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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOANNE ECCLES FOR JUDICIAL REVIEW

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Ian Skelt QC and Gordon Anthony (instructed by Edwards & Co, solicitors) for the Applicant
Tony McGleenan QC and Aidan Sands (instructed by the Departmental Solicitor's Office) for the Respondent
Philip McAteer (instructed by the Crown Solicitor's Office) for the Notice Party

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SCOFFIELD J

Introduction

[1] By this application for judicial review, the applicant, Joanne Eccles, a constable in the Police Service of Northern Ireland (PSNI), seeks to challenge the lawfulness of secondary legislation which renders her ineligible for the payment of a survivor's pension as the surviving partner of Sergeant Gary Dempster. The relevant provisions are to be found in Part C of the Royal Ulster Constabulary Pensions Regulations 1988 (SR 1988/374) ("the 1988 Regulations").

[2] The respondent to the applicant is the Department of Justice for Northern Ireland ("the Department"), which is the department of the devolved administration responsible for the 1988 Regulations. The applicant initially also proceeded against the Pensions Branch of the PSNI as a named respondent; but, instead, the Chief Constable of the PSNI has been added as a notice party to the proceedings. It was agreed that the question of any necessary relief against the Pensions Branch could and should be revisited in the event that the applicant was successful in her challenge to the 1988 Regulations.

[3] Mr Skelt QC appeared with Mr Anthony for the applicant; Mr McGleenan QC appeared with Mr Sands for the respondent Department; and Mr McAteer appeared

for the Chief Constable as notice party. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] Sgt Dempster sadly passed away on 15 June 2019. The applicant's case is that, at the time of his death, she and Sgt Dempster were cohabiting and had been living together as unmarried partners for more than three years at that point. They met through work and began a relationship in 2015, becoming engaged to be married after around three months together. They began cohabiting in 2016 and intended to marry in March 2017. In March 2016, however, the applicant became subject to disciplinary proceedings in work (the details of which are not relevant for present purposes), which she has averred caused her very significant stress, a result of which was that she and Sgt Dempster decided to delay their planned wedding. Evidence provided in the course of the proceedings substantiated the assertion that their wedding had been planned for March 2017 but was then postponed. The applicant's difficulties in work continued, causing both her and (she avers) Sgt Dempster considerable stress and concerns in relation to their mental health.

[5] The applicant has provided a variety of information about her relationship with Sgt Dempster and their financial interdependence. When they began their relationship, Sgt Dempster was separated from his then wife (with whom he had two daughters). He then divorced. As noted above, they began cohabiting in 2016 and when they did so they lived in the applicant's home. They maintained separate bank accounts but Sgt Dempster made a significant monthly contribution towards the applicant's mortgage and also made periodic payments towards other outgoings such as rates and repairs. The applicant provided financial details in support of her averments to this effect. She also relied upon the fact that Sgt Dempster nominated her as his next of kin for the purposes of the online human resources platform used by the PSNI and had ensured that she was listed for that purpose as his fiancée (and she had likewise identified him as her next of kin). She averred that they had also discussed how he intended for her to be his next of kin for the purposes of his pension.

[6] Significantly however, Sgt Dempster omitted to name the applicant as a beneficiary under the Police Federation's benefit scheme. This is a scheme which, amongst other things, makes a significant one-off payment to the families of members who have died. The applicant contends that this omission was presumably because Sgt Dempster assumed that the changes he had made on the PSNI's e-services system (naming her as his next of kin for work purposes) were comprehensive. In any event, Sgt Dempster's ex-wife was still named as next of kin at the time of his death for the purposes of the Federation's benefit scheme. Notwithstanding that, the Police Federation, acting on legal advice, declined to make payment to the deceased's ex-wife and instead recommended that the money should be divided equally between Sgt Dempster's daughters and the applicant. The applicant received one-third of the relevant payment in 2019. (The respondent has

emphasised that it had no role in relation to this payment, as it is effectively a private insurance scheme which is administered by the Police Federation).

[7] The applicant herself is in a pension scheme ("the 2015 Scheme", described further below) which provides a pension to nominated surviving partners; and the evidence filed in the case disclosed that she had not named Sgt Dempster as someone who should receive a lump sum death grant under the 2015 Scheme in the event of her death.

[8] After Sgt Dempster's death, the Police Federation allocated the applicant a welfare officer who liaised with PSNI Pensions Branch on her behalf. Her understanding at that time was that Sgt Dempster was a member of the 2015 Scheme, which provided a pension for unmarried but cohabiting partners, and that therefore she would be entitled to a survivor's pension on that basis. There were some exchanges on the basis of that assumption; but it turned out to be wrong.

[9] The applicant was informed by letter dated 5 November 2019 that she was ineligible for a pension because the relevant scheme of which Sgt Dempster was a member ("the 1988 Scheme"), contained in the 1988 Regulations, did not make provision for unmarried partners. The relevant part of the letter was in the following terms:

> "Under these regulations there is no provision for payment of death in service benefits to a partner, only to married people. Therefore, as Mr Dempster and [the applicant] were not married at the time of Mr Dempster's death we are unable at present to make payment of lump sum or pension to [the applicant]."

[10] Broadly speaking, it may be said that the 1988 Scheme is more generous than the 2015 Scheme. When the 2015 Scheme was introduced, some officers were allowed to remain within the 1988 Scheme given the length of their service and of their contributions under that scheme. Sgt Dempster was one of those officers, having joined the police in 1992. At the time of his death, he remained a member of the 1988 Scheme, although it is also the case that he would have transitioned into the 2015 Scheme only towards the end of his career. This has been confirmed in correspondence from the Pensions Branch, which states that he would have transitioned into the 2015 Scheme on 30 August 2021. For present purposes, the key difference between the two schemes is that the 1988 Scheme, unlike the 2015 Scheme, does not provide for the payment of pensions to cohabiting surviving partners.

[11] The applicant was disappointed with the news that no pension could or would be made available to her under the 1988 Scheme and pursued the issue further by way of correspondence. The Department of Finance initially replied on behalf of the Department of Justice and, in so doing, made the point that the extension of the 1988 Scheme to surviving cohabitees would entail a very substantial

additional cost, which would fall to be paid by current members and the taxpayer whilst the beneficiaries would pay none of the costs. I return to this issue below. Further correspondence did not resolve the issue and the applicant issued the present proceedings for judicial review.

The relevant regulations and pension schemes

[12] The applicant's challenge is directed towards Part C of the 1988 Regulations. These regulations were made by the Secretary of State for Northern Ireland under section 25 of the Police Act (Northern Ireland) 1970 and were subject to a negative resolution procedure during a period of direct rule pursuant to section 1 of, and Schedule 1 to, the Northern Ireland Act 1978.

[13] Part C of the 1988 Regulations provides for awards to be made to widows. Regulation C1 provides for a widow of the qualifying scheme member to receive a pension (and the original form of regulation C1 referred only to widows). The payment of the pension is also subject to limitations. One such limitation is termination on remarriage, provided for by regulation C9. The original regulation C9 provided that, for so long as a widow lived together "as husband and wife" with a man to whom she was not married, the benefit would be suspended.

[14] Part C defines the term 'widow' to include widows, widowers and civil partners; but it does not include cohabitees who are not married or in a civil partnership. That civil partners now enjoy pension protections under the 1988 Scheme can be seen from amendments that were made to Part C by Schedule 1 to the Police Service of Northern Ireland Pensions (Amendment No 2) Regulations 2006 (SR 2006/152) ("the 2006 Regulations"). In addition, those regulations also amended regulation C9 dealing with the termination of a widow's or civil partner's gratuity on remarriage or other events. Where a widow or civil partner remarries or forms a new civil partnership, or lives together with another person as if husband and wife or civil partners, the benefit is suspended. However, the amending provision also provided that where the new marriage, civil partnership or cohabiting relationship ceased, the Board may in its discretion make further payments (*i.e.* the benefit can be revived). The applicant relies upon these provisions as indicating that, both in the original regulations and more fully since the 2006 Regulations, the statutory scheme has recognised the significance of a cohabiting relationship and (at least for some purposes) viewed this as comparable to a marriage or civil partnership.

[15] As noted above, the applicant herself is a member of the 2015 Scheme. This was established under the Police Pensions Regulations (Northern Ireland) 2015 (SR 2015/113) ("the 2015 Regulations"). Unlike the 1988 Regulations, the 2015 Regulations do provide for payments to unmarried surviving partners. Regulations 133, 134 and 136 are the most relevant. Without addressing these provisions in detail, regulation 136(2) provides that the "surviving adult of the member" is entitled to payment for life of a surviving adult's pension. The concept of a 'surviving adult' is defined in regulation 133 as meaning the deceased member's

"surviving spouse, surviving civil partner or surviving adult partner". In turn, the concept of a 'surviving adult partner' is defined in regulation 134 in the following terms:

> "A person (P) is a surviving adult partner of a deceased member of this scheme if –
>
> (a) the following conditions are met –
>
> (i) P and the member were cohabiting as partners in an exclusive, committed long-term relationship;
>
> (ii) either P was financially dependent on the member or P and the member were financially interdependent;
>
> (iii) the member was able to marry or form a civil partnership with P; and
>
> (b) P has satisfied the scheme manager that –
>
> (i) The circumstances in sub-paragraphs (i) to (iii) of paragraph (a) continued to subsist at the time of the member's death; and
>
> (ii) The period of cohabitation had been of at least 2 years' duration at the time of the member's death."

[16] Subject to the factual dispute mentioned at paras [21]-[22] below, on the applicant's case she would plainly meet the definition of a surviving adult partner in the 2015 Scheme. The issue is that her deceased partner was not a member of that scheme.

[17] For completeness, I should also mention a further police pension scheme ("the 2006 Scheme"). This scheme was called the New Police Pension Scheme 2006 but was in fact the result of the Police Pension (Northern Ireland) Regulations 2007 ("the 2007 Regulations"), which were later revoked and replaced by the Police Pension (Northern Ireland) Regulations 2009 ("the 2009 Regulations"). In the 2009 Regulations, adult survivors' pensions are dealt with in regulations 36-39. The 2006 Scheme allows for payment of an adult survivor's pension not merely to the spouse or civil partner of a scheme member but also to an adult survivor. An adult survivor was defined in broadly similar terms to the definition under the 2015 Scheme set out above, save that it was also a requirement under the 2006 Scheme that the scheme member had sent a declaration to the Policing Board (which had not been revoked),

signed by them and their partner, confirming that the relevant conditions were met. (This is the type of requirement which was ultimately held to be unlawful in *Re Brewster's Application* [2017] UKSC 8; and it is no longer a feature of the 2015 Scheme). In principle, however, provided the relevant conditions were met and that the relevant formalities had been attended to, a cohabiting partner was eligible for a pension under the 2006 Scheme in a way which was and is not possible under the 1988 Scheme.

The applicant's challenge

[18] The applicant's challenge is grounded in Article 14 ECHR (in conjunction with Article 1 of the First Protocol). She seeks a declaration that the 1988 Regulations may be read, pursuant to section 3 of the Human Rights Act 1998 (HRA), in a manner compatible with those rights, so as to entitle her to a survivor's pension. In the alternative, she invites the court to quash those Regulations by reason of their incompatibility with her Convention rights – although it may well be that the better course would be for appropriate declaratory relief to be granted and for any ancillary relief to be considered at a further remedies hearing, rather than merely quashing any aspect of the Regulations. That is because the justice of the applicant's case would not really be met by the grant of a quashing order. She requires something positive to establish her entitlement to a pension (which is why her primary aspiration is a Convention-compliant reading of the 1988 Regulations to this end).

[19] Additionally, the applicant relies upon equality of treatment as an aspect of irrationality and contends that the 1988 Regulations are irrational in the differential treatment they maintain between spouses and committed but unmarried cohabiting partners. In essence, the applicant contends that the sole ground on which the benefit was refused to her is that she and Sgt Dempster were not married and that, in her circumstances and in light of other features of the 1988 Scheme and of the 2006 and 2015 Schemes described above, this distinction is unsustainable.

Victim status

[20] Before addressing the substance of the applicant's claim in relation to Article 14, I must say something about the issue of victim status. By virtue of section 7 of the Human Rights Act 1998 (HRA), a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the HRA – as the applicant in these proceedings does – may bring proceedings in relation to that "but only if [she] is (or would be) a victim of the unlawful act".

[21] There is some evidence to suggest that, at the time of Sgt Dempster's death, Ms Eccles would not have met the criteria within the 2015 Scheme to qualify as an adult survivor by reason of cohabitation. Without going into the detail of this evidence, it raises the question of whether, shortly before Sgt Dempster's death, he and the applicant had either ceased to be in a relationship altogether or had ceased

to cohabit. The applicant denies these suggestions and has provided some additional evidence in response. I am also aware that PSNI Pensions Branch had received correspondence from solicitors acting on behalf of Sgt Dempster's daughters in which it was indicated that they would strongly object to any payment of a lump sum to the applicant as an adult survivor. In short, there is now a contested factual issue as to what precisely the state of the applicant's relationship with the deceased was at and immediately before the time of his death. For a variety of reasons, in this application for judicial review the court is not well-equipped to inquire into and resolve any such dispute.

[22] Although the respondent contended that this is an issue on which the applicant bore the burden of proof in order to establish victim status, I have proceeded on the basis that she has a clearly arguable claim to satisfy the conditions of being an adult survivor and therefore can avail of victim status for the purpose of her Convention claim as an actual *or potential* victim of discrimination. In the event that I concluded that her discrimination claim was made out in principle, it was agreed that there would have to be a further fact-finding exercise conducted (by the administrator of the scheme, the Pensions Branch of the PSNI) in order to determine whether, as a matter of fact, the eligibility criteria for an adult survivor through a cohabiting relationship were met as between the applicant and Sgt Dempster at the time of his unfortunate death. If the 1988 Scheme is unlawfully discriminatory, then the applicant "would be" a victim of the relevant act if she is able (as she arguably may be) to satisfy the pension administrator that her relationship with the deceased was such that she would qualify for a survivor's pension under the 2015 Scheme. I therefore do not propose to address this issue further, recognising that it remains in contention and at large. Rather, for present purposes I will simply take the applicant's case about her relationship with Sgt Dempster at the time of his death at its height.

Article 14 analysis

[23] In *Re McLaughlin's Application* [2018] UKSC 48, Lady Hale, at para [15] of her judgment, said that, as is now well known, Article 14 of the Convention essentially raises four questions "although these are not rigidly compartmentalised". They are as follows:

> "(1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?

(4) Is there an objective justification for that difference in treatment?"

[24] I propose to address each of these in turn, although the second and fourth were the most contentious in the submissions made to the court. I have set out the formulation of the appropriate analysis mentioned by the Supreme Court in *McLaughlin* because it arose in a case closely related to the subject matter of the present proceedings. Other similar formulations of the issues to be addressed in a structured Article 14 analysis are contained in cases such as *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 (see para [136], again *per* Lady Hale); and, in the Court of Appeal in this jurisdiction, in *Stach v Department for Communities* [2020] NICA 4 (at para [67], *per* McCloskey LJ). As Knowles J observed in *R (Harvey) v Haringey London Borough Council* [2018] EWHC 2871 (Admin), although there are different ways of analysing the issues, "each analytical route crosses the same bridges and ends up in the same place".

Ambit

[25] The issue of ambit was agreed. There is no dispute that pension entitlements are property rights within the meaning of A1P1 ECHR and that an arguable claim to an entitlement of such a benefit falls within the ambit of A1P1. That is clear from, amongst other cases, *Re Brewster's Application*. It was also agreed that there was differential treatment in this case: it is plain that cohabiting partners are treated differently to surviving spouses of civil partners under the 1988 Scheme. Of course, differential treatment is not unlawful in and of itself. The remaining questions are whether that differential treatment was on the ground of a protected status (comparing the applicant's position to that of someone in an analogous situation who is treated more favourably) and, even if so, whether the difference in treatment is objectively justified.

Status

[26] On the issue of status, the applicant simply relies on the status of being unmarried. She submits that, in this context, this is a clearly recognised status, relying on the authority of the *Re Morrison's Application* [2010] NIQB 51 (see paras [24]-[25]) and the *Brewster* case. Albeit it is not an expressly protected characteristic under Article 14, the applicant submits that it is, and has previously been recognised as being, a sufficiently defined 'other status' for the purposes of Article 14 on the basis of which discrimination might be unlawful.

[27] The respondent argues that this status on its own is insufficient because an unmarried cohabitee under the 2006 or 2015 Schemes would receive a pension (provided the relevant conditions are met). Therefore, the respondent submits, the status has to be more complicated, as found by Knowles J in *Harvey*, a case bearing significant similarities to the present challenge. Its submission on this issue is encapsulated in the following passage from its skeleton argument:

> "If the Applicant seeks to establish that she was a cohabiting partner of the deceased this is not a full description of the "other status" she relies upon. The differential treatment she complains of does not arise from the fact of her cohabitee status. Rather it is her position as a cohabiting partner of a member of the 1988 scheme. When the "other status" relied upon is characterised with precision, as it must be, then it is clear that there is a fundamental difficulty with the Applicant's claim."

[28] The applicant, of course, eschews reliance on a status as convoluted as that put forward by the respondent. I consider there to be force in her objection that the respondent ought not to be entitled to re-formulate or re-plead her case in a manner designed to make it, or having the effect of making it, easier to knock down. I have to deal with the applicant's case in the way in which she has formulated it (and note in passing that, in the *Harvey* case on which the respondent relies, the claimant herself had provided a range of formulations of her status, the second of which was more particularised than that relied upon by the applicant in this case: see para [105] of *Harvey*). I agree that the applicant can rely on her status simply as an unmarried cohabitee. The additional factors referred to in the respondent's submission are in my view more appropriate for consideration at a later stage or stages in the analysis – either on the question of the correct comparator and whether the applicant is in an analogous situation or, ultimately, in the consideration of whether the differential treatment is justified.

[29] The respondent also contends that the status required to be relied upon by the applicant is impermissible, or not subject to the protection afforded by Article 14, because it fails the 'independent existence criterion', that is to say that it does not exist sufficiently independently of the differential treatment of which she complains. This was a factor which began to assume significance in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, a case dealing with criminal sentencing and whether serving a determinate sentence of 15 years or more could be considered an 'other status' for the purposes of Article 14. Lord Bingham observed (at para [28]) that he did "not think that a personal characteristic can be defined by the differential treatment of which a person complains". Albeit there has been some drift away from the insistence on an 'other status' for the purpose of Article 14 constituting an innate personal characteristic, Lord Bingham's central point was that the status cannot simply be defined by the fact of the differential treatment. It must have some independent existence of the complaint itself.

[30] This issue was returned to by the Supreme Court in *R v Docherty* [2017] 1 WLR 181, in which Lord Hughes (with whom the other members of the court agreed), at para [63], observed that a status could not be sufficient to bring Article 14 into question if "the suggested status is defined *entirely* by the alleged discrimination" [italicised emphasis added]. That pitfall was not present in the case

of *R (Stott) v Secretary of State for Justice* [2020] AC 51, in which a majority of the Supreme Court was satisfied that the claimant did not fall foul of the independent existence condition; and the comments on this issue in *Stott* – in which it was observed that the question of whether the personal characteristic constituting one's status could not be defined by the differential treatment itself may require to be considered further in light of the ECtHR's approach to this when the *Clift* case reached Strasbourg (see paras [63] and [70]-[74]) – were therefore treated as *obiter* by the English Court of Appeal in *Haringey London Borough Council v Simawi* [2020] PTSR 702 (see para [35] and [41]).

[31] However, I do not accept the respondent's submission that the applicant's claimed status in this case "is simply a description of the application of the applicable legal rule". I also do not accept that the status relied upon by the applicant (an unmarried but committed, cohabiting partner) is "inextricably linked to the alleged discrimination". It might be, if the respondent is permitted to redefine the status on which the applicant relies; but, as I have said above, I do not consider that it is appropriate in this case for that to be permitted. In my view, as has been permitted in cases such as *Morrison* and *Brewster*, the applicant is entitled to rely on a relatively uncomplicated status (that of being an *unmarried* cohabiting partner). Although the adverse treatment of which she complains is (at least partially) a *result* of that status, the status itself can be identified and relied upon independently of its precise effects in this context. In any event, in many cases, the status relied upon by the applicant will be closely, and perhaps inextricably, linked to the alleged discrimination. That much is to be expected where the applicant is obliged to show that the differential treatment is *on the ground of* that status. In the present case, however, I do not consider the applicant's status on which reliance is placed to be *entirely* defined by the alleged discrimination, so as to fall foul of the independent existence criterion.

Analogous situation

[32] The applicant next contends that she is clearly in an analogous position to a surviving spouse of a deceased member under any of the three schemes (including the 1988 Regulations) and/or an adult partner under the 2015 Regulations.

[33] In particular, she relies upon the reasoning in the *Morrison* case on this issue. In that case, the applicant was the unmarried long-term partner of a police officer who had been killed whilst on duty. She was ineligible for certain benefits under the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations (Northern Ireland) 2006. She would have been eligible for an adult survivor's pension under the 2006 Scheme, however her partner did not meet the relevant service requirement under that scheme. Treacy J (as he then was), relying on the decision in *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39), considered that Ms Morrison was in an analogous situation to a married partner and concluded that it would be wrong at that time to say, in the context of police injury

benefits, that the applicant was not in an analogous position to a married partner for the purposes of Article 14.

[34] I take the same view in the present case. Increasingly, settled and committed cohabiting relationships are recognised in this sphere as being materially equivalent (provided a range of conditions are met) to a marriage or civil partnership relationship. The position in the 2015 Scheme puts beyond doubt that – addressing the issue, as I should, at the time of the applicant's claim for judicial review – there is sufficient equivalence for the applicant's position (taking her case at its height) to be considered as analogous to that of a married partner of the deceased.

[35] The respondent maintained an argument that, in principle, cohabiting partners are not in an analogous situation to spouses because the right to marry, protected by Article 12 ECHR, connotes a formal and legally binding public commitment which is materially different to cohabitation. In doing so it relied upon cases such as *Lindsay v United Kingdom* (1987) 9 EHRR CD555, *Shackell v United Kingdom* (Application No 45851/99, 27 April 2000) and *Burden v United Kingdom* (2007) 47 EHRR 38 as authority for the proposition that the European Court of Human Rights does not recognise marriage and cohabitation as analogous. Rather, the Strasbourg Court has affirmed that marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of man and woman who cohabit.

[36] It is undoubtedly the case that marriage continues to represent a significant and different legal status and relationship as compared with cohabitation, even where the cohabitation arises in the context of a loving, committed and exclusive relationship. Nonetheless, as the respondent accepted in argument, comparability will vary depending upon the context and the purpose of the measure in question. For instance, in the *McLaughlin* case, albeit that case concerned eligibility for Widowed Parent's Allowance and involved the important element of shared childcare, the Supreme Court considered the situation of married and cohabiting partners to be analogous. It also did so in the case of *Brewster*, although that was common ground between the parties in the context of the occupational pension scheme there at issue (see para [47] of the judgment of Lord Kerr).

[37] In addition, the law in this area requires the claimant and the comparator to be in an *analogous* situation, where the circumstances are not *materially* different but need not be identical. In the present context, I share the view of Treacy J that, for the purposes of Article 14, the partner of a deceased scheme member is in a sufficiently analogous position to a widow in circumstances where she can show that at the time of his death they had been living together for a significant period in an exclusive, committed, long-term relationship, in circumstances involving financial dependence or interdependence and were free to marry. In either case, the sense of loss, grief and financial uncertainty are likely to be similar; and the quality of the relationship is such that, particularly in light of the requirement of financial dependence or interdependence, similar questions of future financial provision are likely to arise.

[38] As Treacy J's reasoning sets out in *Morrison* (relying, in particular, on the decision of the English Court of Appeal in *Ratcliffe*) the specific context at issue is of great importance, including the detail of the particular scheme (or related schemes) which are in play. Treacy J considered – in 2010, but looking back to 2008 – that it would be wrong in the context of police injury benefits to view the applicant there as not being in an analogous position to the wife of a deceased officer. One of the key bases on which he reached that conclusion was that, by 2006, as discussed above, the police pension regime had recognised that adult surviving partners who were not married should be eligible for a pension. That position has been copper-fastened in the 2015 Regulations and, as matters stand in 2021, it seems to me that the respondent can no longer properly contend that, in this particular context, the applicant is not in an analogous position to the wife of a married officer.

[39] The respondent relied heavily upon the decision of the English High Court in the *Harvey* case on this issue. This authority has certainly given me pause for thought on the question of whether the applicant is, in fact, in an analogous situation to the relevant comparator. The claimant in *Harvey* had cohabited with her partner, a local government employee, who was made redundant in 2003. Under the Local Government Pension Scheme Regulations 1997, the pension scheme of which the claimant's partner had been a member provided in the event of the employee's death for the payment of a survivor's pension to the employee's surviving spouse, but not to an unmarried cohabiting partner. A new scheme was introduced in 2008, under which provision was then made for payments to unmarried cohabiting partners, although the claimant's partner could not have been a member of that scheme as he was not in local government employment at the relevant time. When the claimant's partner died in 2016, she was informed that she was not entitled to payment under the 2008 scheme. She challenged the 1997 scheme as discriminatory and unlawful under Article 14 ECHR.

[40] However, Ms Harvey's claim was dismissed for the reason, amongst others, that she was not in an analogous position to the relevant comparator. This was because the relevant comparison was not simply between spouses and unmarried persons but, more particularly, between (on the one hand) a spouse whose deceased partner had been a member of the 1997 scheme and had paid through his pension contributions for the benefit of the survivor's pension to be afforded to a surviving spouse and (on the other hand) an unmarried person whose partner had been a member of that scheme but had not paid for that benefit to be accorded to his cohabiting partner, that not being a feature of the 1997 scheme.

[41] I return to the significance and import of the *Harvey* decision below. However, I have not been persuaded that it is appropriate to depart from the more general approach to the question of 'analogous situation' which was adopted in *Morrison*. There are some factual distinctions between the present case and the circumstances of the *Harvey* case which have been relied upon by the applicant. Perhaps the most obvious of these is the fact that, in *Harvey*, the deceased would

never have been in a position to enter the 2008 scheme, having ended his employment in 2003. Accordingly, the *Harvey* case was only ever a case where the core relevant context concerned the 1997 scheme. In contrast, in the present case, not only were the 2006 and 2015 Schemes in existence during the period of Sgt Dempster's employment, but he was due to transfer into the 2015 Scheme in August 2021. As Knowles J acknowledged in his judgment in *Harvey*, whether or not married and unmarried persons are to be regarded as in comparable situations for the purposes of Article 14 depends on the context, including the very particular context as well as in the broader context of pensions (see paras [160]-[161]). The picture in relation to the various police pension schemes in play, or potentially in play, in the present case is more complicated than was the case in *Harvey*.

[42] Additionally, I wonder whether the approach of Knowles J to the question of analogous situation in para [170] of his decision in *Harvey* may be focused too specifically not merely on the situation of the claimant vis-à-vis the appropriate comparator but, rather, on the situation and actions of her deceased partner. I accept that there is an element of judgment in play on this question and that, since the four issues outlined by Lady Hale in *McLaughlin* are not rigidly compartmentalised (see para [23] above), circumstances relevant to one question may bleed into another. For my part however, I would prefer to treat the applicant in this case as in an analogous position to a surviving spouse under the 1988 Scheme (or indeed a surviving cohabiting partner eligible under the 2015 Scheme) and address the significance of the pension contributions made by members of the various schemes in the context of justification. This conclusion on the 'analogous situation' issue appears to me to be consistent with the analysis of Treacy J in the *Morrison* case and, given that that is an authority in a similar field in this jurisdiction, I should follow it unless persuaded that it is clearly wrong (which I am not). I also note that in another police pensions case (albeit raising different issues), *Carter v The Chief Constable of Essex* [2020] EWHC 77 (QB), Pepperall J expressed some doubt about the correctness of the approach in *Harvey* on the issue of whether the claimant was in an analogous situation. At para [64] of his judgment, he doubted whether the question of costing (that is to say, relying on the fact that a benefit was costed into one scheme but not another) could of itself be decisive on the issue of comparability, since otherwise an obviously discriminatory scheme could be defended on that basis.

[43] Moreover, although I accept that, as a matter of principle, this issue should be addressed separately, authority also 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": see Lady Hale at para [25] of her judgment in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42.

[44] The most persuasive aspect of the respondent's case on analogous situation in my view is that, in the *McLaughlin* case, the Supreme Court considered the applicant's argument in respect of eligibility for a bereavement payment to be in a different category from that relating to the Widowed Parent's Allowance. In the

latter case, as Lady Hale observed, "the situation of the children is thus an essential part of the comparison". On the other hand, in the case of a bereavement payment where the claimed benefit was merely for the benefit of the survivor, the court took no issue with the approach adopted by Treacy J at first instance (in *Re McLaughlin's Application* [2016] NIQB 11) when he found that the applicant's situation as a cohabiting partner was *not* analogous to that of a married survivor. That was addressed in the following manner in paras [66]-[67] of Treacy J's judgment at first instance:

> "Through marriage (or civil partnership) a couple regulates their relationship with each other and with the state through their public contract. The couple puts the state 'on notice' of their relationship. A cohabiting couple make no such public contract. This in itself is usually sufficient to make the two relationships sufficiently different in a material particular to lawfully treat the relationships differently in certain circumstances. By the act of marriage the couple 'opt in' to this different treatment – the treatment arises not by virtue of the quality of the relationship or the length of the relationship, but because the couple have made the contract and made the state aware of their changed circumstances.
>
> For this reason I find that the applicant's claim for bereavement payments must fail."

[45] The respondent has submitted that, in her judgment in the Supreme Court in *McLaughlin* (which was the judgment of the majority), Lady Hale "wholly endorsed the approach taken by Treacy J at first instance" on this issue. I am not sure that one can go quite so far as that. At para [26] of her judgment Lady Hale observed that Treacy J's decision on this issue had not been appealed. Accordingly, anything said in relation to that aspect of the case would be obiter (although obviously persuasive). It is clear that Lady Hale was endorsing Treacy J's view that, for the purpose of the Widowed Parent's Allowance, in which the co-raising of children was an important factor, marriage and cohabitation were analogous. It is not in my view clear that she was endorsing his conclusion on the comparability issue in relation to the bereavement payment, particularly in light of the reservations she expressed about the *Shackell* admissibility decision expressed at paras [28]-[29] of her decision.

[46] The *McLaughlin* case involved consideration of social security benefits where a strict distinction between spouses (and civil partners) on the one hand and unmarried partners on the other was maintained. However, in the present context, there is no significant policy debate to be had on this issue as, since 2006, it has been accepted that, in principle, survivor's benefits should be paid to cohabiting partners in the sphere of police pensions, provided certain conditions have been met. In this regard, the present case is more akin to the situation in *Re Brewster* in which that

policy debate had been settled (in favour of cohabitees) but where the issue was how it was delivered. In *Brewster*, of course, the Supreme Court was also content to proceed on the basis that the applicant could rely on a simple status (of being in a cohabiting relationship other than a marriage); and, as I have already noted, considered her position analogous to that of a surviving spouse, albeit these matters were not in dispute (see paras [46]-[47] of the judgment of Lord Kerr).

[47] Occupational pension schemes are clearly different from purely state-funded social security benefits, as cases such as *Brewster* show. In the present case, an additional factor which is of some significance in my view is the element of financial dependence (or interdependence) between the survivor and the deceased. A survivor's pension under the 2015 Scheme is designed to provide for cohabiting partners with an element of financial dependence on the scheme member. Viewed in this way, the survivor's pension is not merely a gratuity but designed to make provision for a scheme member's dependents.

[48] Without doubting that, in some contexts, the fact of marriage will mean that a married partner and an unmarried cohabiting partner are in relevantly different situations for the purpose of Article 14, I am not persuaded that there is such an obvious difference between the applicant and those with whom she seeks to compare herself *in this particular context* that their situations cannot be considered as analogous. In those circumstances – as Lord Nicholls envisaged in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 at para [3] and Lady Hale considered in *AL (Serbia)* (see para [43] above) – I consider this to be a case where the court's scrutiny is best directed at considering the issue of justification.

Justification

[49] The applicant accepted that the central question in this case is whether the respondent can justify the discrimination. She submits that it cannot because it is attempting to maintain a discriminatory distinction far beyond what may be a reasonable period of time to reflect social change; and that its approach is inconsistent with changes which have recently been made to the scheme of police pensions in this jurisdiction. On the applicant's case, the respondent's asserted justification is essentially one of cost which (she contends) is not permissible or sufficient.

[50] Both parties accept that the onus is upon the respondent to justify the differential treatment between the applicant and an appropriate comparator in this case and that, in doing so, it must show that the approach adopted by the 1988 Scheme has an objective and reasonable justification. That is to say, it must pursue a legitimate aim and have a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The intensity of review which applies, however, differs depending upon the subject matter at issue; and in the present case it is accepted by the applicant that the court's enquiry will amount to whether the approach adopted by the 1998 Regulations is manifestly without

reasonable foundation. That is because this case is concerned with socio-economic policy and the distribution of limited financial resources. In *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26 ("*SC*"), Lord Reed noted that the approach of the UK courts had been to respect the policy choice of the executive or legislature "in relation to general measures of economic or social strategy in the context of welfare benefits" unless that approach was manifestly without reasonable foundation (see para [97]); but went on to explain that a nuanced approach is required depending on the precise nature of the case. Notwithstanding that, pensions cases, including in relation to a widow's pension, were noted as a particular example of instances where a wide margin is usually allowed to the state, since they involve economic or social strategy, and where the Strasbourg Court had used the formulation that the state's policy choice would generally be respected unless it was manifestly without reasonable foundation: see paras [115](2), [129](2) and [158]. I also take into account that the status of being unmarried is not an innate personal characteristic but represents a choice (albeit a joint choice on the part of the applicant and her former partner) as to the character of their relationship. It is not a suspect status in respect of which heightened justification may be required (see *SC* at para [114]).

[51] In terms of justification the respondent does *not* rely on the protection of traditional marriage. That justification essentially evaporated whenever the police pension regime generally began to provide for pension benefits for cohabiting couples. Mr McGleenan has squarely eschewed reliance on that justification in favour of the justification advanced and accepted by the English High Court in *Harvey*, namely non-retrospectivity.

[52] The respondent has also drawn attention to the fact that occupational pension schemes – even where, as here, they are available to public sector employees – are not a state benefit. Rather, they are an element of employee remuneration in respect of which, unlike state benefits, pension scheme members have choices. Sometimes choices will be available to move between different public sector schemes, or into an updated scheme, but a fundamental choice which is often (if not invariably) available is the option to opt out of the scheme and save for retirement privately.

[53] As noted above, it is agreed between the parties in this case that the relevant standard of review is whether the respondent's justification is manifestly without reasonable foundation. Lord Wilson described the exercise to be conducted by the court in this regard in *R (DA) v Secretary of State for Work and Pensions* [2019] I WLR 3289 at paras [65]-[66]. Once the state has provided reasons for having countenanced the adverse treatment, it is for the complainant to show that the state's approach is manifestly without reasonable foundation. However, reference to a burden of proof in this regard "is more theoretical than real" because the court "will proactively examine whether the foundation is reasonable" and "it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable".

[54] In my judgement, for the reasons elaborated upon further below, the respondent has raised a reasonable foundation for the different treatment of the applicant as compared with a married widow under the 1988 Scheme, or indeed a cohabiting partner under the 2015 Scheme, the justification in each case being two sides of the same coin.

[55] I accept the respondent's case that it has been a consistent and long-standing feature of government pension policy that changes to a pension scheme should not be retrospective and that changes, where desirable, should be made by way of introduction of a new scheme as a matter of fairness – both to scheme members and inter-generationally. The present case is not a case like *Brewster*, where the scheme member had, in principle, paid for pension benefits to a nominated cohabiting partner but had simply failed to complete the relevant form (which added little or nothing to the requirement that it be proven to the scheme administrator's satisfaction that the substantive conditions for entitlement were met). Rather, in the present case, the scheme of which the deceased was a member simply did not include that form of benefit. Other schemes were available which now do; but Sgt Dempster had not joined any of those schemes. He remained within the 1988 Scheme, which had a number of additional benefits as compared with the 2006 or 2015 Schemes, but in respect of which it was a feature that a pension was not payable to a surviving cohabitee. The respondent's evidence also indicated that there had been no lobby from staff associations to extend benefits to cohabiting partners in the 1988 Scheme – at least in part, no doubt, because other schemes were available which could be joined if that was a priority for the relevant officer.

[56] But what is the problem with a cohabiting partner of a deceased member of the 1988 Scheme being treated in the same way as a spouse, one might rhetorically ask? The respondent's riposte is one of principle, rather than a pure budgetary consideration (although questions of cost and who would fund the additional liabilities also featured). Essentially, it is that it is unfair that a scheme member should avail of a benefit of a type for which they had neither bargained nor paid; and similarly unfair for other scheme members (or the taxpayer) to have to subsidise that unanticipated and unfunded benefit. The respondent's submissions and evidence did raise the question of the cost of funding this additional benefit for the unmarried partners of members of the 1988 Scheme; but its objection is not merely limited to one of cost.

[57] Much of the evidence put before the court in these proceedings by the respondent was the same as the evidence which was marshalled by the defendant in the *Harvey* case. Mr Dukelow, the Head of Police Powers and Human Resources Policy Branch within the Department swore the lead affidavit on behalf of the respondent, in which he provided an overview of the PSNI pension schemes, and a history of police pension schemes more generally, and then set out in some detail the rationale for the position of which the applicant complains in these proceedings. Amongst other things, his affidavit evidence explains the following:

(a) That government policy when the proposal for the introduction of survivor benefits for cohabitees in public sector pension schemes was developed was based on the principles that schemes should not make a change unless the membership was willing to pay for it; that there should be no retroactivity in the application of any new benefits; and that changes to survivor pension rules, where desirable, may be best managed in the context of introducing a new scheme.

(b) In line with HM Treasury policy, such reforms to public sector pension schemes were not made retrospective; and non-retrospectivity remains a fundamental principle of public sector pensions policy, since extending benefits to those who had not been required to make the additional contributions to fund them is considered unfair.

(c) The only exception to this principle was the retrospective equalisation of same-sex civil partnerships with that of married couples; but that was undertaken for specific reasons (to correct a historical inequality) and with no wider relaxation of the principle of non-retrospectivity.

[58] On the second of these points, it is clear that this has been a longstanding policy, reconsidered and maintained over many years, and I am not persuaded that the applicant's point about the 1988 Regulations having been introduced without local or direct democratic involvement in any way serves to increase the intensity of judicial scrutiny warranted in this case. The Treasury response to the 1998 Government Green Paper proposing the introduction of survivor pensions included the following:

> "The principle of no retroactivity is fundamental to the development of pensions policy. Otherwise each evolution in the detail of pension benefits would carry a potentially huge cost in terms of accrued liabilities at the point of change, as well as higher costs accruing in the future. For instances, GAD [the Government Actuary's Department] estimate that if all public service pension schemes extended survivor pensions to unmarried partners and backdated the change to cover all past service credits, the immediate impact on accrued liabilities would be of the order of £10 billion. Not only is it out of the question for this cost to be laid on public funds, but to make it a requirement of financing by scheme members would effectively block the option of changing scheme rules in this way, where it might for other reasons be desirable."

[59] These considerations – principally based on fairness but also in relation to the risk of impeding change and cost to the public – were considered sufficient to justify the differential treatment in the *Harvey* case. In short, I agree with the analysis of Knowles J in that case – albeit this element of his reasoning was strictly obiter given his conclusions in the earlier stage of the analysis – that the relevant difference in treatment is justified, since it is rationally connected to and a proportionate means of achieving the objectives of avoiding unfairness to existing scheme members whose contributions going forward would have to pay, at least in part, for payments of benefits to partners in the circumstances of the applicant, and avoiding a 'windfall' for certain pensioner members. In turn, these objectives serve a number of more immediate, practical purposes. They ensure relative predictability and certainty for the scheme administrator. They also allow the maintenance of separate schemes, in particular more up-to-date schemes, which strike a proper balance of benefits and liabilities which will assist in the recruitment and retention of employees, whilst still being affordable for employers and the taxpayers who ultimately fund the scheme, as well as being fair as between members.

[60] As to the last of these factors, providing a benefit to (the partner of) a scheme member in respect of which that member made no contribution at all amounts to requiring active scheme members to subsidise the benefit for a generation of pensioner members where the former are having their pay reduced (through the setting of their employee contributions at a higher level than would otherwise be the case) in order to increase the deferred pay of the latter.

[61] Knowles J's conclusions on these issues are set out at paras [199] to [220] of his judgment in *Harvey*, in which he discussed the relevant issues using the template of the four-stage *Bank Mellat* test for proportionality. The identified objectives of adhering to the non-retrospectivity principle included that changes were implemented at a stable and affordable cost, within a fixed costs envelope, whilst also providing an attractive package of benefits; that unexpected liabilities were avoided in respect of individual schemes; and that unfairness to existing scheme members was avoided by ensuring that members were only entitled to benefits which were costed into the relevant scheme and paid, so avoiding unfair subsidisation by some and unfair windfalls for others. These objectives were considered sufficiently important to justify the limitation on the claimant's right to receive a survivor's pension; and were so considered notwithstanding that there had been limited infringements of the general principle of non-retrospectivity for particular reasons. The approach adopted was rationally connected to those aims; and there was no less intrusive measure available (without unacceptably compromising the achievement of the objectives being pursued) because the only realistic alternative, as in this case, was to grant the claimant the survivor's pension which she sought.

[62] Assessing matters in the round, Knowles J – who gave judgment in *Harvey* before the further consideration of the 'manifestly without reasonable foundation' test by the Supreme Court in either *DA* or *SC* was available – considered not only

that the government position had a reasonable foundation but that he would have reached the same conclusion without reference to that formulation of the test (see para [217]). That was perhaps prescient given that, in para [128] of his judgment in *SC*, Lord Reed observed that, even in the pensions sphere, there may be cases where the 'manifestly without reasonable foundation' formulation is not to be taken as a conclusive account of the assessment of compatibility with Article 14. As I have already indicated, I find Knowles J's reasoning persuasive and agree with it in respect of whether the issue is addressed purely as one of MWRF or as requiring a more intense level of scrutiny.

[63] The respondent's submissions further suggested that the extension of survivor benefits to unmarried partners would represent "a colossal increase in cost for active members" to provide a benefit to non-contributing members that they had not bargained for when they entered into and contributed to the 1988 Scheme. As well as increased cost to active members, this is also likely to have a significant impact on the public purse. That is because, as Mr Dukelow's evidence set out, the Northern Ireland police pension scheme payments are Annually Managed Expenditure, provided via the Department of Finance and the Department of Justice where there is a shortfall in income over expenditure. The schemes run in deficit with total payments out greater than income received through contributions, so that they are publicly funded in significant measure, with the 1988 Scheme currently running at a significant (and growing) shortfall. Accordingly, if survivors' pensions were to be extended to unmarried partners of deceased members of the 1988 Scheme, the cost to the taxpayer is also likely to be very substantial (with a knock-on impact on future pension schemes and public spending more generally).

[64] Further evidence in relation to this was provided on the respondent's behalf in an affidavit from Mr Scanlon, the Deputy Chief Actuary in the Government Actuary's Department (GAD). GAD was asked by the Department to provide advice and commentary on the potential cost of extending survivors' pensions to unmarried partners in the 1988 Scheme; the wider potential costs on public sector pension schemes in Northern Ireland of extending survivors' pensions to unmarried partners in all cases; and the UK-wide cost implications of extending survivors' pensions to unmarried partners in public service pension schemes. The estimated costs were £47m to £73m for the police pension scheme in Northern Ireland; £140m to £240m for public sector pension schemes generally in Northern Ireland; and £3bn to £5.5bn potential additional costs to UK-wide public sector pension schemes if a similar approach required to be taken in other such schemes which did not provide for such benefits at present.

[65] I treat with caution, as Mr Skelt urged me to, the figures provided by the respondent in relation to the potential cost of a reading of the 1988 Regulations which would entitle the applicant to the equivalent of a widow's pension. That is because the respondent has candidly accepted that no individual data in respect of unmarried partners is obtainable for the 1988 Scheme (nor the other two schemes); and Mr Scanlon's affidavit explains a range of assumptions and uncertainties to

which GAD's analysis is subject which make it difficult to assess with precision what the likely cost would be of the applicant succeeding in her case even in respect of the scheme with which these proceedings are centrally concerned, let alone trying to predict the further read-across which there might then be to other schemes.

[66] Nonetheless, even using the most conservative of Mr Scanlon's estimates and treating that with a degree of circumspection, it is clear, and I accept, that very significant further costs are liable to be incurred if public service pension schemes which do not presently provide benefits for surviving cohabitees were required as a matter of law to extend these benefits to members who have not been making contributions on this basis to date. Pure budgetary considerations are, of course, no answer to the requirements of equal treatment in principle (see, for example, the observations of Lady Hale in *Department of Constitutional Affairs v O'Brien* [2013] 1 WLR 522, at para [74]). But in this context the respondent permissibly prayed in aid the principle that caution is required where decisions on public expenditure are concerned (see, for instance, Singh LJ in *R (Drexler) v Leicestershire County Council* [2021] EWCA Civ 502 at paras [77] and [80]) and that, in a context such as this, the state is entitled to draw bright line rules (see, for instance, Lord Mance in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 at para [51]; and Lord Sales in *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, at para [85]). Neither of these well-known principles require detailed elaboration in this judgment.

[67] The application of the bright-line principle in the present context, however, is simply that, with a variety of schemes available each with a carefully calibrated balance of contributions and benefits, the state is entitled to take the view that it is both fair and appropriate for scheme members to avail only of the benefits of the scheme of which they are a member and not to seek to cherry pick the most favourable parts of each scheme, whether through Article 14 of the Convention or otherwise. At para [125] of his judgment in *SC*, Lord Reed also noted that, in the context of pensions (as with welfare benefits), the ECtHR would look at the compatibility of the system overall, without giving undue weight to the circumstances of the individual, since in these spheres schemes have to deal with broad categorisations in order to be workable, and that this inevitably affects some people more prejudicially than others.

[68] Although one might take a different view as to the provision which should be made for cohabitees of members of the 1988 Scheme, it is not for me to substitute my judgment on this issue. The respondent has advanced a justification which in my view does have a reasonable foundation. It has been accepted as having such a foundation in *Harvey*, with the reasoning of which (on this issue) I agree. Unmarried survivor benefits have now been a feature of public sector pension schemes in this area for the past 15 years. It was open to members of the 1988 Scheme to transition to the 2006 Scheme at any time up until 31 March 2015. Thereafter the 2015 Scheme was available, at least in general, for those for whom this benefit was (or may become) a priority. Separately, and unrelated to her status as a cohabiting partner but merely as a dependent, it would also have been open to Sgt Dempster to apply

to the Policing Board to 'allocate' a portion of his pension to the applicant before his retirement, under regulation B9(2) of the 1988 Regulations.

[69] Mr Skelt relied strongly on the *Morrison* case in the presentation of his client's case, for obvious reasons; but I accept Mr McGleenan's submission that it is distinguishable from the present case because, unlike the *Harvey* case, the *Morrison* case did not involve a pension scheme (but, rather, a statutory injury benefits scheme) and therefore did not involve the issues of fairness to scheme members which is engaged by the non-retroactivity principle.

[70] My conclusion may have been strengthened in the event that the non-provision of a pension for the applicant was as a result of a conscious choice by Sgt Dempster not to transfer into the 2006 or 2015 Scheme, each of which provides a survivor's pension for a cohabiting partner, or, alternatively, as a result of a failure by him to move to one of these schemes in order to protect the applicant's position. The position in this case is complicated by the fact that, at around the time when Sgt Dempster's relationship with the applicant commenced in 2015, the 2006 Scheme was closed and it was no longer open to him to transfer into that scheme. In addition, I was told during the hearing that it was also not possible for Sgt Dempster to transfer into the 2015 Scheme, albeit that it opened to *new* members in 2015. This is because, as a result of the particular transitional arrangements which applied to Sgt Dempster, he would have transferred to the 2015 Scheme in August 2021 (subject to the possibility of being permitted to remain in the 1988 Scheme as a result of a remedy, still under consideration, arising out of the *McCloud* litigation) but was not permitted to transfer into the 2015 Scheme by election before that time. Accordingly, in the very particular circumstances of this case, it appears to be one where there was no effective opportunity for Sgt Dempster to protect Ms Eccles' position – other than as mentioned at para [68] above or by marrying her – at any time *after* it became clear that their relationship had become stable and that it was likely to subsist (albeit he could have joined the 2006 Scheme at some time before then).

[71] Ultimately, however, I have concluded that this is simply a feature of the present case which makes it a particularly hard case which happens to fall on the wrong side of the line as far as the applicant is concerned. There is no evidence to suggest that Sgt Dempster made any specific effort or enquiry in relation to changing his pension scheme in order to provide protection for the applicant. The respondent has also submitted that it would have been open to him to nominate Mrs Eccles to receive the benefit payable by the Police Federation, which he did not do. Whilst survivor benefits would in principle have been available to the applicant as the deceased's cohabiting partner when he moved into the 2015 Scheme, these would also only have been in respect of the period in which he was a member of that scheme. Although these points may be thought to go to the overall justice of the outcome however, they have no impact on the reasoning set out above, namely that the provision of adult survivor benefits extending to cohabiting partners in the two newer schemes only, and not retrospectively in the 1988 Scheme, is a reasonable and

permissible foundation for the differential treatment of which the applicant complains in these proceedings.

[72] I also do not consider that the limited ways in which the current statutory scheme recognises cohabiting relationships and imbues them with some legal significance (see paras [13]-[14] above) makes any material difference to the above analysis. They are recognised only in a way which may have negative effects for surviving spouse entitled to a pension under the scheme (that is to say, as a circumstance which might give rise to disentitlement). I do not accept the applicant's submission that "an equivalence in one part of the scheme must be complemented by an equivalence throughout it in its entirety". That is because the recognition that the formation of a new relationship may be a basis on which it is no longer necessary or desirable to continue to make pension payments does not engage the issues of fairness or non-retrospectivity which are relevant to the applicant's contention that she should be entitled to a pension, notwithstanding that neither Sgt Dempster's contributions (nor those of other members contributing to the 1988 Scheme) were ever made on that basis.

[73] In summary, this is not a case, as the applicant sought to portray it, of the respondent impermissibly or culpably dragging its feet in relation to changes to the police pension options required to reflect social change. On the contrary, the Department has moved with the times and created new schemes which reflect the fact that many police officers may wish to ensure financial provision for partners who are neither spouses nor civil partners. The simple point in this case is that it is only fair that such benefits, now available in principle, are provided through schemes where they are properly costed, planned and paid for.

Equal treatment at common law

[74] The applicant also relied upon the principle of equal treatment as an aspect of irrationality, based on the decision of the UK Supreme Court in *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2018] UKSC 25. In advancing this claim at common law, the applicant accepted that it need only arise if the court found against her in her Article 14 challenge and also that the only possible relief at common law was an order of certiorari or a declaration (and not our reading down such as may be available under section 3 of the HRA).

[75] The facts of the *Gallaher* case are not of particular significance for present purposes. In that case, however, the Supreme Court – principally through the analysis contained in paras [24]-[40] of the judgment of Lord Carnwath – took the opportunity to reiterate that substantive unfairness is not a free-standing ground of judicial review; and that, whilst consistency was a generally desirable objective, domestic law did not recognise equal treatment as a distinct principle of administrative law. Challenges involving alleged inconsistent or unequal treatment in the context of common law principles of public law had to be judged by reference to the ordinary principles of judicial review (such as legitimate expectation and

irrationality). Put simply, differential treatment in materially similar circumstances, without objective justification, may amount to irrationality; but, in a case such as the present, where no question of legitimate expectation arises, irrationality would have to be established.

[76] I accept the respondent's contention that the applicant's (faint) reliance on irrationality at common law, with particular focus on the principle of equality as an aspect of rationality, adds nothing to her Article 14 claim.

Conclusion

[77] Although I consider there is differential treatment in the applicant's case, and that she is entitled to rely upon a status meriting protection under Article 14 ECHR, the difference in treatment arises in a field in which it can be readily justified and where the court will exercise a relatively un-intrusive review function. I consider that the parties were right in the circumstances of this case to agree that the test for the court was whether the respondent has shown a foundation for the approach maintained in the 1988 Scheme which is not manifestly unreasonable (which merely reflects previous case-law indicating how the wide margin of appreciation in this field is to be accommodated in the court's analysis). I consider that it has; and would reach that same decision even if, in light of *SC*, a moderately enhanced level of scrutiny had been required.

[78] Although I have reached my conclusion via a slightly different route from that adopted by the Administrative Court in England in the *Harvey* case, I agree with the fundamental reasoning underpinning the outcome in that case on the question of justification.

[79] In light of the above, I dismiss the applicant's application for judicial review. I will hear the parties on the issue of costs.