Neutral Citation No. [2010] NIQB 51 | *Ref:* **TRE7827**

Judgment: approved by the Court for handing down | *Delivered:* **16/04/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Morrison's (Debbie) Application [2010] NIQB 51

IN THE MATTER OF AN APPLICATION BY DEBBIE MORRISON FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] By this judicial review the applicant challenges the lawfulness of Regulations 12 and 13 of the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations (Northern Ireland) 2006 ("the 2006 Injury Benefit Regulations") insofar as they treat the unmarried partner of a deceased police officer less favourably than they treat such an officer's widow, widower or bereaved civil partner. The applicant's principal ground of challenge is to the validity of the impugned Regulations on the ground that they are incompatible with Art 1 of the First Protocol of the ECHR when read together with Art 14.

[2] Regulations 12 and 13 make provision for two types of injury benefit in both of which eligibility is confined to an "adult survivor". The alleged incompatibility relates to the definition in these Regulations of that phrase which confine availability of the benefits at issue to "a surviving spouse or surviving civil partner of a police officer who dies or has died as a result of an injury … in the execution of duty" [see Regulation 12(1)]. The applicant's case is that as a person outside the definition (being unmarried and not a civil partner) she is being discriminated against in being refused benefits under the two Regulations.

[3] The applicant accepts that on ordinary principles of construction she is not an "adult survivor" within the meaning of Regulations 12 and 13 since she is neither a surviving spouse nor a surviving civil partner of the deceased.

Grounds Upon which Relief is Claimed

[4] The grounds upon which relief is claimed as per the Order 53 statement are:

> **"3.(a) Regulation 12(1) of the PSNI & PSNI Reserve (Injury Benefit) Regulations (NI) 2006 provides that an *Adult Survivor's Special Award* under Regulation 12 or an *Adult Survivor's Augmented Award* under Regulation 13 applies to an adult survivor, which is defined as only a surviving spouse or surviving civil partner thereby ostensibly operating to the exclusion of the applicant. A claim to an *Adult Survivor's Special Award* or an *Adult Survivor's Augmented Award* is a possession within the meaning of Article 1, Protocol 1 to the European Convention on Human Rights. The applicant's position as unmarried partner of the late Kevin Gorman was a status within the meaning of Article 14 of the European Convention on Human Rights. By providing that only spouses and civil partners are eligible for an *Adult Survivor's Special Award* or an *Adult Survivor's Augmented Award* Regulations 12 & 13 of the PSNI & PSNI Reserve (Injury Benefit) Regulations (NI) 2006 discriminate against the applicant contrary to Article 14 in that it amounts to different treatment on the ground of her status and cannot be justified (particularly in light of other legislative provisions whereby the State has demonstrated a policy position of equating spouses/civil partners with cohabiting, unmarried partners in a substantial and financially dependant or interdependent relationship for the purposes of awards on the death in service of various categories of State servants.**
>
> **(b) Further, and/or in the alternative, the applicant contends that for the foregoing reasons the maintenance of Regulations 12 & 13 is irrational and Wednesbury unreasonable."**

Background

[5] The applicant is Debbie Morrison, the partner of the late Kevin Gorman ("the deceased"), an officer in the Police Service of Northern Ireland who was killed on duty with three colleagues on 23 November 2008 in a police road traffic accident near Warrenpoint, Co Down.

[6] The applicant and the deceased were not married but were in a long-term, stable relationship. They had been living together for 3½ years immediately prior to his death and were raising their first child, born in July 2008. The applicant was pregnant with their second child when the deceased was killed. They intended to get married at an unspecified point in the future.

[7] The deceased had, pursuant to the PSNI Pension Scheme, designated the applicant as his death benefit nominee and the applicant and the deceased had signed a joint partner declaration form in accordance with The Police Pension (NI) Regulations 2007 ("the 2007 Pension Regulations") to the effect that they were cohabiting in an exclusive, committed and long-term relationship and that the applicant was financially dependent upon the deceased or they were financially interdependent. By letter dated 18 February 2009 the Chief Constable confirmed that this had been accepted for the purposes of a lump-sum death grant under these Regulations. But for the fact that the deceased had insufficient service the applicant would otherwise have been eligible for a pension under these Regulations. The letter stated:

> **"It is with regret that I have to inform you that you are not entitled to an award under the Police Pension (NI) Regulations 2007. Part 36(c) of said regulations state that Kevin must have fulfilled a qualifying service criteria, which is currently 2 year's pensionable service. Unfortunately Kevin had only 1 year and 104 days pensionable service at the time of his passing.**
>
> **I also must advise you that PSNI and PSNI Reserve (Injury Benefit) Regulations 2006 do not allow for any award to an Adult Partner of an officer who has been killed in the execution of his duty. However, the Chief Constable has agreed to highlight this matter with the NIO and NIPB in an attempt to have this matter raised at the Police Negotiation Board and in order to see if there is any possibility that the relevant regulations could be amended to allow an**

award to an Adult Partner of an officer who has been killed in the execution of his duty. I will advise you on the outcome of this. It is hoped that any such amendment will be implemented retrospectively and as such will benefit you, however I must stress that this is not guaranteed."

[8] By letter dated 24 June 2009 it was confirmed that the Chief Constable had raised the applicant's ineligibility under the 2006 Injury Benefit Regulations with the NIO and that the matter was currently under consideration by them.

[9] By letter dated 11 August 2009 the Chief Constable confirmed that the NIO had not made any change to the decision that the applicant was not entitled to an award under the 2006 Injury Benefit Regulations. They also confirmed that the 2006 Injury Benefit Regulations were currently under review but that any change made in relation to payments to partners would not be made retrospectively but from a forward date. They confirmed that this would mean that the applicant would not benefit from any change to the Regulations.

Legislative Provisions

[10] Regulation 12 of the 2006 Injury Benefit Regulations, in material part, provides:

'Adult Survivor's Special Award

(1) This regulation applies to a surviving spouse or surviving civil partner ("an adult survivor") of a police officer who dies or has died as the result of an injury received without his own default in the execution of his duty ("the deceased officer").

…

(6) An adult survivor shall not be entitled to an adult survivor's special award unless the surviving spouse was married to the deceased officer or, as the case may be, the surviving civil partner and the deceased officer were civil partners, during a period—

(a) before the deceased officer last ceased to be a police officer, if he received the injury while serving as such;

(b) before the end of the continuous period of service during which he received the injury, in any other case.

(7) An adult survivor who, but for paragraph (6)(a), would be entitled to an award under paragraph (2) shall, instead, be entitled to a pension calculated in accordance with the provisions of paragraphs (8) to (12); and such pension shall be treated for the purposes of paragraph (14) and regulation 27 (increase during first 13 weeks) as if it were a special award under this regulation.

…"

[11] Regulation 13 makes provision for payment of an adult survivor's "augmented award" where the death occurred in particular circumstances (e.g. death while saving life, death by attack). Eligibility is likewise dependent on being an "adult survivor".

Police Pension (NI) Regulations 2007

[12] The 2007 Pension Regulations provide a different test of eligibility. Regulation 37, where relevant, provides:

"(1) For the purposes of regulation 36 [which entitles a "survivor" to a pension] a survivor shall mean—

(a) a person who at the time of the death of the officer concerned was his spouse, civil partner or, subject to paragraph (2), other adult partner ("an adult survivor");

(2) An adult partner, other than a spouse or civil partner, shall not be entitled to a pension under these Regulations unless the following conditions are satisfied—

(a) the police officer concerned had sent to the Board a declaration that—

(i) the police officer and the adult partner concerned were cohabiting as partners in an exclusive, committed and long-term relationship;

(ii) the adult partner was financially dependent on the officer or they were financially interdependent;

(iii) the officer and the adult partner were both free to marry each other (where they are of opposite sexes) or to form a civil partnership with each other (where they are of the same sex);

(iv) the police officer acknowledged an obligation to send to the Board a signed notice of revocation should the relationship terminate;

and had not revoked that declaration before his death; and

(b)the surviving adult partner has submitted a claim in writing to the Board and satisfied the Board—

(i)that the circumstances mentioned in paragraphs (i), (ii) and (iii) of sub-paragraph (a) continued to subsist at the time of the officer's death, and

(ii)that the period of cohabitation mentioned in paragraph (i) of sub-paragraph (a) had been of at least two years' duration at the time of the officer's death …"

If this definition of adult survivor and test for eligibility had been included in the 2006 Injury Benefit Regulations this applicant would have qualified for one or possibly both of the benefits claimed under the 2006 Injury Benefit Regulations.

The Policy Context

[13] John Gilbert, Head of the Police Pensions & Retirements Section within the Home Office has sworn an affidavit addressing the history and policy of the legislation at issue in these proceedings. In the first section of his affidavit he traces the evolution of ordinary, special and augmented awards/pensions which historically had all been dealt with under the same legislation. In 1988 the nature of special and augmented awards as injury awards made on a non-contributory basis to all officers, whether or not they were members of the police pension scheme, was confirmed. At para.11 he continued:

> **"This separation in status from the police pension scheme benefits was made complete when the Police (Injury Benefits) Regulations 2006 were introduced. The introduction of the separate instrument to provide for the injury benefits system was required to meet requirements of … HMRC that approved pension schemes do not contain provisions relating to unapproved schemes. This important distinction remains."**

[14] As is apparent the 2007 Pension Regulations and the 2006 Injury Benefit Regulations have different eligibility criteria. Both sets of Regulations embrace spouses and civil partners, the latter reflecting the recognition by statute of the civil partnership as a legal institution. The 2007 Pension Regulations have extended the definition of adult survivor to include partners in an exclusive, committed and long-term relationship where the adult partner was financially dependant or where they were financially inter-dependent (see Regulation 37(2) at para 12 above).

[15] In 2008 the Home Office conducted a public consultation on review of police injury benefits including proposals to amend the system governed by the 2006 Injury Benefit Regulations. As part of this exercise one proposal was that survivor's benefits, already available to spouses and civil partners, should be payable to nominated unmarried and unregistered same sex partners under a new injury benefit scheme reflecting changes which had already taken place in the 2007 Pension Regulations.

[16] In relation to the current difference in eligibility for police pensions and police injury benefits Mr Gilbert in his affidavit stated as follows:

> **"21. As appears above, the 2006 Regulations trace their origins back to preceding legislation over many years. At the time when provision was first**

made for survivors' awards, there was a general assumption that lasting and stable relationships would be marked by marriage. This was reflected in the provisions on eligibility for survivors' awards.

22. In a gradual process over the years, unmarried relationships have become more prevalent and more socially acceptable. In the face of this social change, Government has sought to protect the institution of marriage by retaining more favourable provision for spouses. The protection and promotion of the institution of marriage provides the *historical* context for the exclusion of unmarried partners from public sector pensions and injury benefit schemes.

23. However, by the early part of this century, the Government had come to accept the validity of lasting and stable unmarried relationships. Extending benefits to those in these relationships would also make service in public bodies more attractive, and thus be beneficial to morale, recruitment and retention.

24. Beginning in about 2002, the Government started to make provision for unmarried, non-civil partners in various schemes. In each case this has been done following a detailed examination of the various elements of the scheme in question, to ensure that any additional commitments (including extending eligibility in the manner just described) are balanced by savings elsewhere, so that the scheme as a whole remains affordable and sustainable. Schemes are addressed on a case-by-case basis, considering the particular requirements and features of the scheme at issue.

25. The fundamental principle that more favourable provisions should not be applied retrospectively has also been applied. This promotes certainty but also, as just described, ensures that schemes can be balanced (and therefore

sustainable) with prospective savings being made to off-set prospective additional commitments.

26. The Government aim of protecting the institution of marriage has not, however, been abandoned or jettisoned. This remains a feature of Government policy. Rather, it has been softened to mitigate the effect of providing such benefits for spouses (or civil partners) only. ***A balance has been struck between the eligibility of spouses and civil partners on the one hand, representing a particular form of committed relationship where eligibility ought to be automatic; and transient relationships on the other hand, in respect of which it is plainly not desirable to extend publicly funded benefits.***

27. By 2003 the Home Office was considering reform of pension provision for the police. In December 2003, the Home Office published a consultation document setting out options for the creation of a New Police Pension Scheme ("NPPS"). I now refer to a copy of this document [Exhibit JG1, pages 62-100]. Careful consideration of the responses was then required, in the light of the affordability and sustainability criteria mentioned above.

28. In relation to police pensions, there is also a statutory requirement for consultation with the Police Negotiating Board.

29. Due to the complexity of the issues involved, the significant consequences for the public purse, and the contentious nature of the reforms from the point of view of police officers' representatives, it was not until late 2005 that the policy framework for the new scheme was settled, and not until December 2006 that the content of the necessary Regulations was finalised. This led to the making of the Police Pension (Northern Ireland) Regulations 2007.

30. The Court will note that within the Pension Regulations there remains a difference in approach to spouses or civil partners on the one hand, where

entitlement is automatic; and long-term partners on the other hand, where a number of conditions require to be met before entitlement is established (including nomination and an indication of co-habitation, financial (inter)dependence and freedom to marry). The additional commitments arising from the change, however, were offset by savings in benefits through other elements of the scheme (such as a higher normal minimum pension age and lower accrual rates).

31. At the time of developing the New Police Pension Scheme, however, a decision was taken not to address reform of the police injury benefits system until reform of the police pension scheme was complete, in view of the resources that would have been required to deal with both at the same time, and the difficulties in conducting concurrent consultation with the Police Negotiating Board.

32. Notwithstanding this, new HMRC rules prohibiting the inclusion of provisions relating to unapproved pension schemes in approved schemes meant that it was necessary in 2006 to separate the injury benefit scheme (including survivors' awards) from the pension scheme. Again, as described above, this led to the making of the 2006 Regulations, which consolidated and re-packaged the injury benefit scheme but did not make any substantive change to it, let alone a substantial overhaul as had occurred in relation to the pension scheme.

33. The Home Office was not in a position to move to reforming the police injury benefits system until 2008, when the then Home Secretary announced the intention at the Police Federation Conference in May. In August 2008 the Home Office launched a public consultation on the issue.

34. The summary of the responses to the public consultation exercise (exhibited above) were published in April 2009. Detailed consultation on the proposals contained in the review remains

ongoing within the Police Negotiating Board. The Home Office feels strongly that the time taken in this process so far has been reasonable in all the circumstances. The process of reforming a system such as this is necessarily complex and time consuming, with significant implications for public funds.

35. In the event that the Government were to decide in the future to implement a new injury benefit scheme including provision for survivors' awards for unmarried, non-civil partners, this scheme would *not* cover a claim arising in November 2008, when Constable Gorman died. To do so would be contrary to the established Government policy of not giving retrospective effect to the extension of benefits to a fresh class of claimants. This has already been made clear in the context of the PNB negotiations and is the position of both the Home Office and HM Treasury.

CONCLUSION

36. One cannot but have sympathy for Ms Morrison's position. I understand that the adult survivor's special award, with which these proceedings are principally concerned, if payable, would entitle Ms Morrison to a further £10,732.28 *per annum* (calculated as 45% of average pensionable pay of £23,850.63).

37. However, as appears from the correspondence from the PSNI Pensions Branch of 22 December 2008 and 18 February 2009 exhibited to her affidavit, significant provision has already been made for Ms Morrison and her two children. I also understand that the Chief Constable, recognising Ms Morrison's disappointment at her ineligibility for the adult survivor's special award, has made a further *ex gratia* payment to her of £9,999.99.

38. As is clear from my above averments, the Home Office is considering a package of reforms to the current injury benefits system, including

> **eligibility for an adult survivor's special award extended to nominated unmarried partners and unregistered same-sex partners. Unfortunately for Ms Morrison, however, this will not benefit someone in her position."** [Emphasis added]

Convention Provisions

[17] Art 1 of the First Protocol to the Convention provides:

> **"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the 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."**

[18] Art 14 of the Convention provides that:

> **"The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."**

[19] S.3(1) of the Human Rights Act 1998 provides:

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

Parties Submissions

[20] It was common case that the adult survivors special or augmented award, were to be regarded as a "possession"[1] within the meaning of Art 1 of the First Protocol. The applicant submitted that her status as the bereaved unmarried partner of the deceased rather than his widow is a status which falls within Art 14 of the Convention and by precluding her from claiming an Award on the ground that she is not the deceased's widow, the 2006 Injury Benefit Regulations discriminate against her within the meaning of Art 14 in that they fail to secure to her the enjoyment of her claim to such an Award without discrimination on the ground of her status as the bereaved unmarried partner of the deceased; that such discrimination is not justified; that Regulations 12 and 13 are irrational/Wednesbury unreasonable insofar as they exclude her from eligibility for an award on the ground of her status as the bereaved unmarried partner, rather than widow, of the deceased.

[21] The respondent submits that the applicant has not been discriminated against because she is not in an analogous position to a bereaved spouse or civil partner; that the impugned Regulations are justified and pursue a legitimate aim; that the issue of the provision to be made for injury benefits for police officers is a legislative task; that in carrying out their legislative function the legislator is entitled to a wide area of discretionary judgment; that the Regulations fall to be judged by the Court by a standard of rationality; and that when judged by this standard there is no incompatibility between the Regulations and the Convention.

General Approach to Complaints under Art 14 in conjunction with Art 1

[22] In ***Stec v UK*** **[2005] 41 EHRR SE 295, GC; [2006] 43 EHRR 1017 GC** the European Court stated at para 54:

> **"In cases … concerning a complaint under Article 14 in conjunction with Article 1 of the First Protocol that the Applicant has been denied all or part of a particular benefit on the discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the Applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question … although Article 1 of the First**

[1] The fact that entitlement to an Adult Survivor's Special Award or Adult Survivor's Augmented Award does not arise under a contributory scheme does not preclude it from being a "possession": ***R (RJM) v Secretary of State for Work and Pensions*** **[2008] UKHL 63, [2009] 1AC 311.**

> **Protocol does not include the right to receive a social security payment of any kind, if a State does decide to create a benefit scheme, it must do so in a manner which is compatible with Article 14."**

Is being Unmarried a Status within the meaning of Art 14?

[23] Plainly the ground upon which the applicant claims she has been discriminated is not one of those specifically adumbrated in Art 14. The question therefore arises whether being unmarried is a "status" within Art 14.

[24] There appears to be little doubt that being "unmarried" is a status within the meaning of Art 14. In ***Re G (Adoption: Unmarried Couple)*** **[2008] UKHL 38, [2009] 1 AC 173.** Lord Hoffman said at para.8:

> **"Being married is a status, it must follow that not being married is a status. … I therefore have no difficulty with the concept of being unmarried as a status within the meaning of Art14."**

[25] In light of this authority I conclude that being unmarried is a status within the meaning of Art 14.

Comparability

[26] In order to make good the claim based on Art 1 read with Art 14 the applicant must first establish that she is in an analogous position, in a materially similar context, to a married spouse or civil partner. In support of its proposition that the applicant was not in such a position the respondent referred the Court to two recent decisions of the European Court in ***Shackell v UK*** **(dec) no. 45851/99, 27 April 2000** and ***Burden v UK*** **[2008] 47 EHRR 38**.

[27] In ***Shackell*** the applicant was the unmarried partner of a self employed builder who, on his death, was denied certain widow's benefits under social security legislation. She argued that the payment of benefits to widows but not to her constituted discrimination against her under Art 1 of the First Protocol and Art 14 of the Convention. The European Court declared her application inadmissible. The Court held:

> **"The Applicant … seeks to compare herself to a widow, in other words a woman whose husband, as opposed to partner, has died."**

> **The Court recalls that the European Commission of Human Rights held, in a case concerning unmarried cohabitees who sought to compare themselves with a married couple that -**
>
> **"These are not analogous situations. Though in some fields the de facto relationship of cohabitees is now recognised, there still exist differences between married and unmarried couples, in particular differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who co-habit." (Lindsay -v- United Kingdom Comm Dec 1/11/86 DR 49 at page 181.)**
>
> **"The Court notes that the decision of the Commission dates from 1986, that is over 14 years ago. The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the Applicant is therefore not comparable to that of a widow."**

[28] In ***Burden*** the applicants were unmarried sisters who had lived together all their lives and had shared the same house, which was owned in joint names, for 31 years. Each had made a Will leaving all of their property to the other. Under domestic law when one of the sisters died, the survivor would be liable to pay inheritance tax on any assets received under the Will. In contrast, in the case of spouses, or civil partners, property which passed on death was exempt for inheritance tax purposes. In these circumstances it was alleged that there was discrimination against the sisters when Art 1 Protocol and Art 14 of the Convention were read together. It was alleged by the applicants that they were in an analogous position to the position of spouses or civil partners.

[29] At paras.62-63 the Grand Chamber rejected this submission stating:

> **"62. … the relationship between siblings is qualitively of a different nature to that between married couples or homosexual civil partners under**

> **the United Kingdom Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or civil partnership act union is that it is forbidden to close family members. The fact that the Applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.**
>
> **63. Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences. In Shackell, the Court found that the situation of married and unmarried heterosexual co-habiting couples were not analogous for the purpose of survivors' benefits since "marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The Grand Chamber considers that this view still holds true."**

[30] In light of these authorities the respondent contended that the applicant's application be rejected as non analogous.

[31] ***Burden's*** case has however been the subject of detailed consideration in the House of Lords and in the Court of Appeal. Baroness Hale in ***AL (Serbia) v SoS for the Home Department*** **[2008] 1 WLR 1434** had this to say about ***Burden's*** case:

> **"25. Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr AL, shows, in only a handful of cases has the Court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p 144, quoted by Lord Walker in the *Carson* case, at para 65:**

> **'The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe,... '*in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test*'.'**

A recent exception, *Burden v United Kingdom*, app no 13378/05, 29 April 2008, is instructive. Two sisters, who had lived together for many years, complained that when one of them died, the survivor would be required to pay inheritance tax on their home, whereas a surviving spouse or civil partner would not. A Chamber of the Strasbourg Court found, by four votes to three, that the difference in treatment was justified. A Grand Chamber found, by fifteen votes to two, that the siblings were not in an analogous situation to spouses or civil partners, first because consanguinity and affinity are different kinds of relationship, and secondly because of the legal consequences which the latter brings. But Judges Bratza and Björgvinsson, who concurred in the result, would have preferred the approach of the Chamber; and the two dissenting judges thought that the two sorts of couple were in an analogous situation. 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.*" [Emphasis added]

[32] The decision of the House of Lords in ***Ghaadan v Godin-Mendoza*** **[2004] 2 AC 557** is also instructive. This case was concerned with the Rent Act under which on the death of a protected tenant the surviving spouse, if then living in the house, became a statutory tenant by succession. The legislation provided that a person living with the original tenant "as his or her wife or husband shall be treated as the spouse of the original tenant". Prior to the HRA it had been held that the survivor of a homosexual couple could *not* enjoy this benefit. The applicant claimed that the difference in treatment between homosexual and heterosexual couples breached Art 14. The House of Lords agreed. Baroness Hale at para.138 stated:

> **"138. We are not here concerned with a difference in treatment between married and unmarried couples. The European Court of Human Rights accepts that the protection of the 'traditional family' is in principle a legitimate aim: see *Karner v Austria* (2003) 14 BHRC 674, para 40, the traditional family is constituted by marriage. The Convention itself, in article 12, singles out the married family for special protection by guaranteeing to everyone the right to marry and found a family. Had paragraph 2 of Schedule 1 to the Rent Act 1977 stopped at protecting the surviving spouse, it might have been easier to say that a homosexual couple were not in an analogous situation. But it did not. *It extended the protection to survivors of a relationship which was not marriage but was sufficiently like marriage to qualify for the same protection. It has therefore to be asked whether opposite and same sex survivors are in an analogous situation for this purpose."***

Likewise the 2006 Injury Benefit Regulations extended the protection to survivors of a relationship which was not marriage (i.e. civil partners). Furthermore the 2007 Pension Regulations (which were then legislatively separated for Revenue reasons) extended the protection to include partners in an exclusive, committed and long-term relationship.

[33] The claimant in ***Ratcliffe v Secretary of State for Defence*** **[2009] EWCA Civ 39 [2009] ICR 762**, had for many years been the unmarried partner of a Royal Navy Officer who had joined in 1952 aged 16 and died in 2004 from an illness caused by exposure to asbestos during his service. She submitted an application to the Secretary of State seeking a War Pension pursuant to the Naval, Military, Airforces etc (Disablement and Death) Service Pensions Order 1983. The

Secretary of State, in April 2004, determined that as she was not a widow for the purposes of Art 29 of the Order she was not entitled to a pension. On 6 April 2005 the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 came into force which made provision for payment of a war pension to unmarried dependant partners where death occurred after April 2005. On appeal from the decision of the Pension Appeal Commissioners refusing her a pension the Court of Appeal held that where certain provisions of the applicable scheme drew a distinction between inter alia married partners and unmarried partners the decision whether for the purposes of Art 14 they were in an analogous situation had to be made in the light of the particular scheme and the test for determining whether there had in fact been discrimination was to be applied at the time of the claim. The Court further held that, on the evidence, by the end of 2003 unmarried couples were being treated substantially the same as married couples for the purposes of the Armed Forces Occupational Pension Scheme and the government had announced that, by 2005, it would be treating them the same for the purposes of the War Pension Scheme under the 2005 Order so that at the time of the claim in 2004 unmarried partners were, in the context of armed forces benefits, in an analogous position to that of married partners.

[34] The Court, having reviewed the European and domestic authorities, concluded at para 72:

> **"72. In my view, the decision whether a married and unmarried couple are in an analogous situation must be made *in the light of the scheme under examination.* By the end of 2003 unmarried couples were being treated substantially the same as married couples for the purposes of the Occupational Pension scheme and the Government had announced that it would by 2005 be treating them the same for the purposes of the 2005 Order. This distinguishes the present case from the situation in *Burden*. Thus in 2004 it would, in my view, be wrong to say that they were not, in the context of armed forces benefits, in an analogous position for the purposes of Article 14. To this extent I would reach a different conclusion to that of the Pensions Appeal Commissioner, in paragraph 29 of his decision."** [Emphasis added]

[35] The 2006 Injury Benefit Regulations, by excluding the applicant from eligibility treat her differently from the way they would treat her if she were the deceased widow. Para. 72 of ***Ratcliffe*** recognised that unmarried partners of members of the UK armed forces are in a position analogous to that of spouses to

such members for the purposes of the relevant pension and compensation schemes. That this is so appears to have been explicitly recognised by the government itself in the 2007 Pension Regulations which equated the status of an unmarried partner who can demonstrate co-habitation and a stable relationship with that of a spouse or civil partner in the 2007 Pension Regulations. This is an analogy which is also reflected in the treatment of unmarried couples in relation to pension provision in respect of other public sector workers (see para 49(iii) below).

[36] Thus in 2008 it would, in my view, be wrong to say, in the context of police force injury benefits, that the applicant was not in an analogous position for the purposes of Art 14. In any event for the reasons adumbrated by Baroness Hale in the passage cited at para.31 above the real focus of the enquiry must relate to the justification, if any, for the maintenance of the difference.

Is the Difference in Treatment Justified?

[37] It is well established in the jurisprudence of Article 14 of the Convention that differences in treatment do not *per se* constitute discrimination even where there are persons who are treated differently in analogous positions. In order for discrimination to occur the differential treatment must have "no objective or reasonable justification": see, for examples, ***Rasmussen v Denmark*** **(1984) 7 EHRR 371** (para.38) **and** ***Abdulaziz v UK*** **(1985) 7 EHRR 471** (para.72). In ***Rasmussen*** the Court said:

> **"38. For the purpose of Article 14, a difference of treatment is discriminatory if it "has no objective or reasonable justification", that is, 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"."**

[38] In accordance with the decisions of the European Court in ***Shackell*** and ***Burden*** and indeed the domestic authorities referred to earlier in this judgment it is plain that the promotion of the institution of marriage constitutes a legitimate aim. The focus of the present challenge therefore relates to the second limb *viz* whether or not there was a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

Proportionality: standard of review: suspect and non-suspect grounds

[39] According to the ECHR case law contracting states enjoy a margin of appreciation in relation to the question of justification and in domestic law terms are entitled to a discretionary area of judgment. Particularly as to whether and to what extent differences in otherwise similar situations justify a difference in treatment. The width of this margin of appreciation or the breadth of this discretionary area of judgment depends upon the circumstances, subject matter and background of the case.

[40] In assessing proportionality in the context of Art 14 it has been held that this is a field in which the doctrine of the less restrictive solution is not an integral part of the analysis[2]. Rather the approach, reflecting US jurisprudence, links the standard of review to the status which is in issue. The ECHR has found that some types of discrimination require greater justification than others. Those that will require the greatest justification have been held to include:

- Race[3];
- Colour[4];
- Ethnic Origin[5];
- Sex[6];
- Sexual Orientation[7];
- Illegitimacy[8];
- Nationality[9];
- Religion[10].

---

[2] See ***Wychavon District Council*** **[2007] EWCA Civ 52** at [61]-[62]: "61. ... The "less restrictive alternative" test is not an integral part of the analysis of proportionality under article 14. ... It does not follow that the existence of a less restrictive alternative is altogether irrelevant in the context of article 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."

[3] ***DH v Czech Republic*** **[2008] 47 EHRR 3** at para.196: "… Where the 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."

[4] Ibid
[5] Ibid
[6] See Lord Walker at para.55 of ***Carson***
[7] Ibid
[8] See Lord Walker at para.58 of ***Carson***
[9] Ibid
[10] Ibid

[41] The House of Lords has also made a distinction between different grounds finding that difference of treatment based on certain grounds will require more weighty reasons if they are to be justified than would be needed to justify discrimination based on other grounds – see ***AL (Serbia) v Secretary of State;*** see also ***R (Rudi) v Secretary of State for the Home Department*** **[2008] UKHL 42, [2008] 1 WLR 1434** at para.30 where Baroness Hale stated:

> **"It is obvious that discrimination on some grounds is easier to justify than others."**

See also ***R (RJM (FC)) v Secretary of State for Work and Pensions*** **[2008] UKHL 63**, **[2008] 3 WLR 1023** at para.14 where Lord Mance stated:

> **"… 'the courts' scrutiny of the justification advanced will not have the same intensity as when a core ground of discrimination is in issue."**

And at para.5 where Lord Walker stated:

> **"The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."**

And at para.56 where Lord Neuberger stated:

> **"This is an area where the court should be very slow to substitute its view for that of the executive, especially as the discrimination is not on one of the express, or primary, grounds."**

[42] The House of Lords, when dealing with discrimination based on less or "non-suspect" grounds appears to have applied a test of rationality or reasonableness to the justification of discrimination e.g. per Lord Hoffman in ***Carson*** at para.15 referring to grounds which "merely require some rational justification". See also ***R (RJM (FC)) v Secretary of State for Work and Pensions*** at paras.56-57 where it states:

> **"56. In my view, the discrimination in the present case was justified, in the sense that the government was entitled to adopt and apply the policy at issue. This is an area where the court should be very slow to substitute its view for that of the executive,**

> **especially as the discrimination is not on one of the express, or primary, grounds ... Similarly, I do not think it possible to characterise as unreasonable his view that the disabled will be less likely to need a supplement if they are homeless than if they are not.**
>
> **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 for a 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. However, this is not such a case, in my judgment."**

[43] The rationale for the differing levels of scrutiny between suspect and non-suspect grounds was set out clearly by Lord Hoffman and Lord Walker in ***Carson***. Lord Hoffman stated:

> **"15. Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the 14th Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification: *Massachusetts Board of Retirement v Murgia* (1976) 438 US 285.**

16. There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, e.g. 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 (e.g. 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 about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.

17. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on these matters. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But 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. In the present case, the answer seems to me to be clear."

[44] Lord Walker stated:

"Suspect" grounds of discrimination

"55. The proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the

Strasbourg Court. It appears much more clearly in the jurisprudence of the United States Supreme Court, which in applying the equal protection clause of the 14th Amendment has developed a doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change (apart from the wholly exceptional case of transsexual gender reassignment) and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim.

56. The United States Supreme Court described the concept of a "suspect class" in *San Antonio School District v Rodriguez* (1973) 411 US 1, 29 as a class:

> **"saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."**

Under the law of Massachusetts uniformed state police officers had to retire at the age of 50. This was challenged in *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307. The Supreme Court held that in the circumstances of the case the appropriate test for equal protection of the laws was not strict scrutiny. The only issue was whether the mandatory retirement age had a rational basis, which it did: maintenance of a police force fit enough to carry out arduous and demanding duties. The majority opinion observed (at p 314):

> **"This inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines which create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."**

57. As I have said, these distinctions are not so clearly signalled in the jurisprudence of the European Court of Human Rights. But Mr Howell QC (for the respondent Secretary of State) submitted, in my opinion correctly, that the equivalent doctrine is to be found there. Where there is an allegation that article 14 has been infringed by discrimination on one of the most sensitive grounds, severe scrutiny is called for. As my noble and learned friend, Lord Nicholls of Birkenhead put it in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 568, para 19:

> **". . .where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."**

58. In its judgments the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive grounds. This appears, for instance (in relation to cases of discrimination on the ground of sex) in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, 501, para 78; *Schmidt v Germany* (1994) 18 EHRR 513, 527, para 24; *Van Raalte v Netherlands* (1997) 24 EHRR 503, 518-519, para 39. When Harris, O'Boyle and Warbrick's valuable work, *Law of the European Convention on Human Rights*, was published in 1995, the authors recognised that the Strasbourg Court had its own suspect categories, identifying them as discrimination on the grounds of race, gender or illegitimacy. Since then religion, nationality and sexual orientation have, it seems, been added: see *Jacobs and White, European Law of Human Rights*, 3rd ed (2002), pp 355-6, citing *Hoffmann v Austria* (1994) 17 EHRR 293, 316, para 36; *Gaygusuz v Austria* (1997) 23 EHRR 364, 381, para 42 and *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 1055, 1071, para. 36....”

[45] As Lord Hoffman recognised there may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other. In this respect Lester & Pannick at para.4.14 state:

> **"… It is important to recall, in this respect, that the Convention is a living instrument and must be interpreted in the light of present-day conditions. Discrimination that may have been easy to justify in the past may be more difficult to justify now in the light of changes in social attitudes and mores. Discrimination on the grounds of sexual orientation or *marital status*[11] provide good examples."** [Emphasis added]

[46] However in ***Ratcliffe*** discrimination on the ground of marital status was regarded as a non-suspect ground. Thus Hooper LJ at para.89 stated:

> **"At the end of the day this case in my view falls squarely within the now well established principle that where alleged discrimination in the field of pensions is based on non suspect grounds, Courts would be very reluctant to find that the discrimination is not justified."**

[47] Whether discrimination on grounds of marital status is a suspect, borderline or non-suspect ground the respondent, upon whom the onus lies to justify the discrimination, must nonetheless demonstrate a reasonable relationship of proportionality between the means employed and the aims sought to be realised. Whilst I am satisfied the applicant has been discriminated against on the grounds of her marital status that is not sufficient to make good

---

[11]"Previously, less weighty reasons were required to justify discrimination on grounds of marital status, particularly concerning the rights of unmarried fathers to have contact with their children. See, for example, Application 27110/95: *Michael v United Kingdom* (1995) 20 EHRR 205, ECtHR; Application 27110: *Nylund v Finland,* Judgment of 29 June 1999, ECtHR, but cf *PM v United Kingdom* (2006) 42 EHRR 45 (where the ECtHR found that it was a breach of art 1 of First Protocol taken with art 14 for unmarried fathers not to qualify for tax deductions in respect of child maintenance payments which were available to married fathers who had been divorced or separated from their spouses). More weighty reasons are generally now required for less favourable treatment on grounds of marital status to be justified. See, for example, Application 31871/96: *Sommerfeld v Germany,* (2004) 38 EHRR 35, ECtHR para:93 'The court has already held that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention ... The same is true for a difference in treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship.' "

her claim. However, having established the fact of discrimination the onus then passes to the respondent to justify it if it can. As we have seen some grounds of discrimination are more difficult to justify than others and in the case of non-suspect grounds less will be required to justify – but the onus still remains on the respondent.

[48] However, where discrimination is a result of historic fact, maintenance of a discriminatory regime will still fall within the State's margin of appreciation for such a period as is *reasonable* to effect legislative change following a change in public attitudes. In this context the respondent relied on ***Ratcliffe*** in particular at para.89[12]. They also relied on ***Stec*** at paras.64 and 65[13] where, despite the fact that the subject matter of that case was discrimination on a suspect ground, *namely,* sex the Grand Chamber regarded the pace of reform as being a matter within the margin of appreciation of the State and did not consider it unreasonable for the State, having begun the move towards equality, to carry out a process of consultation and review. See also para.41 of ***Runkee and White v UK,* Judgment of 10 May 1997.**

[49] What is a reasonable period, allowing for appropriate State latitude, is likely to be specific to the overall historical development and context of the

---

[12] 89. At the end of the day this case, in my view, falls squarely within the now 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 to-day, 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 as 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 (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.

[13] "In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States (see *Petrovic*, cited above, §§ 36-43), the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age.

Having begun the move towards equality, moreover, the Court does not consider it unreasonable of the government to carry out a thorough process of consultation and review, nor can Parliament be blamed for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation."

scheme under examination. I consider that, in the context and history of the impugned provisions, by the time of the deceased's death in November 2008 the maintenance of the discrimination on the grounds of marital status exceeded the State's latitude. By November 2008 it was no longer reasonable not to have removed the discrimination on the grounds of marital status inherent in the eligibility criteria. I reach that conclusion for the following reasons:

(i) The respondent had argued that the difference in treatment was justified on the basis that the protection of the institution of marriage remained a feature of government policy and that a balance had been struck between the eligibility of spouses and civil partners on the one hand representing a particular form of committed relationship where eligibility ought to be automatic and transient relationships on the other hand, in respect of which it was contended it was plainly not desirable to extend publicly funded benefits (see Gilbert affidavit at para.26 set out at para.16 above). I have considerable difficulty with that averment since, as the applicant submitted, the 2006 Injury Benefit Regulations do not merely exclude those in "transient relationships", they exclude **all** persons who were not married to or in a civil partnership with a deceased officer, however transient or intransient their relationship with the deceased might have been. Furthermore, the balance said to have been struck in the 2006 Injury Benefit Regulations was not struck in the 2007 Pension Regulations nor in other fields.

(ii) The balance said to have been struck in the 2006 Injury Benefit Regulations, has not been struck by the government in the context of the armed forces. In March 2003 the government announced that unmarried partners in a substantial relationship with service personnel killed in action would henceforth be eligible for *ex-gratia* payments equivalent to benefits paid to a surviving spouse under the Armed Forces Pension Scheme (Official Report (Lords), 20 March 2003, Col WA46 (Parliamentary Under-Secretary of State, Ministry of Defence (Lord Bach)) and see ***Ratcliffe*** at [30]). On 15 September 2003 the requirement that the death occur in conflict was removed: (***Ratcliffe*** at [30]). By the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005/439, made on 5 April 2005 and coming into force

that day, the Secretary of State for Defence provided amongst other matters for the payment, on the death of a member of the armed forces, of "a survivor's guaranteed income payment" and a "bereavement grant" to "his surviving spouse, civil partner or his surviving adult dependant". "Surviving adult dependant" is defined as a person cohabiting as a partner in a substantial and exclusive relationship with a member of the armed forces, and either the person was financially dependent on the member of the armed forces or they were financially inter-dependent (see article 22 of the Order).

(iii) Provision has been made in other fields for unmarried persons to claim awards on the death of their partners: for example Teachers Pensions etc (Reform Amendments) Regulations 2006, Police Pensions Regulations 2006 (England and Wales), Fire Fighters Pension Scheme (England) Order 2006, National Health Service Pension Scheme (Amendment) Regulations 2008 (England and Wales), National Health Service Pension Scheme (Additional Voluntary Contributions) and National Health Service (Injury Benefits and Compensation for Premature Retirement) Amendment Regulations 2008 (England and Wales).

(iv) Finally the Police Pension (Northern Ireland) Regulations 2007, made by the Secretary of State for Northern Ireland on 5 December 2007, provide for the payment of pensions to financially dependent or interdependent unmarried spouses cohabiting in an exclusive, committed and long-term relationship.

[50] Therefore by 5 April 2005, and thus before the enactment of the 2006 Injury Benefit Regulations, the government had ceased to believe in the context of the armed forces that it was appropriate to seek to protect the institution of marriage by limiting eligibility for pensions and injury benefits to spouses or civil partners only. There is no rational distinction between the unmarried partners of service personnel and the unmarried partners of PSNI officers. The irrationality of the maintenance of the discriminatory distinction as between the armed forces on the one hand and the PSNI on the other is apparent. If, for example, a member of the armed forces had been killed on duty in the same road traffic accident his surviving adult dependant would have been eligible for an award under the armed forces scheme referred to above whereas this applicant is ineligible to apply for an award in the PSNI context.

[51] It is noteworthy that in the case of the armed forces the State was able to move initially on an ex gratia basis in 2003 and on a legislative basis by 2005 to ensure that unmarried partners in a substantial relationship were treated no less favourably than spouses. Thus the state has continued to maintain in force an eligibility criteria, discriminating on grounds of marital status, in respect of the police over three years after such discrimination was removed from the armed forces (and even after the change introduced in the 2007 Pension Regulations).

[52] Well before the deceased's death on 23 November 2008, across a range of public service areas, most notably for current purposes the armed forces and the PSNI itself, the government had ceased to consider it justifiable to support the institution of marriage by limiting eligibility for pensions and injury benefits to spouses and civil partners. In the context of the scheme under examination the maintenance of the discriminatory criteria in November 2008 cannot be regarded as reasonable.

Conclusion

[53] In my judgment, the difference in treatment between the applicant as a bereaved unmarried partner and a spouse (or civil partner) in Regulations 12 and 13 of the 2006 Injury Benefit Regulations was not, at the time of her application, capable of being justified.

[54] Accordingly, the impugned Regulations are incompatible with Art 1 First Protocol when read with Art 14.

[55] When the parties have had the opportunity to consider the judgment I will hear them as to the appropriate form of relief.