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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **13/05/2022**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

NORMA MITCHELL

Plaintiff;

and

THE DEFENCE COUNCIL

and

SECRETARY OF STATE FOR DEFENCE

Defendants

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Mr Nick Hanna QC with Mr Donal Sayers QC (instructed by the Northern Ireland Human Rights Commission) for the Plaintiff/Respondent
Dr Tony McGleenan QC and Mr Michael Egan (instructed by the Crown Solicitor's Office) for the Defendants/Appellants

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McALINDEN J

[1] This is an application under Order 18, rule 19 of Rules of the Court of Judicature (Northern Ireland) 1980, originally dated 24 May 2019, and subsequently amended on 4 October 2019, brought by the defendants in this Action commenced by the plaintiff, Norma Mitchell, by means of an ordinary writ of summons issued on 23 August 2018. By this application, the defendants seek to have the plaintiff's statement of claim struck out and/or the proceedings stayed on the grounds that the statement of claim fails to disclose any reasonable cause of action against the defendants and/or that it is an abuse of the process of the court. The original statement of claim was dated 11 October 2018. It was subject to a number of amendments, the last of which was made with the permission of the court at the end of the second day of the hearing on 11 April 2022.

[2] In this most recent iteration of the plaintiff's claim, it is alleged that the first-named defendant is a public authority vested with powers under sections 4, 6 and 8 of the Reserve Forces Act 1996 to make regulations making provision for the payment of pensions, allowances and gratuities by the second-named defendant to or in respect of any persons who are or have been members of the reserve forces. It is further alleged that, in the exercise of those powers, the first-named defendant made the Reserve Forces Non-Regular Permanent Staff (Pension and Attributable Benefits Schemes) Regulations 2011 ('the 2011 Regulations'). It is alleged that the second-named defendant is the chair of the first-named defendant and the officer of state accountable for its business.

[3] It is alleged that prior to his death on 3 March 2016, the late Robert Maynard was a pensioner member of the Non-Regular Permanent Staff Pension Scheme ('the Scheme') which had been established under the 2011 Regulations as a public sector non-contributory pension scheme established for the benefit of non-regular permanent staff of the reserve forces. Mr Maynard had been in pensionable service between October 1981 and April 2007. Although he was unmarried, at the time of his death, Mr Maynard had been continuously cohabiting with the plaintiff since 1988 in a stable, exclusive, long-term and financially interdependent relationship.

[4] Following Mr Maynard's death, the plaintiff applied by letter dated 3 April 2016 to the second-named defendant for a survivor's pension under paragraph D3 of the Scheme. The plaintiff was informed by correspondence dated 13 April 2016 that her application for a survivor's pension was refused because she was neither a surviving spouse nor a surviving civil partner of the late Mr Maynard. Paragraph 8 of the Amended Amended Statement of Claim ('the SOC') specifically alleges that:

> "The failure of the defendants … to secure or make provision for the payment of a survivor's pension to or for the plaintiff under the Regulations unlawfully discriminated against her, and continues to unlawfully discriminate against her, under article 14 of the European Convention on Human Rights ('ECHR') taken in conjunction with article 1 of the first protocol to the ECHR and/or article 8 of the ECHR, and in consequence thereof was, and continues to be, an unlawful act by virtue of section 6 of the Human Rights Act 1998 …"

[5] The SOC goes on to list a number of reasons why the said "act" was and remains unlawful. It is alleged that the failure of the defendants to make or secure provision for the payment of a survivor's pension to the plaintiff "and others in similar circumstances" falls within the ambit of article 1 of the first protocol to the European Convention on Human Rights ('ECHR' or 'the Convention') and/or the

ambit of article 8 of the Convention. It is alleged that the plaintiff's status as the survivor of a stable, exclusive, long-term and financially inter-dependent cohabiting relationship with the deceased is a relevant other status for the purposes of article 14 of the Convention.

[6] It is alleged that the circumstances of the plaintiff are materially analogous to those of surviving spouses and civil partners who are entitled to survivors' pensions under the 2011 Regulations and/or surviving spouses and civil partners who are entitled to survivors' pensions under other public sector pension schemes. It is asserted that there was and is no objective or reasonable justification for treating the plaintiff differently from those persons in materially analogous circumstances. This difference in treatment was and remains manifestly without reasonable foundation.

[7] It is further asserted that in consequence of said continuing unlawful act, the plaintiff has been deprived of a survivor's pension to which she would otherwise have been entitled and she has thereby suffered loss and damage equating to the amount of survivor's pension that would have been payable to her since the death of Mr Maynard. It is alleged that the estimated amount of pension loss between 3 March 2016 and 14 May 2021 was £23,000. It is alleged that this loss continues. Under paragraph 10 of the SOC, the plaintiff alleges that the refusal of a survivor's pension has caused her to suffer distress and hardship in respect of which she claims general damages.

[8] The SOC puts the defendants on notice that, if necessary, the plaintiff will seek an extension of time in respect of so much of the claim as relates to the period between 3 March 2016 and 23 August 2017 under section 7(5) of the Human Rights Act 1998 ('the HRA'). The plaintiff asserts that there are a number of grounds for seeking such an extension of time. It is alleged that the plaintiff's claim for a survivor's pension was made promptly, less than one month after the death of Mr Maynard. The delay in commencing proceedings is explained and justified by the engagement in lengthy correspondence by and on behalf of the plaintiff in her efforts to secure the payment of a survivor's pension and/or to obtain reasons for its refusal and subsequently to obtain legal advice and representation. It is alleged that the evidence in the case will be no less cogent than it would have been had proceedings been on or before 3 March 2017 and no prejudice would be suffered by the defendants if an extension of time were to be granted. It is asserted that the failure to make provision for the plaintiff to receive a survivor's pension is a continuing unlawful act and accordingly even if an extension of time were not granted, the claim will still proceed in respect of the period from 23 August 2017. Therefore, the only difference will be the quantum of the plaintiff's damages claim.

[9] Crucially, the plaintiff claims damages under section 8 of the HRA to compensate her for the "unlawful and continuing unlawful act of discriminating against her under article 14 of the ECHR taken in conjunction with article 1 of the

first protocol to the ECHR and/or article 8 of the ECHR" by failing to make provision for the payment of a survivor's pension to her similar to that payable to surviving spouses and surviving civil partners under the 2011 Regulations from and after the date of Mr Maynard's death on 3 March 2016. The SOC includes a claim for interest under section 33A of the Judicature (Northern Ireland) Act 1978. Although it is specifically asserted in paragraph 9 of the SOC that the plaintiff's loss continues, there is no claim for future loss or any calculation or estimate of same.

[10] The replies to the defendants' notice for particulars served on behalf of the plaintiff on 11 February 2019, reveal that the plaintiff and the deceased jointly owned the family home in Newtownabbey and that a mortgage on the property had been redeemed approximately four years before the death of Mr Maynard. The couple had two joint bank accounts from which household and day to day expenses were met. They also had a joint savings account. There were two children of the family who had attained the age of majority some considerable time before Mr Maynard's death. It is also alleged in the replies to particulars that plaintiff first sought legal advice in respect of this matter in or about June/July 2016.

[11] The defendants' case is comprehensively set out in the amended defence dated 10 May 2019. The defendants do not take issue with the primary factual assertions relied upon by the plaintiff although the plaintiff is put on her proof about the nature, extent and duration of her relationship with Mr Maynard prior to his death. In respect of the pension scheme, it is alleged that the scheme is a legacy scheme which closed to new entrants on 16 August 2010. The pension provision in the scheme was originally enacted under Chapter 9, part 3 of the Territorial Army Regulations 1978. It is admitted that the scheme does not make provision for payment of a survivor's pension to a cohabitee who is not a spouse or civil partner unless the death of the member is attributable to service and the reason for this restricted provision has not been expanded is because the scheme is a legacy scheme.

[12] The defendants' case is that the scheme does not provide the plaintiff with an entitlement to a survivor's pension and that the decision not to pay a survivor's pension to the plaintiff is consistent with the scheme and is lawful. It is asserted that in the absence of an order declaring the scheme unlawful in that regard, the plaintiff does not enjoy a cause of action entitling her to damages. Crucially, the defendants assert that the plaintiff, by means of a private law action for damages, is attempting to prosecute a claim that a statutory pension scheme is unlawful in circumstances where the alleged unlawful nature of the scheme has not been established in a public law challenge commenced by way of judicial review. Consequently, the defendants assert that the plaintiff does not enjoy a cause of action against the defendants; that the pleadings fail to disclose a reasonable cause of action against the defendants; and that the proceedings are an abuse of the process of the court.

[13] The defendants deny that the very limited provision for surviving cohabitees under the 2011 Regulations unlawfully discriminates against the plaintiff under article 14 of the Convention taken in conjunction with article 1 of the first protocol to the Convention or article 8 of the Convention or that the absence of a cohabitee's entitlement to a survivor's pension other than in circumstances where the death is related to service was or continues to be an unlawful act within the meaning of section 6 of the HRA. The defendants admit that the provision of a survivor's pension under the 2011 Regulations falls within the ambit of article 1 of the first protocol to the Convention but they assert that article 8 of the Convention is not engaged in the circumstances of this case. The defendants admit that the plaintiff's status as an unmarried cohabitee is a relevant "other status" for the purposes of article 14 of the Convention but they deny that the plaintiff's circumstances are materially analogous to those of surviving spouses or civil partners within the ambit of the scheme or other public sector pension schemes. However, in the event that it is established that the plaintiff's circumstances are materially analogous to those of surviving spouses or civil partners, the defendants specifically aver that any differences in treatment are objectively and reasonably justified and cannot be said to be manifestly without reasonable foundation. Paragraph 7 of the amended defence sets out the basis on which it is alleged that any established difference in treatment is objectively and reasonably justified.

[14] The defendants' fall-back position is that if a breach of article 14 is established which constitutes an unlawful act under section 6 of the HRA, an award of damages under section 8 of the HRA is not necessary to provide just satisfaction to the plaintiff applying the principles established by the European Court of Human Rights ('ECtHR') in relation to an award of compensation under article 41 of the Convention. Finally, the defendants assert that the plaintiff's claim for breach of Convention rights is barred by the elapse of time by virtue of the provisions of section 7(5) of the HRA and that there is no legitimate basis upon which the court should exercise its equitable jurisdiction to extend the time for commencing proceedings.

[15] The plaintiff served a reply to the amended defence on 5 March 2020 but this was subsequently amended so that paragraphs 2 and 3 of the original reply have been deleted leaving paragraph 1 as a simple joinder. Paragraph one as amended now reads:

> "Save and insofar as the same consists of or contains admissions, the plaintiff joins issue with the defendants upon their Amended Defence."

[16] The defendants' application under Order 18, rule 19 was originally launched on 24 May 2019. The supporting affidavit sworn by Ms Angela Crawford, a solicitor in the Crown Solicitor's Office exhibits some of

the pre-proceedings correspondence in this case. In particular, correspondence from the Northern Ireland Human Rights Commission dated 16 March 2018 is exhibited at Tab 4. It is asserted by the defendants, and not without some justification, that this letter was in the form of a judicial review pre-action protocol ("PAP") letter and it was responded to as such by the defendants in a detailed response dated 9 May 2018 which is exhibited to Ms Crawford's affidavit at Tab 5. The defendants' application was subsequently amended on 4 October 2019 to seek an order staying the plaintiff's proceedings pursuant to the inherent jurisdiction of the court as vexatious or an abuse of the court's process. The application was heard by Master Bell. Mr Donal Sayers appeared on behalf of the plaintiff instructed by the Northern Ireland Human Rights Commission and Mr Michael Egan appeared on behalf of the defendants instructed by the Crown Solicitor's Office.

[17] The Master had the benefit of written submissions lodged on behalf of the defendants dated 18 September 2019, 17 December 2019, 28 January 2020 and 8 October 2020 and on behalf of the plaintiff dated 30 September 2019, 20 November 2019, 17 January 2020 and 26 February 2020. These written submissions were supplemented by oral argument. The Master gave a detailed written judgment on 19 April 2021 in which he refused the relief sought. The defendants appealed the Master's order and when the matter came before me on 11 March 2022, Mr Hanna QC led Mr Sayers QC for the plaintiff/respondent and Dr McGleenan QC led Mr Egan for the defendants/appellants. For the purposes of the appeal, I had the benefit of further written submissions on behalf of the defendant/appellant dated 21 February 2022 and on behalf of the plaintiff/respondent dated 28 February 2022. Following the hearing on 11 March 2022, further written submissions were submitted by the plaintiff/respondent dated 29 March 2022 and by the defendants/appellants dated 8 April 2022. It is now almost three years since this application was launched and during the course of this application the parties have each filed six detailed sets of written submissions, Master Bell has delivered a detailed written judgment running to 86 paragraphs and I now add a further layer of judicial analysis. In performing this analytical task, I must have regard to four important matters.

[18] Firstly, as this is an application brought by the defendants under Order 18 rule 19 to effectively deprive the plaintiff of the opportunity of a substantive hearing on the merits of her claim, the defendants must satisfy the court that "the cause pleaded must be unarguably or almost uncontestably bad."[1] The making of an order under Order 18 rule 19 in favour of the moving party should be restricted to "plain and obvious cases" or confined to cases where the cause of action is "obviously and uncontestably bad."[2]

[19] Secondly, the application brought by the defendants in this instance is primarily grounded on the argument that the manner in which the plaintiff has

[1] Lonrho v Al Fayed [1992] 1 AC 448
[2] O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary [1997] NI 403

gone about bringing her case before the court and the pleaded case are abuses of the process of the court under Order 18 rule 19(1)(d). This means that I must look carefully at the pleaded case (hence the detailed analysis of the same set out above) but I must also scrutinise the means by which the plaintiff has chosen to bring this matter before the court in order to consider whether this constitutes an abuse of the process of the court. Bearing in mind that a high threshold must be crossed before any order can be made in favour of a moving party under Order 18 rule 19, I conclude that an order under Order 18 rule 19(1)(d) should only be made in "plain and obvious cases" where the means used by the plaintiff to bring her case before the court is plainly and obviously an abuse of the process of the court.

[20] Thirdly, when assessing whether this is a plain and obvious case, it is clearly appropriate to take into account the fact that the matter has had a protracted journey through the court system and that the issues raised during that journey have been such as to provoke the parties to each make six sets of detailed written submissions. It is not unreasonable to pose the question: how could a case which gives rise to such an amount of detailed legal analysis resulting in a detailed judgment from a Master of the High Court which runs to over 80 paragraphs ever be described as unarguably or almost uncontestably bad? Posed another way: are the provisions of Order 18 rule 19 intended to provide the court with a mechanism to strike out a case which the court concludes is an abuse of the court, but the court is only able to make this determination after much anxious consideration of detailed and complex legal argument or are the provisions of Order 18 rule 19 only intended to apply to cases where the lack of a proper and sound legal foundation is readily apparent once the issue is raised?

[21] In my view, the court's powers under Order 18 rule 19 cannot be limited in the manner suggested by the last formulation of the question posed in the previous paragraph. A fatal flaw in legal reasoning may only become apparent after careful, painstaking and time-consuming legal analysis; just as unsound foundations of a building may only be revealed by much drilling, digging and sampling. If, upon careful legal analysis, a fatal flaw in legal reasoning is obviously and plainly exposed, it cannot be right to allow the case to proceed to hearing.

[22] The fourth and final matter which the court has to keep in mind is that although a number of important subsidiary issues have been raised with the parties and were discussed during the hearing of the appeal, including the availability of a bespoke alternative remedy and the means by which any future loss claim might be recovered by the plaintiff, the role of the court at this stage is to analyse the key central arguments encapsulated in the plaintiff's pleadings and subject them to the elevated test which has to be applied in any application brought under Order 18 rule 19, and with these four matters at the forefront of my mind, I turn now to consider the key propositions put forward by the parties in this application.

[23] In summary, the defendants'/appellants' case is that, when properly analysed, the plaintiff/respondent is claiming that she has been unlawfully discriminated against because the state has, by subordinate legislation, created, maintained and operated a scheme for the payment of pensions and benefits from which she is specifically excluded, when others in analogous situations are able to benefit from that statutory scheme. It is argued by the defendants/appellants that the plaintiff's/respondent's case is, in essence, a challenge to the legality (convention compliance) of that statutory scheme. In reality, the issues raised by the proceedings are of a pure public law character and, therefore, the proceedings commenced by the plaintiff/respondent by means of an ordinary writ of summons are an abuse of the process of the court. It is argued on behalf of the defendants/appellants that the relief claimed in respect of the infringement of rights protected by public law can and should be obtained by application for judicial review and that it is contrary to public policy and an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority has infringed rights created and protected under public law to proceed by way of ordinary action and, by that means, to avoid the provisions of Order 53 that stipulate that leave of the court must be sought for an application for judicial review to be brought and that an application for leave must be made promptly and in any event within three months from the date the grounds for the application first arose unless the court considers there is good reason to extend the period within which the application shall be made.

[24] The defendants/appellants assert that the plaintiff/respondent has breached a legal rule known as the "exclusivity rule" which was established by the House of Lords decision in *O'Reilly v Mackman* [1983] 2 AC 237. This rule prevents litigation from proceeding as an ordinary civil action when in essence the claimant is seeking to establish that a decision made by a public authority infringed rights to which she was entitled under public law and the litigation ought, therefore, to have proceeded by way of judicial review. In support of this proposition, the defendants/appellants call in aid sections 18 to 23 of the Judicature (Northern Ireland) Act 1978, sections 1 to 8 of the HRA and the provisions of Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980.

[25] It is asserted that these legislative provisions, which are of constitutional importance, provide a bespoke mechanism for challenging the lawfulness (including compatibility with Convention rights) of acts performed or decisions made under primary or subordinate legislation. It is further asserted that where, as in this case, the challenge is against the provisions of a public law statutory scheme conferring benefits on specific groups of individuals where no such entitlement exists in private law, this bespoke mechanism must be used as this mechanism contains a number of important safeguards which would be inappropriately bypassed and circumvented, if the challenge was allowed to proceed by means of an ordinary writ of summons.

[26] The thrust of the defendants'/appellants' case is that where, as in this instance, the challenge is against a decision made under a statutory scheme set up under subordinate legislation, where it is clear that the decision is entirely consistent with the scheme and, indeed, the decision is clearly mandated by the specific provisions of the scheme, the challenge is, in reality, a challenge against the scheme itself and is a paradigm example of a public law challenge which, under the principles set out in *O'Reilly v Mackman* [1983] 2 AC 237, must be brought by way of judicial review. Further, if the basis of the challenge is an allegation of an infringement of one or more of the incorporated Convention rights, the scope of the judicial review challenge including the canon of statutory interpretation to be applied, the range of possible outcomes and the availability of various remedies including the making of a discretionary award of damages is further trammelled by the provisions of the HRA. An award of damages in this context is not a private law remedy but is an award of financial compensation made by the court if and only if it is satisfied that such an award is necessary to afford just satisfaction to the claimant, taking into account the principles applied by the ECtHR in relation to an award of compensation under article 41 of the Convention.

[27] The defendants/appellants argue that regardless of the debate in England and Wales in relation to whether the adoption of the Civil Procedure Rules has resulted in the exclusivity rule as expressed by Lord Diplock in *O'Reilly v Mackman* being subsequently interpreted and applied in a more flexible and nuanced manner in that jurisdiction; when a Convention rights based challenge to a statutory scheme is mounted in this jurisdiction, the specific provisions referred to in paragraph [24] above in combination with the exclusivity rule as set out in *O'Reilly v Mackman*, require an applicant to proceed by way of judicial review, complying with the requirements of Order 53. If the application is brought promptly and leave is granted, the court is then required to scrutinise the statutory scheme in the manner permitted by the HRA. If possible, the court should interpret the provisions of the statutory scheme in a Convention compliant manner and, if that is not possible, in some clearly defined situations, where primary legislation prevents a Convention compliant interpretation, the court should consider making a declaration of incompatibility.

[28] They further argue that for the plaintiff/respondent in this case to attempt to proceed by way of ordinary writ of summons seeking a "finding" of unlawful discrimination and the single remedy of damages is clearly and plainly an abuse of the process, particularly in light of such high authority as *R(Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 573, *R(Sturnham) v Parole Board* [2013] 2 AC 254 and *Anufrijeva & Ors v Southwark LBC & Ors* [2003] EWCA Civ 1406 where the courts have interpreted section 8 of the HRA as introducing a novel, discretionary remedy of international origin, which in essence should be a remedy of last resort, especially where the main concern is to bring an infringement of a Convention right to an end.

[29] The defendants/appellants contend that section 7 of the HRA cannot be interpreted as creating, in every instance where there is an allegation of a breach of a Convention right, a cause of action analogous to a claim for a breach of personal legal rights, including those existing in the field of tort, which entitles the claimant to proceed by way of ordinary writ of summons. They concede that in some instances in which the Convention right allegedly infringed has a private law analogue, as may be the case with articles 2, 3 or 8, or where there is an alleged breach of article 5 which specifically provides for a remedy in damages, it is clearly appropriate to initiate a claim for damages by way of ordinary writ of summons. Section 7 of the HRA clearly permits this. However, this permission does not extend to every alleged breach of a Convention right, irrespective of context, and certainly does not extend to a situation in which there is no analogous private law right in play, especially where the claim amounts to a direct challenge against a statutory scheme. They argue that the "appropriate Court or Tribunal" within the meaning of section 7(2) of the HRA in what is a direct challenge to the lawfulness of a statutory scheme is the judicial review court. The defendants/appellants argue that the plaintiff's/respondent's abuse of the process of the court is rendered all the more egregious by her deliberate decision to abandon any claim for a declaration and to solely claim damages thus precluding herself from proceeding by way of judicial review under the provisions of Order 53.

[30] On behalf of the plaintiff/respondent, Mr Hanna QC argues that when determining the outcome of this application, the court must concentrate on the final iteration of the plaintiff's/respondent's claim and not let itself be distracted by earlier iterations which may have given the impression that the claim is or formerly was a direct challenge to the lawfulness of a statutory scheme. In oral submissions, he robustly argues that this was never the plaintiff's intention. Mr Hanna QC accepts that the scheme contained within the 2011 Regulations is perfectly lawful and the state was perfectly entitled to make the provisions for the transfer of payments upon the death of a scheme member that were set out in the 2011 Regulations. Mr Hanna's argument is that the plaintiff/respondent is not attempting to impugn any of the provisions of the 2011 statutory scheme; quite the opposite. The plaintiff's/respondent's case as pleaded is that <u>in addition</u> to the perfectly lawful provisions of the 2011 scheme which made provision for the transfer of payments upon the death of a scheme member to a surviving spouse or civil partner, the defendants/appellants should have made separate similar provision for the transfer of payments upon the death of a member of the scheme to a cohabiting partner of the deceased member of the scheme who was neither a spouse nor a civil partner of the deceased member so as to ensure that there is no unlawful discrimination between individuals in clearly analogous situations in relation to an entitlement to the transfer of payments upon the death of a scheme member.

[31] The unlawful act of a public authority in the context of sections 6, 7 and 8 of the HRA which is alleged in this case is the failure to make such similar provision.

That is all. What the court is being asked to adjudicate upon and make a finding in respect of is whether the failure to make such similar provision amounts to unlawful discrimination in breach of article 14 ECHR, when taken in conjunction with the provisions of article 1 of protocol 1 to the Convention and/or article 8 of the Convention. Mr Hanna QC is at pains to emphasise that this does not constitute a challenge to any of the provisions of the 2011 statutory scheme and, therefore, the exclusivity rule set out in *O'Reilly v Mackman* simply does not apply to this case.

[32] Mr Hanna QC argues that this final iteration of the plaintiff's/respondent's case may not be to the defendants'/appellants' liking, but it is not for the defendants/appellants to shape or mould the plaintiff's/respondent's arguments to their liking and it is not for the court to facilitate this restructuring. When adjudicating upon this final iteration of the plaintiff's/respondent's case, Mr Hanna QC envisages that the court will have to consider the limitation issues raised by the HRA and, thereafter, will have to consider whether the various Convention rights are engaged, whether there is a difference in treatment between individuals or groups in analogous situations and, if so, whether this amounts to unlawful discrimination. This issue will involve an evaluation of the reasons or justifications put forward for any material difference in treatment which in the context of article 1 of protocol 1 will involve the court in a consideration of whether any identified difference in treatment can be said to be "manifestly without reasonable foundation." Thereafter, assuming that the plaintiff/respondent is successful in each of these steps, it will be for the court to assess whether it is necessary, in order to afford just satisfaction, for an award of damages to be made and, if so, to consider what that award should be in light of the ECtHR jurisprudence in relation to article 41 ECHR. All these steps can be comfortably accommodated in the hearing of a normal action begun by ordinary writ of summons. Indeed, in light of the remedy sought, this is the only process open to the plaintiff/appellant.

[33] In relation to the subsidiary issue of how any claim for future loss would be dealt with if the plaintiff/respondent is successful within such a process, it is argued on behalf of the plaintiff/appellant that as this case involves a continuing wrong giving rise to continuing losses, as opposed to a past and concluded wrong which has ongoing damaging consequences, there is clear support for the proposition[3] that damages will be awarded to her in respect of the loss sustained (by reference to notional pension payments) up to the time of the assessment of her claim. Thereafter, if the defendants/appellants do not respond to the court's judgment by making corresponding provision in new regulations to include surviving cohabiting partners within the categories of individuals entitled to payments upon the death of a member of the scheme, the plaintiff/respondent will then be entitled to issue fresh proceedings to recover further damages for an asserted continuing breach of her Convention rights in a manner consistent with the approach approved of by Jervis CJ in *Battishill v Reed* (1856) 18 C.B. 696.

[3] See McGregor on Damages 21st edition, chapter 11-010 to 11-028

However, the plaintiff/respondent has not been able to refer to any ECtHR or domestic authority to support the proposition that in the context of an award of compensation for breach of article 1 of protocol 1 to the Convention in combination with article 14, such an approach would be appropriate. Further, there is a clear and consistent line of authority from *Henderson v Henderson* (1843) 3 Hare 100 to *Talbot v Berkshire County Council* [1994] QB 290 which demonstrates that a claimant is barred by cause of action estoppel from pursuing a claim which could have been litigated at the same time as a claim previously brought. Any attempt to do so would be adjudged to be contrary to public policy and an abuse of the process of the court.

[34] Whatever the merits of this particular argument, it is not determinative of the central issue before the court, which is whether it is an abuse of the process of the court to bring a claim for damages for past losses by reference to notional pension payments from the date on which the plaintiff/appellant applied for such payments under the 2011 scheme up to the date of assessment by way of proceedings commenced by means of ordinary writ of summons whilst deliberately deciding not to mount a specific challenge to the statutory scheme. However, the issues thrown up by the tentative and superficial consideration of how to deal with anticipated future loss resulting from a failure or refusal to supplement the existing statutory scheme just serves to illustrate the difficulties and complexities involved in the litigation which the plaintiff/appellant has embarked upon.

[35] A central plant of the case being made out by the plaintiff/respondent is that the unlawful act that the plaintiff/respondent is complaining of is the failure to make provision for the payment of a survivor's pension to her similar to that payable to surviving spouses and surviving civil partners under the 2011 Regulations from and after the date of Mr Maynard's death on 3 March 2016. It is argued that the 2011 Regulations are perfectly lawful in their own right. The unlawful act is the failure to make other regulations extending entitlement to surviving cohabiting partners. The question which must be asked is whether such an argument can be made in light of specific provisions of section 6(6) of the HRA which provides as follows:

> "(6) "An act" includes a failure to act but does not include a failure to—
>
> (a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

[36] During this hearing, the defendants/appellants have not forcefully pursued the argument that this provision renders the plaintiff's/respondent's case

unsustainable and the reason for this becomes apparent when one considers how the 2011 Regulations came into law. It is agreed between the parties that the 2011 Regulations were made subject to negative resolution. This means that they became law when made and before being laid before parliament and their status as law could only be revoked by negative resolution of parliament. If this is how the 2011 Regulations were brought into law, the failure to make further regulations subject to negative resolution which extend entitlement to payments to individuals in the plaintiff's/respondent's situation could constitute "An act" within section 6(6) because neither exception contained in subparagraphs (a) or (b) include the failure to make regulations subject to negative resolution. Therefore, there is nothing in section 6 of the HRA that would constitute a knockout blow to the case being made by the plaintiff/appellant.

[37] In summary, the plaintiff's/respondent's first line of defence to this application brought by the defendants/appellants is that *O'Reilly v Mackman* simply has no application to the present case as there is no challenge to the 2011 Regulations. However, as a fallback position, it is argued on behalf of the plaintiff/respondent that as a consequence of the enactment of sections 6, 7 and 8 of the HRA, the exclusivity rule, if it has survived at all, has been significantly relaxed so that, as Lord Woolf MR stated in *Clark v University of Lincolnshire and Humberside* [2001] 1 WLR 1988:

> "39. The emphasis can therefore be said to have changed since *O'Reilly v Mackman* [1983] 2 AC 237. What is likely to be important when proceedings are not brought … under Order 53, will not be whether the right procedure has been adopted but whether the protection provided by Order 53 has been flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in Part 1. Those principles are now central to determining what is due process."

[38] The protections provided by Order 53 which the defendants/appellants argue have been flouted by the plaintiff/respondent in this case are the requirements of obtain leave and to bring such an application for leave promptly and in any event within three months. In response to this, the plaintiff/respondent argues that as this is a case involving a continuing wrong, the time limit provision of Order 53 does not apply. The plaintiff/respondent further contends that having regard to the circumstances of this case, it is undoubtedly the case that the low threshold of arguability would inevitably have been surmounted and leave to apply for judicial review would have been granted so that no injustice is done by commencing the claim by ordinary writ of summons. Having considered these arguments, it is impossible to conclude that the

plaintiff's/respondent's arguments in relation to this discreet point are plainly bad.

[39] Another protection which the courts provide to those whose actions are subject to applications for judicial review is the requirement for applicants for judicial review to have exhausted specific alternative remedies provided by the scheme which is subject to challenge. In this instance, when one considers the provisions of the 2011 scheme in conjunction with the provisions of the Pensions Schemes Act 1993 and when one analyses the judgment of Deputy High Court Judge Timothy Fancourt QC, now Fancourt J, in the case of *Jean Langford v Secretary of State for Defence* [2015] EWHC 875 Ch, it is clear that the 2011 scheme allows for an internal appeal of a refusal to make payments under the scheme, with a further right of appeal to the Pensions Ombudsman under the provisions of the 1993 Act, with a further right of appeal to the High Court on a point of law. The defendants/appellants argue that by proceeding by means of an ordinary writ of summons, the plaintiff/respondent has effectively evaded the judicial review protection of the need to exhaust specific remedies provided under the scheme which is subject to challenge. Having carefully analysed this issue, I am not convinced that the defendants'/appellants' argument in this respect constitutes a knockout blow in that it is reasonable to argue that the point or points of law which the High Court is likely to have been asked to determine on appeal from the Pension Ombudsman in this instance would, in substance, have been materially the same or very similar to the points of law which the High Court is being asked to determine in the present proceedings, as is illustrated in the *Langford* case.

[40] In relation to the plaintiff's/respondent's arguments that the exclusivity rule has been significantly relaxed since the enactment of the HRA; chapter 50 of the 21st edition of McGregor on Damages, which deals with the award of damages under the Human Rights Act 1998, contains a section (50-040 to 50-055) entitled "(3) Appropriate forum and procedural treatment of claims." The exclusivity rule is specifically considered in paragraphs 50-044 to 50-055 and the clear thrust of this passage, as exemplified in paragraph 50-046, is that:

> "To the extent consistent with the CPR, human rights claimants will often have a genuine choice of procedure, and indeed higher courts have now indicated that ordinary proceedings may be preferable for the hearing of HRA damages claims."

The case of *Clark v University of Lincolnshire and Humberside* [2001] 1 WLR 1988 and its endorsement by Lord Hope in *Ruddy v Chief Constable of Strathclyde* [2012] UKSC 57 is also referred to in the same paragraph of McGregor, with the comment:

> "Lord Hope observed that the ground had moved considerably since *O'Reilly* and that, since *Clark v University of Lincolnshire and Humberside*, a more flexible approach prevailed, with procedure calibrated to the demands of the case rather than dictated by the mechanical application of an indeterminate distinction between public law and private law."

Paragraph 50-048 of McGregor indicates that there are limits to this flexible approach and in a passage which is clearly relevant in the context of the present case it is stated that:

> "Claims for damages for past breaches of rights are to be distinguished from cases where the gist of the claim is a challenge to the validity of an administrative act or measure, in which case *O'Reilly* will dictate the use of the judicial review procedure, in unmodified form."

[41] However, even in cases where the claim is a challenge to the validity of a statutory scheme, it may be appropriate to adopt a flexible approach. The decision of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust, Lancashire Care NHS Foundation Trust and the Secretary of State for Justice* [2017] EWCA Civ 1916 is an example of a case in which the Convention compatibility of a statutory scheme was tested in proceedings commenced by ordinary civil action. In that case, the Secretary of State for Justice was joined as a defendant in order to argue that the provisions of the Fatal Accidents Act 1976 that provide for an award of bereavement damages were discriminatory against surviving partners who were not surviving spouses or civil partners of the deceased. It was alleged that this difference in treatment was in breach of article 14 ECHR in conjunction with article 8 ECHR. The facts and circumstances of the claim are very succinctly set out in paragraphs [1] to [8] of the judgment. The plaintiff's claim for unlawful discrimination was upheld and a declaration of incompatibility in respect of the primary legislation that was the subject of the challenge was made in the context of an ordinary civil action. Paragraphs [101] to [103] contain the court's discussion in respect of an award of damages. As explained therein, the claim for damages was abandoned because such a claim was not sustainable in light of the provisions of section 6(2) of the HRA.

[42] Turning then to another section of chapter 50 of McGregor entitled "6. Damages For Breach of Particular Rights" (50-182 to 50-209), the defendants/appellants highlight the fact that although this section deals with awards of damages for breaches of articles 2, 3, 5, 6 and 8, it does not contain any discussion of the award of damages for breach of article 14 or article 1 of protocol 1. It is argued that the absence of any such discussion is indicative of there being

no appreciable or significant body of jurisprudence relating to an award of damages for breach of article 14 in conjunction with article 1 of protocol 1 to the Convention. It is further argued that this lack of a significant body of jurisprudence is significant in the context of this application.

[43] However, in the section of chapter 50 of McGregor dealing with pecuniary loss (50-117 to 50-123), the plaintiff/appellant relies on the opening sentence of para 50-121 which states:

> "Two significant cases involving damages claims by companies in respect of violation of art.1 Protocol 1 reinforce that damages awards will generally be made for proven pecuniary losses."

In the same paragraph, reference is then made to the cases of *R(on the application of Infinis Plc) v Gas and Electricity Markets Authority* [2013] EWCA Civ 70 and *Breyer Group Plc v Department of Energy and Climate Change* [2015] EWCA Civ 408, both involving challenges against decisions or proposals made under statutory schemes. However, it is worthy of note that the *Infinis* case was a case commenced by way of judicial review and although *Breyer* was commenced by means of an ordinary civil action, an earlier judicial review had established that the impugned proposal in that case was unlawful. The plaintiff/appellant also places reliance on the case of *Mott v Environmental Agency* [2019] EWHC 1892 referred to in paragraph 50-119 of McGregor. The commentary states: "damages for proven pecuniary loss followed as of course where the claimant was subject to limits on how many salmon he could fish, such limits constituting an unlawful interference with property rights protected by art.1 Protocol 1 in the absence of compensation." However, of importance, the relevant footnote reads:

> "This damages judgment followed on from a decision of the Supreme Court finding the fishing limits were unlawful: [2018] UKSC 10."

The case being referred to is *R(on the application of Mott) v Environment Agency*, a case commenced by way of judicial review.

[44] Having discussed in detail and, hopefully, having done justice to, the arguments of the defendants/respondents and the plaintiff/appellant, I turn now to my consideration of these arguments, bearing in mind the test that has to be applied as set out in paragraphs [18] to [22] above.

[45] Insofar as the plaintiff/respondent argues or has previously argued that the exclusivity rule which finds its origin in the case of *O'Reilly v Mackman* is now defunct and has no application in the post HRA era, that argument is uncontestably bad. There are numerous examples in the recent caselaw of England and Wales where applications have been successfully brought claiming

that a failure to adhere to the exclusivity rule amounts to an abuse of the process of the court. Reference to one such example will suffice to support the conclusion I have reached. In the case of *R(on the application of Menjou) v The Secretary of State for Justice* [2021] EWHC 1231 (QB), the claimant alleged that certain provisions relating to legal aid and the funding of private prosecutions were contrary to European law and sought an order that the Ministry of Justice should pay damages in relation to costs and fees incurred as a result. The claimant brought a Part 8 claim seeking a number of declarations, including one declaring that the Ministry of Justice was liable to pay the sums involved. Various grounds were raised to seek to strike out these proceedings, one of which was that the proceedings were a public law challenge and should have been brought by judicial review rather than by way of a private law claim. Eady J held that there was no merit in the claims to start with and, thus, the rest of what was said is to an extent obiter, but she did, nonetheless, consider what was the appropriate procedure in paragraph [65] to [69] of her judgment. I do not wish to unnecessarily lengthen this judgment but it is worthwhile setting out these paragraphs in full:

> "[65] First, the defendant argues that the claim amounts to an abuse of process because the claimant is using the incorrect procedure. In this regard, the defendant argues that the claimant is seeking to pursue what is, in substance, a judicial review claim without utilising the specified procedure for such claims under CPR Part 54. The claimant has, instead, utilised the Part 8 procedure, which (the defendant objects) has the practical effect, for instance, that the claimant avoids the requirement to provide a detailed statement of his grounds and a statement of the facts relied on. More specifically, the defendant observes that CPR Part 54.2 provides that the judicial review procedure *must* be used in a claim for judicial review where the claimant is seeking, *inter alia*, a mandatory order. The claimant contends that the case law provides a more flexible approach and argues that he is seeking to pursue his claim as a private individual, asserting his rights under the HRA. He says that the defendant is taking an overly-technical objection that is inconsistent with the development of the civil law in this regard.
>
> [66] I acknowledge that the court should avoid adopting an overly-technical approach and agree that the case law has developed, to provide for what might be described as a more nuanced approach to the exclusivity principle arising from

the speech of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 (HL). That said, it is plain that the present claim comprises a claim for judicial review as defined in CPR Part 54.1(2)(a). That is because it involves both a claim to review the lawfulness of an enactment (that is, both section 18(1) of the SCA and the provisions of LASPO) and a claim to review the lawfulness of what is said to be a failure to act in relation to the exercise of a public function (the failure to take measures to implement the Directive). In *O'Reilly v Mackman,* Lord Diplock stated (see page 285) that this would be:

> '… contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by that means to evade the provisions of [CPR Part 34].'

[67] Although the claimant might ultimately derive a private benefit from the declarations he seeks, that does not establish that this is a claim where his private law rights are necessarily in issue. A private right arising from a point of construction does not preclude the question of the meaning and effect of a public decision - here what is said to be failure to transpose the Directive into domestic law - retaining its public law status: see, by analogy, the decision in *T&P Real Estate Limited v Mayor and Burgesses of the London Borough of Sutton* [2020] EWHC 879 (Ch) at paragraphs [37] to [40].

[68] In the present case, the claimant has not identified any sufficient private law interest that would justify the use of the Part 8 procedure by way of exception from the general rule in *O'Reilly v Mackman* (i.e. that public law claims should be pursued by way of public law (that is judicial review) proceedings). Moreover, the claim form makes clear that the relief sought by the claimant

> includes a mandatory order that the defendant pays the claimant his entitlement for legal aid and reimbursement of expenses under the Directive. It is impermissible to use the Part 8 procedure for the purposes of seeking such mandatory relief. That would have to be a claim pursued under CPR Part 54.
>
> [69] For those reasons, I agree with the defendant that the pursuit of this claim by way of CPR Part 8 amounts to an abuse of process. That, however, would not be the end of the matter: the next stage would be for me to consider whether some relief should be granted to allow the claim to be pursued by the appropriate alternative means. In this case, however, I am satisfied that that is not a step that should be taken, or indeed could properly be taken. First, because of the view I have already formed on the application to strike out/for summary judgment. Second, because of the view that I have reached as to the second basis for the defendant's complaint of abuse of process; that is, that this is an attempt to re-litigate decided issues. I turn to that point next."

[46] This recent case graphically demonstrates that the exclusivity rule is alive and well and in vigorous good health.

[47] The argument pursued by the plaintiff/respondent that in the post HRA era, a significant degree of flexibility has been introduced into the operation of the exclusivity rule is clearly an argument which finds widespread support in the caselaw and in respected legal literature. A more nuanced and flexible approach to the operation of the exclusivity rule is clearly recognised as appropriate following the implementation of the HRA. However, to argue that this flexibility extends to being entitled to bring proceedings by way of ordinary civil action where the only issue raised is, in reality, a direct challenge to the lawfulness of primary or subordinate legislation is to argue a legal proposition which is plainly and uncontestably bad; and any attempt to bring such a challenge by way of ordinary civil action would, in my view, be an abuse of the process of the court.

[48] The issue at the heart of this case is and to my mind always has been whether the plaintiff's/respondent's case amounts in reality to a direct challenge to the lawfulness of subordinate legislation. The defendants/appellants argue that, however this claim is dressed up, when it is carefully analysed, it is and solely is a direct challenge to the lawfulness of subordinate legislation. The plaintiff/appellant argues that it is not. No challenge is being mounted against

the 2011 Regulations. In as far as they make provision for the transfer of payments upon the death of scheme member to a surviving spouse or surviving civil partner, they are perfectly lawful. The absence of similar provisions for the transfer of payments upon the death of a scheme member to a surviving cohabiting partner is the cause of the unlawful discrimination which is said to exist in this instance and which gives rise to a claim in damages under the Human Rights Act 1998 that can be pursued in an ordinary civil action.

[49] According to the plaintiff/respondent, it is the failure of the defendants/respondents to make such similar provision which is the cause of the unlawful discrimination. So, what does that failure actually consist of? It can only be properly described as a failure to make regulations (subordinate legislation) to provide entitlement to the transfer of payments to a surviving cohabitating partner upon the death of a scheme member. This, in turn, can only be properly described as a failure to act in the exercise of a public function.

[50] What would actually happen if the defendants/respondents were, in the exercise of that public function, to make such similar provision for the transfer of payments to a surviving cohabitating partner upon the death of a scheme member by means of new subordinate legislation? Would this involve the creation of an entirely separate statutory scheme for surviving cohabiting partners or would it mean amending and supplementing the provisions of the existing scheme to include surviving cohabiting partners within the scope of the existing scheme? The only reasonable course of action in the exercise of that public function would be the amendment and supplementation of the provisions of the existing scheme by means of new subordinate legislation. And why would the existing scheme have to be amended and/or supplemented? Surely the only possible answer is that the scheme would have to be amended and/or supplemented because it is the public law mechanism which has been used to create any entitlement to any payments by any individuals or classes of individuals and in order for that scheme and its operation not give rise to the existence and perpetuation of unlawful discrimination, such an amendment would have to be made.

[51] In reality, what is being challenged here by means of private law proceedings is the failure of one or two public bodies to exercise a public function in failing to make subordinate legislation for the purpose of amending and/or supplementing a statutory scheme which creates the only source of entitlement to a specified financial benefit for specific categories of bereaved individuals. To argue that this in reality is not a public law challenge is to mount an argument that is obviously and uncontestably bad and to mount such a challenge by means of private law proceedings is clearly and plainly an abuse of the process of the court. I, therefore, conclude that the defendants'/respondents' application should succeed and that the Master's Order should be reversed.

[52] As to the appropriate remedy under Order 18, rule 19, I am minded to simply stay the plaintiff's/respondent's present proceedings, to allow the

plaintiff/respondent to utilise the appeal procedure contained within the 2011 Scheme and/or to commence an application for leave to apply for judicial review. Mr Hanna QC argues that if the court accepts that the defendants'/appellants' arguments are correct and a claim for damages brought by way of ordinary writ of summons is an abuse of the process of the court, then under the provisions of Order 53, rule 7(2)(b), a claim for damages could not be included in any application for judicial review brought by the plaintiff/respondent. I do not consider that this argument withstands scrutiny. The plaintiff/respondent would plainly be entitled to issue an application for leave to apply for judicial review challenging the lawfulness of the 2011 Scheme and at the same time to issue proceedings for damages under the HRA by way of an ordinary civil claim and the ordinary civil claim could be stayed until the final outcome of the judicial review challenge was known. If the judicial review application was successful, the claim for damages could then proceed. If this analysis is correct then under Order 53, rule 7(2)(b) it would be possible to include a claim for damages in any application for leave for judicial review, rather than issue separate ordinary civil proceedings for damages.

[53] However, it is not my function in this hearing to make a final determination on this discrete issue and, therefore, I will simply stay the present proceedings pending the outcome of any application for leave to apply for judicial review, in case any such application does not include a claim for damages. These proceedings are, therefore, stayed with liberty to apply. I reserve the issue of the costs of this application until such time as this matter is brought back before the court for a review of the stay of proceedings, either at the conclusion of any judicial review application or in 12 months' time, if no application for leave to apply for judicial review has been launched by that time.