultees, enclosing the paper, summarised the four options and again drew attention to partner pensions for cohabitees (subject to the overarching legal position) as one of the additional benefit improvements. Consultees included all members of the Northern Ireland Legislative Assembly, MPs and Members of the House of Lords, relevant Employing Authorities, the local political parties, each District Council, the Northern Ireland Public Service Alliance, the Northern Ireland Local Government Association, the Northern Ireland Local Government Officer's Superannuation Committee, the Chief Executive of the Northern Ireland Housing Executive, each Education and Library Board and the Equality Commission for Northern Ireland.

[16] During the course of the hearing the attention of the court was drawn to a letter dated 9 October 2006 from the Secretary of NILGOSC responding to the consultation instituted by the Department by the document "Where next? – Options for a new look local government pension scheme in England and Wales". The contents of that letter reflected the carefully considered views of the committee. The committee confirmed that the unions had been pressing for partners' pensions to reflect the increase in common-law partners but, with regard to the proposals contained in the consultation paper, the committee drew the attention of the Department to concerns that:

> "The introduction of cohabitees' pensions would introduce a number of inequalities that would need to be considered to prevent the Scheme being open to challenge."

Those concerns included the view that the lack of a valid nomination form was likely to result in disputes where all the other criteria for cohabitee pensions had been met whereas, by contrast, a survivor's pension would automatically be paid to a married or civilly registered partner without the need for such a form. Thus, it seems clear that such reservations were raised during the period of consultation with the wide spectrum of public bodies referred to above, which included, inter alia, the Equality Commission, prior to the implementation of the impugned regulations.

[17] Further consultation subsequently took place on the draft Regulations. The covering letter sent to consultees by the Local Government Policy Division of the Department of the Environment in Belfast, together with the draft regulations,

confirmed that the Department had carried out screening for equality impact under the terms of section 75 of the Northern Ireland Act 1998 and that, as a consequence, the Department was satisfied that "*the draft Regulations will not lead to significant discriminatory or negative differential impact*" (my emphasis). The consultation period closed on 31 October 2008 and the 2009 Regulations then came into force on 1 April 2009.

[18] Thus it seems clear that the 2009 Regulations are identical to the equivalent Regulations in the remainder of the UK in terms of the requirements for establishing a long-term cohabiting relationship in order to qualify for a survivor's pension. The Principal Civil Service Pension Scheme in England and Wales also requires the joint execution of a declaration by the member and the dependent, together with proof of a long-term cohabiting relationship at the time of the member's death. It is to be noted that the Police Pension (Northern Ireland) Regulations 2007 SR2007/476 also required a joint partner declaration to the effect that the partners were cohabiting in an exclusive, committed and long-term relationship and that the applicant was financially dependent upon the deceased or that they were financially interdependent.

[19] In summary, the impugned Regulations have been sponsored by a Department of the Executive exercising powers established in accordance with delegated legislation after prolonged and detailed consultation with a wide number of interested public bodies.

The approach of the court to Article 14 discrimination

[20] As indicated earlier there is agreement between the parties in relation to the application of Article 14 and Article 1 of the First Protocol of the Convention. The parties are agreed that cohabiting in an unmarried partnership is an arrangement that qualifies as an Article 14 status but it is important to bear in mind that the authorities confirm that the approach of the court should take account of the nature of the particular status involved. That is so whether the court adopts the "suspect grounds" qualification preferred by the U.S. Supreme Court, the ECHR approach reflected in the quotation above from the decision in Stec or Lord Walker's concept of "concentric circles" in RJM v Secretary of State for Work and Pensions [2008} UKHL 63. In that case both Lord Walker and Lord Neuberger found the distinction between what an individual *is* and what he or she *does* helpful. Marriage, civil partnership and unmarried cohabitation are all arrangements that the participants choose to enter unlike characteristics such as, for example, gender, race or colour with which an individual is born although it is also important to bear in mind that the wording of Article 14 does not limit discrimination to innate characteristics. In Al (Serbia) v Secretary of State for the Home Department [2008] UKHL 42 Baroness Hale provided a helpful analysis of the difference between the relevant jurisprudence of the U.S. Supreme Court and ECHR and in Humphreys v The Commissioners for her Majesty's Revenue and Customs [2012] 1 W.L.R. 1545 she approved the Stec test in the context of discrimination relating to state benefits at

paragraphs 15 – 19 of her judgment. Lord Hope, in Al (Serbia), in accepting that status could come within the provisions of Article 14, went on to say at paragraph [9]:

> "Adulthood is a status, as is the state of being not married. But the status of adults is not one which has so far been recognised as requiring particularly weighty reasons to justify their being treated differently from others, as Baroness Hale points out. The less weighty the reasons that are needed, the easier it is to regard the fact that the appellants were treated differently as falling within the discretionary area of judgment that belongs to the Executive."

[21] In such circumstances, it seems to me that the fundamental point to be determined in this litigation is whether the inclusion of the requirement to furnish the respondent with a nomination form can be justified in terms of proportionality. To adopt the approach recommended by Baroness Hale in Al (Serbia) the court should concentrate on the reasons for the difference in treatment and whether they amount to an "objective and reasonable justification" having regard to the particular circumstances always bearing in mind that the burden lies on the appellant.

The approach of the court to the issue of proportionality

[22] The history of the decision-making process has been set out in some detail above. The scheme represents a carefully thought out framework for the distribution of financial benefits accrued as a consequence of an individual's employment in local government and membership of the scheme. That framework has been provided by detailed regulations sponsored by a Department of the Executive in accordance with delegated legislation after detailed and prolonged consultation. In promulgating the regulations the Executive has sought, as a matter of policy, to accommodate changing social and cultural attitudes which have produced the relatively recent substantial increase in cohabitee relationships – see the illuminating overview provided by Baroness Hale in Stack v Dowden [2007] UKHL 17 at paragraphs [44] and [45].

[23] In seeking to achieve this end the Department has recognised that, as yet, cohabitee relationships differ from and do not attract the same prima facie stable bundle of legal duties and obligations acquired by those who enter into the formal relationships of marriage and civil partnership. That is consistent with the current Strasbourg jurisprudence as articulated in decisions such as Burden v U.K. (2008) 47 RHHR 38 and Yigit v Turkey (2011) 53 EHRR 25. The concept of "nominated cohabiting partner" included in Regulations 24 and 25 seeks to incorporate a number of fundamental elements including the receipt by the funding body of a formal written nomination by the member, such nomination to include a declaration of their relationship signed by both cohabitees. Human nature ensures that cohabitation

relationships are endlessly variable in terms of continuity, commitment and content. The clear intention of the policy appears to have been to construct a definition that would be pragmatically effective in reducing public concerns based on perception of the cohabitee relationship as being inherently informal and transient. The form of nomination delivered to the body responsible for funding the pension functions as the public statement from both participants equivalent to the production of a certificate of marriage or civil partnership. After the death of the member, without such a form, the Appellant is dependent upon the evidence of only one party and may require to conduct a rather intrusive investigation of the evidence. No doubt, in adopting that definition, the Department took into account the use of similar definitions in other pension benefit schemes, the aim of preserving parity with England and Wales and Scotland and the benefit of efficiency in preparing costings and funding projections. It seems clear that the need for evidence of such nomination was also consistent with government policy in seeking to ensure that such schemes reasonably reflected rapidly changing social and cultural attitudes.

[24] During the course of the hearing before this court Dr McGleenan rightly recognised examples of hardship that could flow from the adoption of the need to receive a nomination form from the member, an example of which is undoubtedly constituted by the situation of the respondent. Further examples have been identified by Girvan LJ. As Girvan LJ has pointed out the "take up "rate of nominations received by the appellant during the years 2009-2011 appears very low. However, on joining the pension scheme the member receives a welcome pack including a Membership Certificate stating the member's partnership status and the employee's membership form makes clear that a partnership status of 'in a Declared Partnership' will only be accepted if a completed nomination form is held on file. The appellants' Pensions Manager has provided an affidavit setting out in detail the references to the need for nomination together with the documentation that NILGOSC issues to its members annually requiring them to indicate, inter alia, their Partnership Status offering the options 'single/married/civil partnered/ divorced/ widowed/ in a Declared Partnership.' Members are provided with an annual pension benefit forecast which includes an inquiry form upon which the member may bring personal information up to date.

[25] Counsel also drew our attention to the recent decision in Swift v Secretary of State for Justice [2013] EWCA Civ 193, a case concerning the circumstances in which a cohabitee could recover damages under the Fatal Accident Act 1976 ("F.A.A"). In particular, Dr McGleenan referred the court to the judgment of Lord Dyson MR at paragraphs [23] to [30]. In that case Lord Dyson expressed the view that Parliament was entitled to decide upon some mechanism for proving the requisite degree of permanence and constancy in a cohabiting relationship and he accepted that, in doing so, the law could lead to some results which many would regard as unjust. At paragraph [39] he said:

> "Parliament was entitled to prefer a bright-line distinction to an approach which depended on fact-

> sensitive decisions in each case as to whether the relationship was sufficiently constant or permanent to justify a right of claim under Section 1 of the FAA. It is now well understood that where Parliament chooses to draw a line it is inevitable that hard cases will fall on the wrong side of it. But that is not a sufficient reason for invalidating it if in the round it is beneficial and it produces a reasonable and workable solution: see Carson per Lord Hoffman at paragraph 41 and Lord Walker at para 91; and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 1 AC 1312 at para 33, [2008] 3 All ER 193 per Lord Bingham."

I also note that in delivering the judgment at first instance in Swift, which was upheld in the court of appeal, Eady J said, at paragraph [60]:

> "[60] It is obvious, in cases where Parliament chooses to draw a line, that hard cases will fall on the wrong side of it, but that will not invalidate the rule if, judged in the round, it is beneficial; that is to say, if it achieves a purpose which the legislature deems to be desirable."

In a similar vein Lord Neuberger observed in RJM, at paragraph [57]:

> "The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification of the policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."

[26] In my view the constitutional arrangement implementing the separation of powers requires the domestic court or tribunal considering the impact of Convention rights in the context of primary or secondary legislation, particularly resulting from widespread consultation, to give such weight as may be appropriate, in the circumstances of the particular case, to the legislative source and history of the decision, the legislative/executive content, intent and purpose, the policy context and the nature of the specific right/s involved. In the course of giving judgment in Morrison Treacy J referred to the decision in Ratcliffe v Secretary of State for Defence

[2009] EWCA Civ 39 in which Hooper LJ provided a careful analysis of human rights jurisprudence on discrimination. In that case the appellant had enjoyed an unbroken and true partnership with a member of the armed forces for some 20 years. Her partner died after developing mesothelioma caused by exposure to asbestos during his service in the Royal Navy. The relevant Service Pensions Order of 1983 restricted payment of a War Pension to an unmarried dependant living as a spouse only:

> (a) If the unmarried dependant was wholly or substantially maintained by the member on a permanent bona fide domestic basis throughout the period beginning 6 months prior to the commencement of his service until his death; and
>
> (b) If the unmarried dependant had in her charge a child of the member.

As in this litigation, Hooper LJ had to consider the application of A1P1 and Article 14. After careful analysis of the relevant authorities he concluded that the issue had to be decided in the light of the particular pension scheme under examination. He then proceeded to consider the issue of justification and, having done so, he concluded at paragraph 89:

> "89. At the end of the day this case, in my view, falls squarely within the narrow well-established principle that where alleged discrimination in the field of pensions is based on non-suspect grounds, courts will be very reluctant to find that the discrimination is not justified. Whatever the position today, historically the distinction in the War Pension Scheme between married and unmarried partners and between unmarried partners who fell within the very narrow criteria for a pension and other unmarried partners was justified. In 2003 the Government recognised that the distinction was no longer justified, altered the Occupational Pension Scheme prospectively and announced its intention to make changes to the War Pension Scheme from some time in the future but also prospectively. The decision, from what point in time unmarried partners are put in an analogous position to spouses in the field of pensions, is a decision for the Government and is a decision with which the courts will not normally interfere. In the words of Laws LJ in Carson's case [2003] 3 All ER 577, para 73 (referred to at para 51 above):

> 'In the field of what may be called macro-economic policy, certainly including the distribution of public funds upon retirement pensions, the decision-making power of the elected arms of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest.'"

[27] I have found this a difficult case to determine and it is not hard to sympathise with the position in which the respondent finds herself. I bear in mind the words of Lord Dyson in concluding his judgment in Swift when he said:

> "The decision as to which cohabitees should be able to claim damages for loss of dependency raises difficult issues of social and economic policy on which opinions may legitimately differ. There is no obviously right answer."

However, in my view, the requirement to nominate is an integral element in the scheme under consideration rather than the 'additional hurdle' perceived by Treacy J. I respectfully accept the view of Girvan LJ that precedent alone is not enough. However, while simple precedent would not be enough to provide reasonable justification, it would seem that the Department relies upon the benefits accruing from parity across the U.K., efficiencies in costings and funding projections and, given rapidly changing patterns of social behaviour, a policy view that nomination is an essential component in providing the 'clear evidence' necessary to qualify as a cohabiting partnership. Girvan LJ has also noted that the Armed Forces pension scheme does not appear to require a formal nomination. That may reflect a difference of policy as between types of scheme and, if so, would tend to reinforce my concern that the court should be very careful to avoid reaching a merits decision on policy. It is clear that the burden of justification of the regulations as proportionate remains upon the Department throughout. However, given the factual context of this case, I do not accept that 'very weighty reasons' have to be established by way of justification. In my view the requirement for nomination has not been shown to be "manifestly without reasonable foundation" – the test applied in respect of state benefits in Stec and approved by Baroness Hale in Humphreys. Bearing in mind the jurisprudence cited above, standing back and taking account of all of the relevant factors, on balance and not without a degree of reluctance, I am satisfied that the burden has been discharged by the appellant and, accordingly, I would allow the appeal.