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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NORMA MITCHELL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE RESERVE FORCES NON-REGULAR PERMANENT STAFF PENSION SCHEME

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Nicolas Hanna KC and Donal Sayers KC (instructed by Northern Ireland Human Rights Commission) for the applicant
Tony McGleenan KC and Michael Egan (instructed by the Crown Solicitor's Office) for the proposed respondents

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SCOFFIELD J

Introduction

[1] By this application the applicant, Ms Norma Mitchell, seeks leave to challenge the failure of the proposed respondents to make or secure the same provision for the payment of a survivor's pension to surviving, unmarried, cohabiting partners of deceased members under the Reserve Forces Non-Regular Permanent Staff (Pension and Attributable Benefits Schemes) Regulations 2011 ("the 2011 Regulations") as is made for spouses and civil partners under the 2011 Regulations. She does so on the grounds that there has been, and there continues to be, unlawful discrimination in violation of article 14 ECHR (taken in conjunction with article 1 of the First Protocol (A1P1) to the Convention and/or article 8 of the Convention), contrary to section 6 of the Human Rights Act 1998 (HRA).

[2] The procedural background to the proceedings is a little unusual and is discussed below. An inter partes leave hearing was convened to address the merits of the case and the respondents' objections to the grant of leave, including that the application did not raise an arguable case with a realistic prospect of success and that it was in any event irredeemably out of time.

[3] Mr Hanna KC appeared for the applicant with Mr Sayers KC; and Mr McGleenan KC appeared for the proposed respondents with Mr Egan. I am grateful to the applicant's counsel for their comprehensive and detailed written submissions, to the respondent's counsel for their highly focused written submissions, and to both parties for the economical oral submissions made at the leave hearing.

Background to the case

[4] The genesis of this application is found in the unhappy death of the applicant's partner, Mr Robert Maynard. The applicant and Mr Maynard had been in a loving and stable relationship, living together since 1988. Together they raised two children (who are now adults) and were financially interdependent. However, they remained unmarried and had not entered into a civil partnership.

[5] Mr Maynard sadly passed away on 3 March 2016. Prior to his death, he had been a pensioner member of the Non-Regular Permanent Staff Pension Scheme ("the Scheme") which is now set out in the 2011 Regulations. As outlined by the applicant, the scheme is a non-contributory occupational pension scheme 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, latterly serving as a Lance Corporal in a Territorial Army regiment of the Royal Corps of Signals. The applicant's affidavit sworn on 12 May 2023 describes the events and correspondence between her and the Ministry of Defence (MoD) which arose after Mr Maynard's death. I adopt the narrative contained within that affidavit in large part over the following paragraphs.

[6] Following Mr Maynard's death, the applicant received a letter from the MoD expressing condolences and advising her that there may be an entitlement to an award of a survivor's pension. The applicant submitted an application, indicating in her letter that she and the deceased had been together for 30 years and had a 25-year joint mortgage (which had been fully redeemed four years prior to Mr Maynard's death); that they had two children together, for whom they were jointly financially responsible; and that they had held joint current and savings accounts together. (Ms Mitchell also indicated that she was Mr Maynard's 'common law wife', handwriting this option into an otherwise closed list of relationship statuses (these being Widow(er), Civil Partner, Child, Child(ren)'s carer, or Child(ren)'s Guardian)). I was informed during the course of submissions that the pension was expected to be worth in or around £370 per month to the applicant (around £4,500 per year).

[7] The application for a survivor's pension was refused and the applicant was informed of this by the MoD in a letter dated 13 April 2016. The relevant part of that letter read as follows:

> "Unfortunately, there is no provision within the NRPS Regulations to award Family pension benefits to anyone other than a surviving spouse or civil partner. Therefore, I

> regret to inform you that you will have no entitlement to a Family pension."

[8] In response to the above correspondence, the applicant sought assistance from her elected representatives, Jeffrey Donaldson MP and Pam Cameron MLA, who went on to engage with the MoD on her behalf. The MoD position was clarified in a letter dated 20 July 2016 addressed to Ms Cameron from Mark Lancaster MP, the then Parliamentary Under-Secretary of State for Defence Veterans, Reserves and Personnel. (Mr Lancaster's letter indicated that he had previously responded to Mr Donaldson on 25 May of that year; but that response has not been exhibited to the applicant's affidavit). The letter to Ms Cameron stated as follows:

> "[The response to Mr Donaldson] explained that unfortunately, the Non Regular Permanent Staff Pension Scheme regulations state that for a pension to be paid to an adult dependant, if the pensioner member dies, the member must leave a widow or surviving civil partner. The Ministry of Defence Pensions Authority have considered Ms Mitchell's case and have confirmed that there is no scope for any discretionary award to be made."

[9] The letter urged Ms Mitchell to contact the Veterans Welfare Service for advice and potential onward referral to others who could offer advice and help. It is unclear if she took up this encouragement at that point, although she appears to have done so later. In any event, later correspondence ensued between (or on behalf of) the applicant and the MoD on the issue in 2017. On 20 July 2017, in response to a letter of 11 June 2017 written by the applicant, the Defence People Secretariat of the MoD stated the following:

> "As outlined in Mr Lancaster's letter of 13 April 2017 [also not exhibited in the evidence in these proceedings], it is the long standing policy of successive Governments that any changes or improvements to public service pension schemes should not be applied retrospectively. It is only in exceptional circumstances that HM Treasury permit the rules of a public sector pension scheme to be changed in a way that would have retrospective effect, which in essence, this would be."

The earlier civil proceedings

[10] Thereafter, the applicant engaged with the Northern Ireland Human Rights Commission (NIHRC) ("the Commission") which, through its legal assistance function, also acted as solicitors on her behalf in taking the matter further. Pre-action correspondence between the Commission and the Crown Solicitor's Office (CSO) was exchanged between March and May 2018. The CSO correspondence of 9 May 2018

made the point that any judicial review application was already "substantially out of time". Proceedings were then brought in the High Court in August 2018 by way of writ of summons, the applicant seeking damages under the HRA in a private law claim. In 2019, the defendants in that claim applied to strike out the action, contending that the challenge was "improperly asserted" as an issue of private law, rather than a public law claim which ought to have been commenced by way of judicial review.

[11] There was a hearing on that matter before Master Bell. The argument centred on the rule in *O'Reilly v Mackman* [1983] 2 AC 237 and the responsibility of the courts to properly uphold the doctrine of the procedural exclusivity of Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980, as amended (RCJ). The Master found for the plaintiff (the applicant in the present proceedings). However, that decision was later overturned in the High Court by McAlinden J: see [2022] NIQB 34. At para [51] of his judgment, McAlinden J found that the plaintiff's actions amounted to an abuse of the process of the court; and that what was really being challenged was "the failure of one or two public bodies to exercise a public function". He issued the following order:

> "These proceedings are stayed 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, with liberty to apply. The issue of the costs of this application are reserved 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."

[12] In summary, McAlinden J held that the applicant's case should be pursued by way of judicial review either alone or in the first instance. It was wrong for the proceedings not to have been commenced in this way in the first place, given their substance and character. He did not make any finding that the statement of claim failed to disclose any reasonable cause of action and, so, left open the merits of the claim.

[13] The plaintiff appealed the decision of McAlinden J to the Court of Appeal, where his decision was upheld on appeal and his order affirmed: see [2023] NICA 82. (The decision of the Court of Appeal was given ex tempore, with reasons for the judgment being reserved. The written judgment was handed down on 11 December 2023). The applicant appears to remain in respectful disagreement with the approach adopted by McAlinden J; but it has been endorsed by the Court of Appeal whose judgment, insofar as material, is obviously binding on me.

[14] The present public law proceedings were therefore commenced in light of the decision of McAlinden J, affirmed by the Court of Appeal, that the issue should always

have been raised by means of a judicial review application. A 'refresher' exchange of pre-action correspondence was had between the parties (owing to the significant passage of time since the initial such exchange) and the application for leave to apply for judicial review in accordance with RCJ Order 53 was made on 12 May 2023.

The challenge and the Regulations

[15] There are two proposed respondents. The first is the Defence Council, a body acting under the corporate seal of the Secretary of State for Defence, established by letters patent, and the functions of which are provided for in and under the Defence (Transfer of Functions) Act 1964. Section 1(1)(b) of that Act envisages that the Council will have "powers of command and administration over [His] Majesty's armed forces… with the administration of matters relating to the naval, military and air forces respectively". It is also empowered, under section 4 of the Reserve Forces Act 1996 ("the 1996 Act") to make "regulations with respect to any matters relating to any reserve force, being matters with respect to which [His] Majesty may make orders under that subsection". The second proposed respondent is the Secretary of State for Defence ("the Secretary of State"). The Secretary of State is the Chair of the Defence Council and is further the officer of state accountable for its business and for that of the MoD.

[16] The applicant challenges the proposed respondents' failure to act in a Convention-compliant manner. There was some debate at the hearing as to whether, on the one hand, the applicant is seeking to challenge the discriminatory treatment she has suffered and (on her case) presently suffers or whether, on the other hand, she is truly challenging the content of the 2011 Regulations (so that the challenge was one to legislation). I return to that issue below, which has potential significance for the delay point relied upon by the respondents. In any case, it is necessary to set out the relevant provisions governing the Scheme so that the challenge (whatever its form) can be properly understood.

[17] As alluded to above, the 1996 Act makes provision for the making of orders and regulations concerning the armed forces. Section 4 of the 1996 Act provides as follows:

> "(1) [His] Majesty may, by order signified under the hand of the Secretary of State, make orders with respect to—
>
> (a) the government and discipline of any reserve force; and
>
> (b) all other matters and things relating to that force (except pay, bounty and allowances).
>
> (2) Subject to the provisions of any order under subsection (1), the Defence Council may make

regulations with respect to any matters relating to any reserve force, being matters with respect to which [His] Majesty may make orders under that subsection.

(3) Orders or regulations under this section may make different provision for different cases (including different forces), and may include such supplementary, consequential, incidental and transitional provisions as appear to [His] Majesty or the Defence Council (as the case may be) to be necessary or expedient.

(4) Regulations under this section may be amended or revoked by an order or further regulations under this section; and an order under this section may be amended or revoked by another order under this section.

(5) Any order or regulations under this section shall be laid before each House of Parliament after being made."

[18] Section 4 is supplemented by section 8, which concerns pensions, and which is in the following terms:

"(1) Orders or regulations under section 4 may make provision for—

(a) the payment of pensions, allowances and gratuities by the Secretary of State to or in respect of any persons who are or have been members of the reserve forces;

(b) the making of payments towards the provision of pensions, allowances and gratuities to or in respect of any such persons.

(2) Orders or regulations under section 4 may also make provision for the payment of, or the making of payments towards the provision of, pensions, allowances and gratuities in respect of the death or disability of a person attributable to his service as a member of a reserve force.

(3) The provision made under this section may include provision for or towards the payment of lump sums instead of, or as well as, pensions."

[19] The relevant regulations are the 2011 Regulations (see para [1] above). They came into effect on 1 September 2011. Regulation 4 revoked the provisions of the Territorial Army Regulations 1978 which had previously made provision for the equivalent pension scheme. Regulation 5 provides that those entitled to a payment of any benefit to or in respect of service in the non-regular permanent staff under the previous scheme, where that entitlement would have continued but for the commencement of the 2011 Regulations, are "to be treated as if the entitlement has arisen under the corresponding provisions in Schedule 1 or Schedule 2." Schedule 1 sets out – or, in the terminology of the 2011 Regulations, 'restates' – the pension scheme and Schedule 2 restates the benefits scheme.

[20] These proceedings are concerned with the provisions within Schedule 1 to the 2011 Regulations. A number of the definitions (dealt with in the general interpretation provision, rule A.1) are relevant for present purposes, as follows:

(a) a "member" is defined as "an active member, a deferred member, a pensioner member or a pension credit member";

(b) a "pensioner member" is "a person who in respect of a person's service or by reason of transfer credits, in entitled to present payment of pension";

(c) "AFCS 2011" means the scheme set out in the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011; and

(d) "the benefits scheme" means "the Non Regular Permanent Staff Attributable Benefits Scheme set out in Schedule 2".

[21] Part C of the Scheme sets out retirement benefits, including pensions for members. A number of conditions are set out which a person must satisfy in order to benefit from an annual pension. It is uncontroversial that Mr Maynard satisfied those conditions.

[22] Part D of the Scheme then sets out death benefits, including pensions for adult dependants. The relevant portions of Part D for present purposes are rules D.3 and D.7. Rule D.3 provides as follows:

"**D.3 Pensions for adult dependants**

(1) This rule applies if any of conditions A to D is met.

(2) Condition A is—

(a) an active member dies on or after 6th April 1988;
(b) the member leaves a surviving spouse or civil partner; and
(c) the member had 2 or more years' reckonable service.

(3) Condition B is—

(a) an active member died on or before 5th April 1988;
(b) the member left a widow; and
(c) the member had 5 or more years' reckonable service.

(4) Condition C is that—

(a) a deferred or pensioner member dies; and
(b) the member leaves a widow.

(5) Condition D is that—

(a) a deferred or pensioner member dies;
(b) the member was in pensionable service on or after 1st October 1987; and
(c) the member leaves a widower or surviving civil partner.

(6) Subject to rules D.7 and D.8, the surviving spouse or surviving civil partner of a deceased member is entitled to a pension for life.

(7) Where an active, deferred or pensioner member dies without leaving a surviving spouse or surviving civil partner and—

(a) a person is entitled to compensation in respect of the death—

(i) under the benefits Scheme, by virtue of being a surviving eligible partner of the member within the meaning of that Scheme, or
(ii) under the AFCS 2011, by virtue of being a surviving adult dependant of

the member within the meaning of that Scheme, and

(b) had that person been a surviving spouse or surviving civil partner of that member one of conditions A to D would be met,

this rule applies as if that condition were met."

[23] Rule D.7 goes on to provide as follows:

"**D.7 Reduction or withholding of pension: marriage or forming a partnership less than 6 months before death**

(1) The Defence Council may reduce or withhold a pension under rule D.3 where paragraph (2) applies.

(2) This paragraph applies where—

(a) the deceased married or formed a civil partnership less than 6 months before death; or

(b) a pension is payable by virtue of rule D.3(7) and the Defence Council are satisfied that the person was—

(i) a surviving eligible partner (within the meaning of the benefits Scheme), or
(ii) a surviving adult dependant (within the meaning of the AFCS 2011),

for less than 6 months before death."

[24] Taken together, the relevant aspects of Part D can be understood as meaning that an adult dependant's pension (often referred to in other schemes as a 'survivor's pension') will be paid for life in respect of a pensioner member of the Scheme where:

(a) A pensioner member dies and either (b) or (c) applies; that is,

(b) The member leaves a widow or a surviving civil partner, who was married to (or had formed a civil partnership with) the member for more than 6 months before the member's death; or

(c) The member does not leave either a widow or a surviving civil partner but there is an individual who is a recipient of compensation in respect of the death under

either the benefits scheme set out in Schedule 2 or the AFCS 2011 scheme (set out in separate legislation), as a surviving eligible partner or surviving adult dependant, where again this status was enjoyed for more than 6 months before the member's death. The death benefits payable to a surviving adult dependant under Schedule 2 arise where the member's death was attributable to or hastened by his or her service; and under the AFCS 2011 where the death of the member or former member of the forces is caused wholly or partly by their service.

[25] It is accepted that the applicant does not fall into either category (b) or (c) above. The issue in these proceedings is whether her exclusion from entitlement to such a pension represents unlawful discrimination contrary to article 14 ECHR when compared with others who can or do benefit from such a pension.

Summary of the applicant's arguments

[26] The parties have addressed both the merits of the proposed claim and the procedural issues which arise, principally whether leave should be refused on the basis of delay even if there are arguable grounds.

[27] The applicant contends that her challenge is not against the 2011 Regulations. Rather, properly understood, she submits, hers is a challenge against the continuing discriminatory policy on the part of the proposed respondents not to provide a survivor's pension to surviving cohabiting partners. The unlawfulness, she contends, arises from the first proposed respondent's failure to make corresponding provisions which would benefit someone in her position when (i) provision for surviving spouses is in force; (ii) the failure to make equivalent provision for surviving cohabiting partners is not justified; and (iii) that failure is not saved from illegality by virtue of section 6(6)(a) HRA. On this analysis, it is not the Scheme itself which unlawfully discriminates, but the first proposed respondent by way of permitting a discriminatory situation to continue.

[28] For the applicant, Mr Hanna argued that there was clearly an arguable case with a realistic prospect of success. A summary of his principal submissions is set out below.

[29] The applicant contends that her circumstances are materially analogous to those of surviving spouses and civil partners who are entitled to survivor's pensions under the 2011 Regulations; and, indeed, to surviving cohabiting partners who are entitled to pensions under other public sector pension schemes. Mr Hanna highlighted the distinction between military and non-military pension schemes; and pointed out that surviving cohabiting partners are entitled to pension payments under the Civil Service Pension Scheme. Relying on the House of Lords' decisions in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 and *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, he submitted that the applicant's circumstances are sufficiently close to call for an explanation of the

differential treatment and that, on proper inquiry, it would be revealed that the difference in treatment does not withstand scrutiny.

[30] In an addendum to her skeleton argument, the applicant asked the court to consider her deceased partner's position vis-à-vis the position of a notional colleague, Mr X. In this hypothetical comparison, Mr X – whose circumstances are otherwise identical to Mr Maynard's – marries his partner, Y, just over 6 months before his death, therefore entitling Y to survivor benefits. The applicant and Y's circumstances are identical, save for a marriage 6 months before X's death. To provide pension benefits to Y but not to the applicant in those circumstances demonstrates that, by not marrying her partner, the applicant has been treated less favourably and without justification. Therefore, it is the requirement, in order to secure entitlement, that a couple would have to marry (or enter a civil partnership) which the respondents have to justify.

[31] As to potential justification for the difference in treatment, the applicant submits that there is no lawful justification for it (or, for present purposes, that there is arguably no lawful justification for it). There were a number of aspects to this argument as it was advanced. First, it was submitted that there is no justification for the proposed respondents' policy of promoting the institutions of marriage and civil partnership (as relied upon the respondents' pre-action response). The applicant argues that no such policy has been publicly promulgated and that any such purported justification is inconsistent with the findings of Treacy J in *Re Morrison's Application* [2010] NIQB 51 (at para [50]) that "by 5 April 2005… the government has 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". If such a policy exists (contrary to what was said in *Morrison*), the applicant argues that it falls upon the respondent to justify that policy at the substantive stage of hearing and demonstrate that it amounts to sufficient justification for the differential treatment. Second, it was argued that the exclusion of cohabiting partners does little to promote clarity or certainty; and hat it is unnecessary to maintain the distinction for practical reasons related to the ease of administration of the Scheme. The applicant contends that this can be managed without significant difficulty and has been in other schemes which have accepted eligibility for survivor benefits for cohabitees.

[32] It was further argued that the subject-matter of the claim does not fall within the area of socio-economic policy because this case is not concerned with welfare benefits, *state* pensions or any kind of social security provision. This is relevant to the intensity of review which the court will apply and cannot be advanced as an independent justification for the differential treatment. Rather, this case is concerned with *occupational* pensions. Therefore, the applicant submits that there can be no justification for Mr Maynard being, in effect, disadvantaged as compared with his married colleagues on the basis that *the State* has refused to pay his partner the same survivor benefits to which any married survivors would be entitled. On the contrary, an occupational pension scheme represents deferred remuneration and Mr Maynard's work was worth the same as those of his married colleagues. As to affordability, the

applicant points to the fact that there is a steady decline in recent years in the number of people who are getting married, so that there ought to be less of a pensions liability to the spouses of ex-servicepersons than previously, which could then be used to pay survivor pensions for eligible cohabiting partners.

[33] As to remedy, the applicant's position is that if there has been unlawful discrimination, an award of full pecuniary damages will be necessary in order to provide her with just satisfaction. The approach to any damages which might be payable was, appropriately, not pursued in oral argument at the leave stage and I do not propose to discuss it further at this stage of the proceedings. In the first instance, the applicant simply seeks a declaration that she has been the victim of unlawful discrimination contrary to section 6 HRA.

[34] Turning to the respondents' objection on the ground of delay, the applicant contends that there is no real issue of delay in this case. In the first instance, it is said that there has been no delay as the applicant did not become a victim until the date of her partner's death (March 2016); and that, as the applicant is not challenging the relevant legislation itself, the discrimination of which she complains represents a continuing state of affairs. Therefore, as long as the breach continues, time does not 'run out' applying the approach evident in authorities such as *R (Bamber) v Crown Prosecution Service* [2020] EWHC 1391 (Admin), at para [40]; *R (M) v Newham LBC* [2020] EWHC 327 (Admin), at para [118]; and *R (Fire Brigades Union) v South Yorkshire Fire and Rescue Authority* [2018] EWHC 1229 (Admin), [2018] 3 CMLR 27, at para [142].

[35] In the alternative, it was submitted that if the application is out of time (which the applicant denies), there is in any event good reason for extending time. Essentially, the applicant submits that the judicial review time limit in a case such as the present may operate in a way which is unjustifiably capricious if time runs from the date of the legislation with which the challenge is concerned. Any potential applicant would not have standing until their cohabiting partner died; and it is only then that they would or should be expected to turn their mind to any discrimination which disadvantaged them. As suggested in the applicant's written submissions, "a question mark will inevitably hang over the lawfulness of the discriminatory treatment unless and until someone brings a judicial review challenge within three months of the death of a cohabiting partner. That could be many years after the legislation comes into force." In the applicant's submission, excluding judicial review at that point would have the effect of continuing a discriminatory treatment that has no justification.

Summary of the proposed respondents' arguments

[36] For the proposed respondents, Mr McGleenan opposed the grant of leave both on the merits and on the grounds of delay. He submitted that a challenge on article 14 ECHR grounds to a legislative provision which engaged broad categorisations, differentiating on non-suspect grounds, in the socio-economic sphere, and which operates without discriminatory effect in all or most cases, cannot prevail. He relied upon *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022]

AC 223, at paras [158]-[162]; *Re Attorney General for Northern Ireland's Reference (Abortion Services (Safe Access Zones))* [2022] UKSC 32, at paras [18]-[19]; and *Re JR123's Application* [2023] NICA 30, at paras [37]-[38], [55]-[57] and [78]-[80].

[37] More particularly, he submitted that making only non-retrospective provision for cohabiting partners in relation to pension schemes is justified for the purposes of article 14 on the basis of cases such as *R (Harvey) v LB Hackney and Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2871 (Admin), [2019] ICR 1059; *Re Eccles' Application* [2021] NIQB 111; and *Green v Metropolitan Police Commissioner and Secretary of State for the Home Department* [2022] EWHC 1286 (Admin). I return to each of these authorities in some detail below.

[38] In relation to delay, it was submitted that the applicant's challenge is irredeemably out of time. The proposed respondents' case was that a challenge to legislation must be brought within three months of the date upon which the applicant was first affected by the impugned provisions: see *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199, at paras [125]-[127]; and *Re Allister's Application* [2022] NICA 15, at paras [567]-[600]. That had not occurred in this case and, on the contrary, the applicant had unsuccessfully attempted to circumvent the time limits and other safeguards in RCJ Order 53 by wrongly issuing civil proceedings, exacerbating the situation further by unsuccessfully appealing the decision and order of McAlinden J rather than bringing judicial review proceedings at that point.

The issues

[39] The merits test at this stage of the proceedings is whether there is an arguable case with a realistic prospect of success (see *Re Ni Chuinneagain's Application* [2022] NICA 56, at para [42]). I have addressed the arguments and analyse the issues in the following order. First, properly regarded, is the applicant's challenge to be viewed as a challenge to the Regulations? Second, and most importantly, has the applicant demonstrated that there is an arguable case with a realistic prospect of success in terms of unlawful discrimination? Third, is the challenge out of time? And, if so, fourth, are there good reasons to extend time? I deal with the third and fourth issues together.

The true nature of the challenge

[40] The applicant's essential submission as to the fundamental nature of her case is that there is no challenge to the 2011 Regulations. She accepts that the operation of the Scheme is, for the most part, perfectly unobjectionable. Rather, what is being challenged is the proposed respondents' maintenance of an unlawful and discriminatory difference in treatment in breach of article 14 ECHR. Whilst this failure could be cured by extending survivor benefits to surviving cohabiting partners in the applicant's position, it could also be cured by removing them from those who currently receive unjustified, more favourable treatment than the applicant (or alternatively, but more hypothetically, by the respondents' introducing a policy which provides adequate justification for the difference in treatment). In any event, on the

applicant's case the 'target' of the proceedings is the policy position adopted by the respondents and their ongoing failure to rectify the unjustified difference in treatment. The respondents' riposte is simply that a challenge to something the Regulations do *not* do (but which, it is argued, they *ought* to do in order to avoid unlawful discrimination) must be regarded as a challenge to the Regulations.

[41] This issue has been touched upon, at least to some degree, in the earlier, related private-law proceedings. In his judgment in the writ action (see para [11] above), McAlinden J held as follows:

> "[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 to 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."

[42] The Court of Appeal, upholding that decision, similarly observed at para [35] of its judgment that "the appellant in substance challenges 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".

[43] In seeking to demonstrate that her challenge is not a challenge to the Regulations themselves, the applicant points to section 6 HRA. She submits that section 6 is so constructed such that the decision of a relevant public authority (here, the Defence Council and/or the Secretary of State) *not* to include provisions in

secondary legislation, or not to amend secondary legislation to cure unlawful discrimination, is challengeable. Section 6 (in material part) provides as follows:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (3) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> …
>
> (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."

[44] Specifically, it is the provision made by section 6(6) which the applicant contends aids her case. She says that the proposed respondents' decision (in effect, the first proposed respondent's decision) not to make further arrangements is a deliberate failure to act. This failure is not included, she argues, in those failures to act which are excluded from the definition of "an act" for the purposes of section 6. The 2011 Regulations were subject only to negative resolution, that is to say that the Defence Council makes them and they are put before Parliament only after the fact, with the Regulations taking effect in the meantime unless prayed against in Parliament.

[45] In my judgment, there is a significant degree of semantics about this whole debate. In one sense, the applicant is correct: she is not seeking to challenge any part of the Regulations as made. She does not contend that any of the Regulations, *per se,* are unlawful or require to be quashed. At the same time, the source and origin of her complaint is that the Regulations make provision for others which does not apply to her. Moreover, in order to cure the (alleged) illegality of which she complains, the Regulations would need to be amended or supplemented in some way, either to

remove the benefits of which the applicant claims she is unlawfully deprived or (more realistically) to confer similar entitlement upon those in her position. As both McAlinden J and Treacy LJ highlighted in the judgments in the earlier civil proceedings, these issues are intimately bound up with the provision which is (and is not) made in the 2011 Regulations. (It is perhaps relevant to note in this regard that the remedy sought by the Commission on the applicant's behalf in its pre-action correspondence in March 2018 was, in fact, a disapplication of "the statutory exclusion of stable cohabiting partners such as Ms Mitchell from entitlement to a survivor's pension under the Scheme…".) The failures of which the applicant complains are, in reality, a failure to have made the Regulations in different terms and/or a failure to amend them. Although she may be content with a remedy consisting of a declaration and damages under section 8 HRA, any entitlement to such damages and their amount can only be considered pursuant to section 8(3) after having regard to the other public law remedies which the court may grant.

[46] In substance, therefore, the challenge should be viewed as one which is about the legislative provision which has been made (or not made) in this case, rather than a free-standing policy decision on the part of the proposed respondents, or either of them. It would be highly artificial in my view to consider her claim to be anything other than an indirect challenge to the Regulations. This appears to me to accord with the view taken by both McAlinden J and the Court of Appeal. (They each analysed these issues for a different purpose, namely whether to categorise the claim as a public law issue which should properly have been brought by way of judicial review. However, they each viewed the claim as intimately connected to the respondents' regulation-making function.)

[47] I am fortified in this view by an additional, somewhat technical argument which was advanced by Mr McGleenan. He pointed to the fact that, in principle, the 2011 Regulations *do* make some provision for survivor benefits to be paid to unmarried cohabitees in some circumstances: see rule D.3(7). The issue for Ms Mitchell is that she does not fall within the provisions of that rule. She is therefore part of (what Mr McGleenan referred to as) a 'carve-out' from the cohort of unmarried cohabitees who are entitled to survivor benefits. This analysis is also not without its difficulties, since the 2011 Regulations simply confer limited entitlement to such benefits for unmarried cohabitees in a narrow category of cases, rather than providing such entitlement generally and expressly excluding a group of which the applicant is part. Nevertheless, this argument generally supports the respondents' position that the challenge is, at root, about what is (and is not) within the Regulations.

[48] I nonetheless accept the applicant's submission that section 6(6) HRA does not preclude her from mounting her challenge. McAlinden J also considered that to be the case (see para [36] of his judgment). That is because of the way in which the 2011 Regulations are made. They are neither "primary legislation" nor a remedial order, so section 6(6)(b) HRA is irrelevant. Although section 6(6)(a) applies to "legislation" more generally (which I take to include both "primary legislation" and "subordinate legislation", each defined terms in section 21 HRA), it excludes only failures to

introduce in, or lay before, Parliament a *proposal* for legislation. Where subordinate legislation is subject only to negative resolution, a proposal for legislation is not required. The rule-making authority simply makes the subordinate legislation. It has effect unless and until annulled by Parliament.

[49] This issue was addressed by Scott Baker J in *R (Rose) v Secretary of State for Health* [2002] EWHC 1593, in which he held that regulations made subject to the negative resolution procedure were amenable to a claim that the Secretary of State had breached a positive obligation under the HRA. At para [51], he said this:

> "Where the primary legislation provides that a statutory instrument shall be subject to annulment by resolution of either house, but after being made, it would not be a proposal for legislation for the purposes of Section 6(6)(a) of the 1998 Act. Contrast the position where the primary legislation provides that a statutory instrument may not be made unless authorised by affirmative resolution. There, the instrument would be 'a proposal for legislation' for the purposes of Section 6(6)(a) of the 1998 Act. I am indebted to a joint note written at the request of the Court of Appeal by Mr Robin Allen Q.C. and Mr Philip Sales in another case (see Public law [2000] P.L. 361) which all parties agree accurately states the law on this point. As the authors observe, the distinction reflects the general concern in the 1998 Act to preserve and protect parliamentary sovereignty; parliamentary sovereignty is more closely engaged where subordinate legislation cannot be made without direct approval by Parliament."

[50] The significance of the debate just addressed relates principally to the issue of delay, which is dealt with in further detail below (see paras [79]-[103]). The text of RCJ Order 53, rule 4, appears to me to be as significant, if not more so, than the issue just discussed. Insofar as relevant, however, I consider that the proposed respondents' analysis is the more commonsense view; and that the applicant's analysis is somewhat artificial, placing form above substance, in the circumstances of this case.

The merits: materially analogous circumstances and justification

[51] Turning to the merits, there was no dispute that the subject matter of the applicant's claim fell within the ambit of A1P1 rights; nor that she could rely upon a status which could fall within an 'other status' for the purposes of article 14; nor that, subject to the appropriateness of her comparators, she was treated less favourably than them. The two key issues in dispute were whether the applicant was in a relevantly analogous position to her chosen comparators and, if so, whether the differential treatment was justified.

[52] The applicant drew on two categories of potential comparators which were specifically identified in her Order 53 statement: (i) surviving spouses and civil partners who are entitled to survivors' pensions under the Regulations; and (ii) surviving spouses, civil partners and surviving cohabiting partners of deceased members who are entitled to survivors' pensions under *other* public sector schemes. The applicant's essential submission is that a long-term, stable, financially interdependent, cohabiting partner of any public sector occupational pension scheme member (including a member of the 2011 Scheme) is in almost the same position vis-à-vis that member as would be a married or civil partner of that member. As a result, it is said that there is a strongly arguable case that this comparison is sufficiently close to satisfy the requirement of being in an analogous situation for the purposes of article 14 analysis. In the course of pre-action correspondence, the proposed respondents disputed the analogous nature of those in category (i) in its entirety and further disputed the analogy with those in category (ii) insofar as that concerned surviving spouses and civil partners.

[53] I am satisfied for present purposes that there is an arguable case that the applicant is in a relevantly analogous position to married or civil partners of deceased members of the Scheme. Although, in the *Harvey* case (supra), Julian Knowles J found that an unmarried partner was not in a "relevantly comparative position" to a married partner in the same scheme (because provision had not been made for survivor benefits to be awarded to unmarried couples: see para [170], distinguishing *Re Brewster's Application* [2017] UKSC 8), it seems to me that that issue is (at least arguably) more properly addressed in relation to justification. Knowles J's reasoning was that, when a pension scheme is being designed, the package of benefits to be provided is costed and reflected (in part) in the level of contributions which members make to the scheme, so that the comparative spouse was merely receiving what her husband paid for through his contributions to the scheme. The same issue also arises in relation to surviving cohabiting partners who have entitlements in different schemes which provide for those benefits: the argument is that those individuals' partners have paid for their benefits. Again, however, that appears to me to go more naturally to justification.

[54] I would not therefore refuse leave in this case on the basis that it is clear that the applicant has no relevant comparator. That was the approach I took in the case of *Eccles'* case (supra, see paras [39]-[43]). I have not been persuaded that I should take a different approach in this case. I further note that Fordham J, in the *Green* case (supra), also declined to follow *Harvey* on this point, having regard to the discussion in *Carter v Chief Constable of Essex Police* [2020] ICR 1156 and this court's judgment in *Eccles* (see para [88] of *Green*). I also proceed on the basis that it is appropriate in this case, or at least permissible, to focus on the issue of justification (as suggested by Lady Hale in the *AL (Serbia)* case, at para [25]) rather than whether the chosen comparator is sufficiently analogous.

[55] The parties accept that the relevant approach in relation to justification of differential treatment is set out in the decision of the Supreme Court in the *SC* decision

(supra). The proposed respondents contend that the question is whether the difference in treatment was manifestly without reasonable foundation (MWRF). In her written submissions the applicant did not dispute that the correct test in assessing any claimed justification for a difference in treatment is whether the difference in treatment was MWRF. However, it was suggested that low-intensity review, applying that standard, was nonetheless inappropriate. In oral submissions, the applicant sought to distance her case from those where a pure MWRF analysis is appropriate, as explained by Lord Reed in *SC* (see especially paras [158]-[162]). On her behalf, Mr Hanna made the point that Lord Reed's comments were to be read in the context of challenges against legislation which concern matters of social or economic policy, neither of which was apposite in this case, he submitted.

[56] An extremely helpful summary of principles is contained within para [115] of the judgment of Lord Reed in the *SC* case. Generally, *SC* warns against a mechanistic adoption of the MWRF standard. However, the essence of Lord Reed's judgment in relation to this issue may be best encapsulated at para [158]:

> "… In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. Those grounds, as currently recognised, are discussed in paras 101-113 above; but, as I have explained, they may develop over time as the approach of the European court evolves. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, as cases such as *Schalk*, *Eweida* and *Tomás* illustrate, besides the cases concerned with "transitional measures", such as *Stec*, *Runkee* and *British Gurkha*. Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children."

[57] At para [161] of his judgment, Lord Reed explained in relation to proportionality in article 14 cases that, "… it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case" and that there is "… a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues."

[58] Rather than a binary debate as to whether or not pensions, and occupational pensions in the public sector in particular, fall within or without the label "social or economic policy", Lord Reed's judgment indicates that this may be a multifactorial issue. There may be a variety of factors in an individual case which increase, or decrease, the intensity of review which the courts will deploy in considering justification for article 14 purposes. Sometimes there will be factors which pull in opposite directions in an individual case.

[59] In my view, however, it is clear that a wide margin of judgment is available to the proposed respondents (and the government more generally) in this area. Although this case is not a direct challenge to legislation, for the reasons discussed above (see paras [40]-[47]) I consider that it is very closely analogous to that. Moreover, although the matter is not one for primary legislation, it is clear that the provision to be made in relation to pensions and benefits payable to ex-members of the reserve forces and/or their dependants is to be determined through a legislative process: by the making of subordinate legislation, subject to the oversight of Parliament through the negative resolution procedure. Although Parliament did not have any active involvement in the making of the 2011 Regulations, the important point is that it oversees the process and has the power to intervene if dissatisfied with the provision made. (In any event, in para [161] of Lord Reed's judgment in *SC,* he makes clear that a wide margin of discretion may be available to the executive branch of government, of which the proposed respondents form part, and not merely the legislative branch.)

[60] I do not accept that the fact that the pension scheme in this case is an *occupational* pension makes a significant degree of difference. There may be a modestly more intense review as a result, over and above what might be applicable where a state pension alone is concerned. It might be suggested that the issue here is one more of social policy than economic policy. Nonetheless, a generally low standard of review (approaching MWRF) appears to me to be appropriate in this sphere. That was the view taken in the *Eccles* case in relation to a police occupational pension scheme (see para [50]).

[61] In addition, I note the following two points. Throughout the *SC* judgment, reference is made to low-intensity review in the field of "pensions", amongst other fields, without making any distinction between the types of schemes potentially at issue. Sometimes such reference is made in conjunction with reference to welfare benefits and, at other times, not. Further, in this case since the relevant scheme is non-contributory, ultimately public money is required to fund it and would be required to

'top up' the fund, if necessary, due to unexpected or unplanned liabilities. In those circumstances, any material distinction between an occupational public sector pension and a state pension is reduced.

[62] Finally, it is clear that the status or statuses upon which the applicant can rely in this case do not fall within the 'core' or 'suspect' status category. Generally, cases involving "non-suspect" grounds invite "less strict scrutiny, other things being equal" (*SC,* para [114]). In light of the matters just discussed, I consider that a low-intensity review is plainly appropriate.

[63] Of course, before the court addresses the proportionality of the differential treatment, applying whatever intensity of review is appropriate, the proposed respondents must have identified a legitimate aim which is furthered by difference in treatment.

[64] It appears to me that there is a case that the proposed respondents are seeking to rely in these proceedings on a justification (the protection of marriage) which has been abandoned in this context (see para [31] above), especially in view of the introduction in 2005 of a new scheme – which Mr Maynard was not eligible to join – which opened up entitlements for surviving cohabiting partners in a similar position to the applicant. In the absence of evidence at this stage clearly demonstrating the significance of, and reliance upon, that objective in the present context, I assume for the moment that it is irrelevant. I also assume in the applicant's favour that it would be perfectly achievable for the proposed respondents to cater for the payment of survivor pensions to unmarried cohabiting partners (as they have done for others) in a way which did not materially or unacceptably affect the clarity and certainty of the scheme provisions. The battleground in this case on the issue of justification is what was referred to in short hand as the principle of non-retrospectivity, to which I now turn.

[65] Before doing so, I simply mention that, for the purposes of determining whether or not leave should be granted, I leave aside the proposed respondents' reliance on the *Abortion Services (Safe Access Zones)* and *JR123* cases. Mr McGleenan argued that the 2011 Regulations could not be incompatible with article 14 unless they were incompatible in all or almost all cases to which they applied. In response, the applicant says that she is not challenging the legislation; and, in any event, since this is a 'bright-line' issue, the failure to make provision for persons in the applicant's position would do so against all in that group without exception. Having regard to the observations of the Court of Appeal in para [236] of *Re Dillon and Others* [2024] NICA 59, I do not consider that it would be appropriate to refuse leave on the basis of the proposed respondents' reliance on this issue. As the Court of Appeal indicated, the correct application of the doctrine from those cases upon which the proposed respondents rely is not straightforward. I consider that to be particularly so where the challenge, as here, is based on article 14 and a contention that the applicant is wrongly excluded from a benefit afforded to others under the piece of legislation at issue. In those circumstances, all of those within the applicant's group will similarly be the

victim of unlawful discrimination. Moreover, the doctrine relates to the grant of a particular *remedy* (a section 4 HRA declaration of incompatibility or similar declaration at common law declaring legislation generally incompatible with Convention rights) rather than the question of whether or not the applicant's rights have been violated: see paras [81]-[82] of *JR123.*

[66] The issue in this case seems to me likely to boil down to a question of whether the non-retrospectivity justification is sufficient to justify the differential treatment of which the applicant complains. In pre-action correspondence, the proposed respondents made the point that Mr Maynard's scheme was a "legacy scheme", which closed to new entrants in 2010, and the Government's position is that benefit entitlements should generally be determined in line with the rules applicable at the time when the scheme member served. The MoD response in July 2017 (see para [9] above) clearly made the case that the justification for the differential treatment was based on the non-retrospectivity issue; and that seems to have been previously explained in the Minister's letter of 13 April 2017 which has not been provided to the court in the course of these proceedings.

[67] Although the issue may have been clouded by the subsequent reliance in pre-action correspondence from the CSO of two further strands of justification, the non-retrospectivity justification is squarely raised in the pre-action correspondence of 9 May 2018, in the following terms:

> "The Scheme is closed to new members having been superseded by the Reserve Forces Pension Scheme 2005 and again subsequently by the Armed Forces Pension Scheme 2015 both of which extended the range of benefits available to members. The changes made by these new schemes were not retrospective. To be entitled to avail of such extended benefits the member had to have service in the new schemes after the effective date.
>
> It is accepted that the MoD has introduced entitlements to Pensions for Life (PfL) for a very specific group of people who were justifiably different from spouses of members of other occupational pension schemes mainly because they were not always able to build up a pension in their own right because of the mobile nature of service life. Pensions for life were not extended to members of the Scheme as the same argument could not be made in the case of Non Regular Permanent Staff and other Reservists because their nature of employment is static and not mobile. The changes made were due to the special circumstances of service families and do not apply to changes in relationship status prior to April 2015. The introduction of PfL is not relevant to the position of the Applicant as she was not entitled to

> an adult dependent pension under the Scheme in any event. The MoD's position is that the changes did not alter the Government's general presumption against making retrospective changes to existing public service schemes."

[68] In his oral submissions, Mr McGleenan (rightly, in my view) focused on the question of non-retrospectivity. In this case, a pension was actually *in payment* to Mr Maynard as a pensioner member at the time of his death. The provision for his pension had always been made on the basis that his unmarried cohabiting partner was not eligible for survivor benefits.

[69] The idea that changes to pension schemes which expand eligibility for benefits can properly and lawfully be limited to prospective changes only was upheld in *Harvey, Eccles* and *Green*. In the respondents' submission, relying upon those authorities, this case has no prospect of success and 'does not get past' the fact that the alleged discrimination is on a non-suspect ground, in a scheme legitimately using bright-line rules, and where the non-retrospectivity justification has been upheld by the courts on a number of occasions in similar circumstances.

[70] The facts of the *Harvey* case are very similar to the present case. The pension scheme in *Harvey* was an occupational pension scheme for public sector employees, as in this case. In both cases, the pensioner was subject to the rules of the scheme in place at the time when their pension became payable, i.e. when they became a non-active member of the scheme; but their partner later sought to rely on subsequent replacement schemes which treated unmarried cohabitees more favourably than previously. The comparators in each case are essentially the same (see para [52] above and para [9] of the judgment in *Harvey*). I do not consider that the applicant in this case can be in a better position than the claimant in *Harvey* simply because Mr Maynard's scheme did not require him to make contributions. The only rights he earned by his work entitling him to employer contributions did *not* include benefits such as the applicant now seeks.

[71] It was held that the claimant in the *Harvey* case was not in an analogous situation to those with whom she compared herself. That was because the relevant comparison was not simply between spouses and unmarried persons, but between a spouse whose deceased partner had been a member of a scheme which had paid for the benefit of a survivor's pension to be afforded to a surviving spouse; and/or between a cohabiting partner of a scheme member in which it was a costed benefit that an unmarried cohabiting partner would receive a survivor's pension: see paras [170]-[183] of the judgment.

[72] Additionally, it was further held in *Harvey* that any difference in treatment was justified, since the decision not to extend the changes made in the later scheme (which was more generous to unmarried cohabiting partners) to cohabitees of pensioner members of the earlier scheme was rationally connected to, and a proportionate means of achieving, the objectives of avoiding the imposition of unexpected pension

liabilities on administering authorities, avoiding unfairness to existing scheme members, and avoiding a 'windfall' for pensioner members: see, in particular, paras [51], [200]-[206] and [218] of the judgment in *Harvey*; and, more generally, paras [193]-[220] on the issue of justification. (I have used the short-hand phrase 'non-retrospectivity justification' as covering each of these considerations). In deciding the *Harvey* case, the *Brewster* decision in the Supreme Court was distinguished; and the *McLaughlin* decision in the Supreme Court was applied. *Brewster*, of course, was a case in which the relevant scheme *did* provide survivor benefits for unmarried cohabiting partners. The issue in that case related merely to the process by which such partners' entitlement was established.

[73] A detailed discussion of the Government's evidence in relation to the non-retrospectivity principle in public sector pension schemes is set out in paras [52]-[60] of the judgment in *Harvey.* Similar evidence was put before the court in *Eccles* (see para [57] of that judgment). In that case, I accepted that it has been a consistent and long-standing feature of government pension policy that changes to a pension scheme should not be retrospective and that changes, where desirable, should be made by way of introduction of a new scheme as a matter of fairness both to scheme members and inter-generationally. The difficulty with an approach similar to that suggested by the applicant in the present case was that "essentially… it is unfair that a scheme member should avail of a benefit of a type for which they had neither bargained nor paid; and similarly unfair for other scheme members (or the taxpayer) to have to subsidise that unanticipated and unfunded benefit" (see paras [55]-[56]). Given that the approach challenged in that case represented an expression of long-held government policy across the board in this area, it was not of any particular assistance to the applicant that there had been limited democratic involvement by the legislature in the making of the particular regulations under challenge (see para [58]). Applying the proportionality test, I held in *Eccles* that the differential treatment was justified, whether applying a MWRF analysis or a more intense level of review: see paras [59]-[63]; and paras [66]-[67].

[74] Similar subject matter was returned to again by the Administrative Court in England and Wales in the *Green* case, which analysed the reasoning in both *Harvey* and *Eccles*. In that case, the claimants were entitled to surviving partner's pensions under a police pension scheme but challenged the regulation which provided that such entitlement ceased where they married or cohabited with another. A newer (generally less beneficial) version of the scheme had removed that restriction. Again, the claimants wanted a similar benefit to that which was provided under the more recent scheme, of which their partners had not been part. Fordham J held that the impugned regulation required justification under articles 8 and 14 ECHR. In each case, however, he considered that the rule was justified and lawful on the basis that there was a policy coherence and integrity in holding to pension scheme rules which had been designed and costed and to which active scheme members had contributed. As the judge said, the issue of non-retrospective changes to scheme benefits 'loomed large' in that case and was again explained (see paras [15]-[17]). Ultimately, Fordham J concluded that the regulation, and its continuing application to the claimants albeit

it had been jettisoned in a more recent version of the scheme, was justified and proportionate (see para [69]). The reasoning for this conclusion is set out in paras [70]-[82] of his judgment.

[75] Of particular significance in the context of the present case, however, is Fordham J's analysis (a) of the integrity of pension scheme rules (applying those which have been designed and costed for, and contributed to by, the relevant members) and the idea of basic prospectivity (making enhancements which are applicable only in respect of active scheme members at the date of the rule change) at para [73]; (b) of the justification for the use of bright-line rules at para [80]; and (c) of the latitude to be afforded to the government in the socio-economic context at para [81]. In relation to non-retrospectivity, Fordham J followed and applied both *Harvey* and *Eccles* (and *Carter*), holding that the issues discussed in those cases were "critical to the justification of the difference in treatment between those in receipt of [police pension scheme survivors' pension benefits] who do – and those who do not – cohabit, marry or enter a new civil partnership with a new partner" (see para [73]). In his specific article 14 analysis relating to justification, at paras [89]-[91], Fordham J endorsed the reasoning in *Harvey* and *Eccles* and, as in those cases, found that the defendant's approach was justified whether or not the MWRF standard of review was appropriate.

[76] Harvey was decided *before* the Supreme Court's decision in *SC*. The judge reached his decision applying two competing approaches to whether the MWRF test was met (see para [120]). He did not consider that there was any material difference in approach required between article 14 cases which arose in the state welfare and benefits context and those to public sector pension schemes (see para [120]). *Eccles* and *Green* were each decided after the Supreme Court decision in *SC* and reached similar conclusions.

[77] In light of the consistent approach adopted in the authorities discussed above raising the same or similar issues, I accept the proposed respondents' submission that the applicant ultimately has no reasonable prospect of success in this case. The applicant's riposte to the respondents' reliance upon the non-retrospectivity justification was unconvincing and has failed to persuade me that leave ought to be granted:

(a) First, it was submitted on the applicant's behalf that, in 2011, Mr Maynard was transferred into a new scheme. His rights under the old scheme (and the 1978 Regulations) were gone and, at that time, he could properly have been moved onto the new regime. However, this argument is a sleight of hand. It ignores the fact that Mr Maynard was not, in fact, moved into a new scheme with additional or different benefits. Rather, it was a restatement of the scheme of which he had been a member, with his benefits simply continuing, albeit with a new legal underpinning. (The proposed respondents have indicated that the restated provisions in Schedule 1 to the 2011 Regulations contained no material changes to dependants' pensions and the restatement was in order to comply with requirements of the Finance Act 2004.) To say that Mr Maynard *could* at

that stage have been moved onto a new scheme with additional benefits is merely to beg the question. Mr Maynard's pensionable service had ended several years before. For the reasons explained above and in the previous cases to which I have referred, the proposed respondents were not legally obliged to move Mr Maynard into a new scheme at that point with materially different benefits.

(b) The applicant's written submissions also made the suggestion that "it will be interesting, on discovery, to see documentary evidence of the thinking and analysis" carried out by or on behalf of the proposed respondents about possible changes in relation to this issue; also suggesting that the applicant would be seeking discovery in relation to similar analysis carried out prior to introducing survivors' pensions for cohabiting partners under a *different* scheme, the Civil Service Pension Scheme, and as to the timing of materially similar changes in other public sector occupational pension schemes. It is an unattractive proposition that leave should be granted in order to permit wide-ranging discovery requests, which are rarely appropriate in judicial review, particularly in relation to other schemes with which these proceedings are not directly concerned, in the hope that something may turn up which assists the applicant. Moreover, that appears especially speculative in circumstances where the proposed respondents have clearly indicated that they were applying a cross-government policy of non-retrospective pension provision, where evidence in relation to that general policy has already been provided and scrutinised in a number of the cases discussed above.

(c) The applicant also suggested that, if required for financial reasons, the level of pension benefit should have been reduced pro rata amongst all those entitled, including surviving cohabiting partners, in order to fund the additional cost of providing enhanced survivor pensions to a wider range of adult dependants. This ignores the fact that the non-retrospectivity justification encompasses more than a mere financial objection to scheme members or (in this case) the public purse, or both, having to meet additional liabilities. It also relates to more general questions of fairness. It is certainly not without reasonable foundation for the proposed respondents to have concluded that they would not reduce the benefits which were due to spouses or civil partners under the scheme of which Mr Maynard was a member (assuming this could be done lawfully) simply to fund new benefits for unmarried cohabiting partners.

(d) The applicant then suggested that the decline in the number of stable long-term cohabiting couples who are married or are in civil partnerships would offset the financial cost of funding survivor pensions for cohabiting partners. Whether or not this is correct is a matter of speculation on which the court has no evidence. However, again, the non-retrospectivity justification relied upon by the proposed respondents relates not merely to finding or reallocating additional funds but, rather, to the range of factors mentioned at para [72] and discussed in the authorities.

(e) Finally, the hypothetical scenario referred to in the applicant's supplementary skeleton (see para [30] above) was relied upon as illustrating that the relevant scheme could give rise to different outcomes with only marginal changes in circumstance. However, that is simply to recognise that, in schemes such as that under consideration in these proceedings, where bright-line rules are deployed, there may be marginal cases which have the appearance of unfairness or inconsistency. That is not to say that the rules themselves are irrational or without foundation. The scenario posited by the applicant simply recognises that Mr X's partner, Y, became eligible for a survivor's pension upon marriage in accordance with the rules of the scheme which had been known to the scheme members all along. It does not mean that Mr X's service was 'worth more' than that of Mr Maynard; but simply that Y was able to avail of a benefit which was one of those earned by them equally under the terms of the scheme, whereas Ms Mitchell is not. It is not simply (as the applicant argued) that Ms Mitchell would have had to have married to secure this entitlement; rather, she would have had to have been the partner of a scheme member whose work earned the benefit she now seeks under the terms of the Scheme.

[78] The applicant's skeleton argument indicated that it was "rather than more detailed than would be usual in an application for leave" and that it addressed "all of the substantive issues relevant to the application". Having considered these submissions and the oral submissions made by each party at the leave hearing, I consider that leave should be refused on the merits. The applicant compares herself with partners of scheme members who were subject to different defined-benefit scheme rules which bargained and budgeted for survivor benefits to be paid to those partners. The proposed respondents' rationale for treating those partners differently was legitimate. I do not consider the applicant's claim to have a realistic prospect of success (that is to say, that there is a realistic prospect of the court finding that the difference in treatment is disproportionate and unjustified), having regard to the authorities discussed above addressing similar complaints and the low intensity of review which is appropriate.

Delay

[79] Recognising that an extension of time to bring these proceedings may be necessary, a claim for an order extending time is included within the applicant's Order 53 statement in the following terms:

> "An order granting the Applicant an extension of time within which to bring this application, there being good reason to extend time given the explanation provided for such delay as has occurred, the importance of the issue raised by the Applicant's case to the Applicant and more generally, the merits of the Applicant's application, the substantial prejudice to her rights that would result should

> the matter not proceed, and the public interest in the matter proceeding."

[80] The merits of the proposed respondents' delay objection are related to a number of the issues discussed above. The first question is whether the challenge is within time. If not, it can proceed (subject to the court's assessment of the merits and any other knock-out blow deployed at the leave stage). If the challenge is out of time, the question is whether there are good reasons for extending time. If so, time will usually be extended; and, if not, the application for leave will generally be dismissed. A further option is that the issue of delay is deferred to be dealt with more fully in the course of the substantive hearing, although that is generally undesirable (see *Re OV's Application* [2021] NICA 58, at para [11], where the Lady Chief Justice stated that "delay should, where possible, be dealt with at the leave stage").

[81] The starting point is, of course, RCJ Order 53, rule 4(1), which states:

> "An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[82] Fundamentally, this claim was not brought when it could and should have been. That much was accepted, at least in part, by the applicant. That is because the applicant originally sought to constitute the challenge as a private law action and it was only referred to the Judicial Review Court once the Court of Appeal had upheld the judgment and order of McAlinden J in relation to that issue. That course has, in itself, caused considerable delay.

[83] However, the applicant relies on the argument that the proposed respondents' failure to 'fix' the discrimination which arises from the Regulations is a continuing failure. Mr Hanna relied upon three cases in particular in support of this aspect of the argument (see para [34] above). In *Bamber*, Knowles J observed that a continuing failure to disclose material negates the delay in bringing an application for judicial review (at para [40]):

> "I say at once that I am not concerned about the second, delay, point. There is an ongoing duty on the CPS regarding disclosure and if the material which the Claimant seeks is disclosable, it is disclosable."

[84] Likewise, in *Newham*, Linden J rejected the respondent's argument that a challenge to a continuing breach of statutory duty was brought out of time (at para [118](ii)):

> "Even if I had accepted Mr Evans' case that any breach must have occurred after 27 February 2018 and at the point at which suitable accommodation in the form of the current accommodation became unsuitable through the passage of time, in my judgement the complaint would remain one of an ongoing breach of statutory duty which continues, as far as I am aware, to this day."

[85] Finally, in *Fire Brigades Union*, Kerr J held (at para [142]) that "… the case for relief is stronger where there is no plan to put an end to the unlawful conduct and every intention of continuing with it."

[86] The applicant argues that the proposed respondents' failure to act in a Convention-compliant manner constitutes a continuing breach of statutory duty in this sense. However, that argument is closely linked to the argument that the challenge is not to the 2011 Regulations. As explained above, I prefer the respondents' analysis that, in substance, this is a challenge to the provision made in the Regulations and that that should be the starting point for the purposes of determining when time for the commencement of these proceedings began to run. I consider that the 'continuing duty' cases can be distinguished on the facts and that the analysis set out in the *Delve* case is more directly on point.

[87] The respondents rely heavily upon *Delve*, where the English Court of Appeal unanimously held that "unlawful legislation is not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial review rolls forward for as long as the legislation continues to apply" (see para [124]). In disagreement with Lang J's analysis on this issue, the Court of Appeal held that there was "no continuing series of acts" in that case. On this basis, the respondent argues that the applicant's challenge is out of time; that it has been for some time; and that there are no compelling reasons for allowing it to continue.

[88] The applicant seeks to distinguish the *Delve* case on the basis that it was not about an omission but, rather, something within the legislation in that case which was positively offensive. However, that argument is circular to a degree because, ultimately, the complaint here is that there is an omission *in or from the Regulations* and that the situation which the Regulations brought about has resulted in unlawful discrimination. As the applicant's skeleton argument said, "What is unlawful (because it discriminates without justification) is failing *simultaneously* to make corresponding provision for surviving cohabiting partners in circumstances were, at any particular time, (1) provision for surviving partners is in force…". The word "simultaneously" is emphasised in the original, where it plainly means simultaneously to the introduction of the 2011 Regulations (and thereafter). In addition, one of the key reasons for the approach adopted in *Delve* by the Court of Appeal is to avoid the type of 'rolling' time limit suggested by the applicant, even where the legislation at issue (arguably) requires something to be added rather than

removed. In para [124] of the joint judgment of Sir Terence Etherton MR, Underhill VP and Rose LJ, the Court said this:

> "If [the 'continuing unlawful act' analysis] were the test, there would effectively be no time limit for challenging primary or secondary legislation or for that matter administrative conduct which continues to affect a claimant unless or until the action is withdrawn or revised. The Appellants rely on *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 to argue that this is a case of continuing illegality. In that case the Supreme Court held that the time limit for bringing a claim in respect of disciplinary proceedings brought by the Bar Standards Board started to run only from the end of the proceedings when the claimant's appeal against the decision was allowed and not from the start of the proceedings when the BSB decided to pursue the case against her. That case does not in our judgment assist the Appellants. What the Court was looking at there was a series of acts comprising a course of conduct occurring over an extended period of time, not the continuing effect of a single act. There is no continuing series of acts here. The adoption of each Pensions Act affecting the Appellants' pension age was a single act which was completed for this purpose at the latest when the legislation was brought into effect."
>
> [underlined emphasis added]

[89] The question, in my view, is whether the challenge should have been brought within three months of the 2011 Regulations coming into force on 1 September 2011 (as Mr Maynard and/or the applicant would then have been a *potential* victim under section 7 HRA of the alleged unlawful discrimination); or whether that was unnecessary but the challenge should nonetheless have been brought within three months of Mr Maynard's death or the applicant being informed that she was not entitled to survivor benefits on 13 April 2016 (as an actual victim).

[90] Of these two options, the latter is obviously the more appropriate. It is unrealistic to expect the applicant to have challenged the matter in 2011 when Mr Maynard was alive and well. No doubt, she hoped not to have to call on his pension provision then or at any time in the future. They may have had no fixed view on whether or not they may in due course marry. (That is not addressed in the evidence). In any event, when Mr Maynard's pension was in payment to him, the issue simply did not arise. Ms Mitchell was first materially affected at the time of his death. To consider time as running from then appears to me consistent with the approach taken by the Court of Appeal in *Delve* (see para [126] and the reference to the correct principle being that judicial review grounds first arise "when a person is affected by the application *to him or her* of the challenged policy or practice"). A

legislative provision may first affect an individual at the time it is enacted or made (as was the case in *Delve*: see para [127]). In other cases, the effect of the provision will only 'bite' at a later stage.

[91] Although I expressed some concern about the potential harshness of the approach in *Delve*, depending on the individual circumstances of the case, in *Re Ni Chuinneagain's Application* [2021] NIQB 79 (at para [44]), I note that, since then, *Delve* has been followed and applied in this jurisdiction (along with a number of cases from the Court of Session in Scotland which took a similar approach) by Humphreys J in *Re Armstrong's Application* [2022] NIQB 32. At para [24] of his judgment in that case, Humphreys J said:

> "On the analysis put forward by the applicant, these proceedings could have been commenced at any time within the last 10 years since there is a 'continuing breach' of article 2. I do not accept this. The phrase "within three months of the date when grounds for the application first arose" connotes a quite different test from "before the end of the period of one year beginning with the date on which the act complained of took place" in section 7(5)(a) of the HRA. In the latter case, on the reasoning in *O'Connor*, time may not run until the continuing illegal act has ceased but in the former, time runs from when the illegal act first occurs, whether it continues or not."

[92] Perhaps more importantly, the Court of Appeal in *Re Allister's Application* [2022] NICA 15, without mentioning the *Delve* case, adopted a similar approach. It looked at the "true target" of the case (which was the provision made in the Northern Ireland Protocol: see para [43]); determined that time began to run when the Protocol was ratified (see para [50]); and then asked whether it was appropriate to extend time. It did not take the approach that the Northern Ireland Protocol continued to apply and, therefore, there was an open-ended opportunity to challenge it. The "single factor" which resulted in an extension of time in that case was its constitutional importance (see para [57]).

[93] In this case, there was not, in reality, any series of decisions on the part of the proposed respondents (other than those – if indeed they could be understood as decisions rather than a mere restatement of the current position – generated by correspondence on behalf of the applicant asking them to relent). The grounds of challenge *first arose*, which is relevant for the judicial review time limit, when the applicant was first affected by the situation brought about by the 2011 Regulations. Whether or not there are continuing consequences or effects of the provision then made does not alter the fact that time began to run in March/April 2016. The applicant's affidavit rightly commences by explaining that the application "relates to an issue that first arose in 2016".

[94] The applicant plainly did not make her application, or even seek redress through the courts, within time for the purposes of the judicial review time limit. Pre-action correspondence was only sent by the Commission in March 2018. Her writ of summons was issued on 23 August 2018. That was well outside three-month time limit for judicial review (13 July 2016); and, indeed, outside the one-year time limit which might have been argued to be available under section 7(5)(a) HRA (13 April 2017), had that been applicable (although the applicant's analysis is that that would simply have limited the damages available to her to those in respect of acts one year prior to the issue of the writ and thereafter).

[95] It is clear that the applicant immediately sought assistance from some elected representatives after receiving the correspondence of 13 April 2016. However, after Mr Lancaster's letter of 20 July 2016, there is a period in which very little appears to have occurred. The applicant's grounding affidavit, filed in part to explain the periods of delay before these proceedings were commenced, says merely that, "Following a meeting at Antrim Civic Centre in March 2017, Danny Kinahan MP wrote to Mark Lancaster MP on my behalf". A response to that letter was received dated 13 April 2017, which the applicant avers was only forwarded to her in early June 2017. She then corresponded directly with Mr Lancaster and received a response in July 2017 from the Defence People Secretariat of the MoD. It was only at that point that the applicant sought advice from a solicitor and contacted the Commission.

[96] However, it was clear from the correspondence of July 2016 that the problem was with the Regulations; that there was no scope for any discretionary award; and that political intervention had not secured any advantage for the applicant, nor was any in prospect. The correct course at that point was to seek legal redress.

[97] The Commission began corresponding with the proposed respondents over a year later in August 2017; and a number of months passed during which disclosure of information was in issue. The extent of information required to launch the present judicial review was extremely limited, as is apparent from the limited documentation exhibited to the applicant's grounding affidavit. Pre-action correspondence was only sent in March 2018, around 9 months after the applicant sought legal assistance; with proceedings being commenced only 5 months later again.

[98] In considering whether there is good reason for extending time, the court must be careful not to employ a mechanistic approach (see *Allister*, per Keegan LCJ at para [57]). There is no exhaustive definition of "good reason" and the cases where an extension has been granted should not be considered to have precedential value (per McCloskey LJ at para [590] of *Allister*).

[99] In seeking to demonstrate the requisite good reason, the applicant submitted that the time limit is capricious in a case such as this because another (hypothetical) applicant could issue a challenge against the same regime if their partner were to die today and the affected surviving partner made their application within three months of that. Accordingly, the applicant suggests that a "question mark will inevitably hang

over the lawfulness of the discriminatory treatment unless and until someone brings a judicial review challenge within three months of the death of a cohabiting partner", which could occur many years after the legislation comes into force. She asks rhetorically, therefore, why the court would not grasp the nettle and deal with the issue at this point rather than taking the chance that further time and expense will have to be taken up addressing it at a later point. To the court's knowledge, there is no similar challenge either in train or in prospect. The possibility of such a challenge being brought is hypothetical and is likely to be a decreasing prospect with the passage of time. More importantly though, it is a principled approach, rather than capricious, to expect a litigant to comply with the time limit applicable to them under the Court Rules rather than excusing non-compliance simply because another litigant may be in a position to comply with the time limit in different circumstances.

[100] Turning back to the delay in this case, I do not consider that the applicant should be penalised for her lawyers' decision to pursue her claim initially by way of civil action. I accept that there is a private law element to the claim (since the applicant seeks damages to recoup what she considers to be her loss arising from the unlawful discrimination). I also consider that, after the civil proceedings had been commenced, the time taken to resolve the procedural debate as to the correct forum should not be given significant weight. That said, there is some force in the point made by Mr McGleenan that judicial review proceedings should have been issued promptly after the decision of McAlinden J. His submission was that this was the correct course rather than wasting time and costs on an unmeritious appeal of that decision, echoing an observation to similar effect by Treacy LJ in para [42] of his judgment on the appeal. Even assuming that the applicant wished to exercise her appeal rights, she could nonetheless have issued judicial review proceedings on a protective basis.

[101] The applicant should not be unduly criticised for seeking to resolve her concerns about her pension entitlement by political means in the first instance. Nonetheless, there are still two significant periods of time during which legal redress through the courts was not pursued which have not been adequately explained or excused, namely (i) the period from July 2016 to March 2017 (see paras [95]-[96] above); and (ii) the period from July 2017 to August 2018 (see para [97] above). I also have some concern about the intervening period from March 2017 to July 2017 when Mr Kinahan MP had been engaged but in circumstances where previous political representations had proven fruitless.

[102] It is well established that evidence must be adduced to account for all periods of delay": see, for instance, *Re Laverty's Application* [2015] NICA 75. This was reiterated in *Allister* at para [54]. I am not satisfied that good reason has been shown for extending time in this case in all of the circumstances, particularly having regard to the inadequately explained periods of delay mentioned above and taking into account the overall period of delay before the issue of judicial review proceedings after the judicial review time limit had expired. (Obviously, any passage of time since the issue of the judicial review proceedings is not to be held against the applicant in this regard.) In light of the view I have taken of the merits, these do not weigh in the balance in

favour of extending time but, even if I had considered the case to be arguable, this would not have been sufficient on its own to warrant the grant of an extension. I do not doubt the importance of this issue to Ms Mitchell but I do not consider that there is any significant issue of wider public interest in this case for a number of reasons. First, the equivalent scheme was later amended, prospectively, so that the number of people in the applicant's position is likely to be relatively small and diminishing. Second, as indicated in the discussion above, these issues have already been considered and addressed by the courts in this jurisdiction and in England and Wales such that there is no significant issue of principle which requires to be addressed in the public interest.

[103] I conclude that an extension of time to bring these proceedings is required and decline to grant an extension.

Conclusion

[104] In the *Green* case, Fordham J encapsulated the approach required on the part of the court in an article 14 challenge of this type as being that of 'zooming out' to consider the wider social and economic picture; rather than merely 'zooming in' on the apparently serious and severe adverse consequences for the claimant (see para [95] of his judgment). One cannot but have sympathy for the applicant who, whilst dealing with the loss of her long-time partner, also felt that she was not being provided with benefits morally due to her in recognition of the settled nature of her relationship with Mr Maynard and/or that his service was in some way being devalued. The proposed respondents' correspondence has been at pains to seek to allay those feelings. For my part, I have considerable sympathy for Ms Mitchell; but this cannot affect the dispassionate application of the relevant legal principles.

[105] For the detailed reasons given above on both the merits and the issue of delay, the application for leave to apply for judicial review is dismissed.

[106] I will hear the parties on the issue of costs.