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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Brewster's (Denise) Application [2012] NIQB 85

IN THE MATTER OF AN APPLICATION BY DENISE BREWSTER FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS' SUPERANNUATION COMMITTEE

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TREACY J

Introduction

[1] By the present application for judicial review, the applicant challenges the decision of the respondent Northern Ireland Local Government Officers' Superannuation Committee ("NILGOSC") made on 1 July 2011, by which it declined to pay a survivor's pension to the applicant following the death of her co-habiting partner.

[2] In reaching the decision NILGOSC applied Regs24 and 25 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 ('the 2009 Regulations') for which the notice party Department of Environment ("DOE") is responsible.

[3] David Scoffield QC appeared for the applicant, Mr Sayers BL for the respondent, Mr McGleenan QC for the Notice Party. The Attorney General for Northern Ireland ("AGNI") was placed on notice of the application by virtue of notices under Order 120 and Order 121 of the Rules of the Supreme Court (NI) and made written submissions. I am indebted to all counsel for their excellent written and oral submissions in this important and difficult case.

Issue for Determination

[4] The applicant was not married to the deceased but was his long-term cohabiting partner. They were engaged to be married. Her central argument is that the impugned decision is a breach of her rights under Art 14 ECHR read together with Art 1 of the First Protocol ECHR and discriminates against her on the basis of her status as the unmarried partner of the deceased. In consequence she is being deprived of a pension in the sum of approximately £4,650 *per* year. The applicant's challenge is that co-habiting partners are treated less favourably than married partners by virtue of the requirement placed upon co-habiting partners that a nomination be made.

[5] It is accepted that there is different treatment involved, that being unmarried is a status within the meaning of Art 14, and that the facts in issue fall within the ambit of Art 1 of the First Protocol. The focus of the challenge is therefore on the justification for the different treatment. For the purpose of Art 14, a difference of treatment was discriminatory if it had no objective or reasonable justification, that was, if it had not pursued a legitimate aim *or* if there had not been a reasonable relationship of proportionality between the *means* employed and the aim sought to be realised. [see Re Morrison's Application [2010] NI 194].

Background

[6] The applicant and Mr McMullan had been in a long-term relationship for many years. They had been co-habiting for 10 years and had purchased her present property together some years ago also, having previously lived together in two other properties.

[7] In April 2009, co-habiting partners became eligible for survivor's pensions under the NILGOSC scheme for the first time but it seems that nomination forms were not available until 21 May 2009. Seven months later, and shortly before Mr McMullan's death, the applicant and he became engaged.

[8] Mr McMullan died suddenly on 26 December 2009. At the time of his death he had been employed by Translink for approximately 15 years. During that period he paid into an occupational pension scheme administered by the proposed respondent.

[9] NILGOSC has paid out a death grant in respect of Mr McMullan's death in the sum of around £68,000 and half of this has been paid to the applicant. NILGOSC declined to pay the applicant a survivor's pension in the absence of a nomination form contending that it has no discretion under the relevant regulations to do so. It was confirmed at the leave hearing that the application proceeds on the basis that a nomination form was not filled in or was not submitted.

Statutory Framework

[10] The Scheme is governed by the 2009 Regulations, which were made by the DoE under Art9 of, and Schedule 3 to, the Superannuation (Northern Ireland) Order 1972. Regs 24 and 25 of the 2009 Regulations are the most relevant for present purposes. Regulation 24 provides for "survivor benefits" in relation to active members of the scheme who die. It provides:

> "(1) If a member dies leaving a surviving spouse, *nominated* cohabiting partner or civil partner, that person is entitled to a pension payable from the day following the date of death.
>
> (2) The pension is calculated by multiplying his total membership, augmented as if regulation 20(2) (early leavers: ill-health) applied, by his final pay and divided by 160..."
>
> (3) If there is more than one surviving spouse, they become jointly entitled in equal shares under paragraph (1)."

[11] The definition of "nominated cohabiting partner" is provided in reg 25:

> "(1) "Nominated cohabiting partner" means a person nominated by a member in accordance with the terms of this regulation.
>
> (2) A member (A) may nominate another person (B) to receive benefits under the Scheme by giving the Committee a declaration signed by both A and B that the condition in paragraph (3) has been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.
>
> (3) The condition is that —
>
> (a) A is able to marry, or form a civil partnership with, B;
> (b) A and B are living together as if they were husband and wife or as if they were civil partners;
> (c) neither A nor B is living with a third person as if they were husband and wife or as if they were civil partners; and

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

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

(5) A nomination ceases to have effect if —

(a) either A or B gives written notice of revocation to the Committee;
(b) A makes a subsequent nomination under this regulation;
(c) either A or B marries, forms a civil partnership or lives with a third person as if they were husband and wife or as if they were civil partners; or
(d) B dies.

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

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

[12] Reg 23 deals with the payment of death grants. Regs 23(1) and (2) provides as follows:

"(1) If an active member dies, a death grant is payable.

(2) The Committee at its *absolute discretion* may make payments in respect of the death grant to or for the benefit of the member's nominee or personal representatives, or any person appearing to the Committee to have been his relative or dependant at any time."

Submissions

[13] The applicant's central argument is that the respondent's position is in breach of her rights under Art 14 ECHR (taken in conjunction with her rights under Art 1 of the First Protocol ECHR) and discriminates against her on the basis of her status as the unmarried partner of the late Mr McMullan.

[14] The applicant submits that the provisions of the 1999 Regulations requiring that a 'nomination of cohabiting partner' form have been submitted in order for the applicant to qualify for a survivor's pension are unlawful and the respondent ought to have applied the relevant provisions in a Convention-compliant way or, as necessary, ought to have disapplied them.

[15] In the alternative, if that were not possible and/or if the relevant provisions were not unlawful of themselves, the applicant further contended that the 1999 Regulations are unlawful by virtue of failing to provide any discretion to NILGOSC in circumstances such as those of the applicant's case.

[16] The issue of discrimination against non-married partners was recently considered by the High Court in Northern Ireland in the case of Re Morrison's Application. That case concerned injury benefits payable to certain survivors when a police officer died in the execution of duty. In ***Morrison*** the impugned injury benefits regulations did not make *any* provision for co-habitees in contrast with the current challenge.

[17] It was held that the relevant Regulations discriminated against non-married partners by treating them differently in a manner which was not compatible with Article 14 ECHR (taken together with Article 1 of the First Protocol). In summary the court concluded:

(a) A hoped-for death benefit may be a "possession" for the purposes of Article 1 of the First Protocol to the European Convention (paragraph [20]);

(b) Being unmarried is a status for the purpose of the prohibition on discrimination contained in Article 14 of the Convention (paragraphs [24] and [25]);

(c) Unmarried partners and spouses (or civil partners) are likely to be in an analogous situation for these purposes (paragraphs [36] and [50]);

(d) Accordingly, any difference of treatment must be justified and the onus of doing so rests on the respondent (paragraph [47]); and

(e) In considering the issue of justification, the Court will consider whether the difference in treatment is proportionate, including whether there is a "reasonable relationship of proportionality between the means employed and the aims sought to be realized" (paragraph [47]).

[18] The respondent drew attention to the fact that in support of her argument that the exclusion of cohabiting partners under the injury benefit regulations was disproportionate the

applicant in ***Morrison*** relied, inter alia, on the Police Pension (NI) Regulations 2007 which provided a different test for eligibility making provision for surviving partners. However under that scheme an adult partner, other than a spouse or civil partner, was not entitled to a pension *unless* the police officer concerned had sent a declaration to the relevant Board in terms similar to that required under the regulations impugned in this case.

[19] The applicant here contends that having to complete this "additional paperwork" is an unnecessary hurdle which ought not to be imposed on a cohabiting partner – particularly when they already bear the burden of satisfying NILGOSC (irrespective of the nomination form) that the relevant conditions of entitlement existed at the time of death and for two years before that – and is in fact so disproportionate and/or so redundant as to be irrational, and certainly unjustified.

[20] Even where some difference in treatment can be justified the applicant submits the measure in issue still has to be proportionate to the legitimate aim pursued; in other words, Article 14 requires an examination of whether it goes further than is really necessary bearing in mind the objective in question. The case was about the "means employed" to differentiate between different cases and not, as in Morrison, the issue of principle as to whether differential treatment itself is warranted.

[21] Importantly it was common case this applicant satisfied the prescribed condition in accordance with Reg 25(3) for eligibility for a survivor's pension namely they were able to marry each other, were living together as if they were husband and wife, neither was living with a third person as if they were husband and wife and they were financially interdependent. The applicant's disentitlement therefore arose *solely* because her co-habiting partner had not nominated her to receive benefits under the scheme in accordance with Reg 25(2).

[22] Married and civil partners qualify automatically for the pension. They do not bear the burden, as does the applicant, of satisfying NILGOSC that she meets a number of other qualifying conditions. This burden, Mr Scoffield submitted, makes the completion of the nomination form redundant, since there could only ever be one cohabiting partner who satisfied the conditions. Like marriage, therefore, the conditions of entitlement for cohabitees are such that there could never be competing claims.

[23] Given that there is an obligation to prove substantive entitlement (i.e. that the relevant conditions are met), the applicant asks what is the point of requiring the form also? They refer to a letter dated 14 May 2010 from NILGOSC to the applicant's solicitors:

> "In addition to completing the appropriate paperwork they must supply us with such things as documentary evidence of financial interdependency, have been able to marry each other and have lived together as husband and wife for at least 2 years prior to completing the relevant Nomination of Cohabiting

> Partner Form. In the case of Mr McMullan no such form was completed and thus a spouses [*sic*] pension cannot be paid to Ms Brewster."

[24] The nomination form provides:

> "You and your nominated partner should be aware that on your death we will have to verify that the conditions for nomination have been satisfied, for example, a confirmation that you lived in a shared household with shared household spending, or that you had a bank account or mortgage in joint names**."**

[25] Mr Scoffield argues the situation is all the more inequitable when one has regard to the fact that there are no substantive details to be contained on the form which are in any doubt. This is a case where, if the relevant pension is not paid to the applicant, the monies contributed by and on behalf of Mr McMullan are simply lost to any beneficiary. This applicant is plainly the person to whom – and the only person to whom – Mr McMullan could or would have wanted such a pension to be paid.

[26] The applicant submits that Reg 25(2) makes clear that the nomination form is nothing more than a "declaration" that the substantive eligibility criteria are met and that the declaration form therefore adds nothing. This, she says, is underscored by the fact that the nomination is invalidated if the substantive conditions were not in fact met (Reg25(4)); that the nomination is invalidated if the substantive conditions later cease to be met in a relevant way (Reg 25(5)); and that the nomination is invalidated if the substantive conditions have not also been met for the period of two years preceding the member's death and the contrary has not been proven to the respondent's satisfaction (Reg 25(6)(b)).

[27] The applicant submits there is compliance with the substantive conditions which is important and not the filling out of the form and accordingly it is less favourable and unjustifiable treatment to exclude the applicant from recovery on the basis of the non-completion of a nomination form.

[28] The completion of the form is an additional burden on non-married partners, which married partners do not have to undertake. Married partners are "automatically" entitled to the spouse's pension. For married couples, entitlement arises simply by reason of their being in the relevant relationship. When one gets married, there is nothing further that NILGOSC requires you to do in relation to your pension. All that a married partner must do is to prove the quality of their relationship with the deceased. By way of contrast, when the applicant proves the quality of her relevant relationship with the deceased, this is insufficient.

[29] The applicant submits that the different approach to unmarried cohabiting partners renders it much more likely that there will be a problem (as here) with entitlement.

[30] Given that there could only ever be one person eligible for the survivor's pension, the applicant submits that the requirement of completion of the form constitutes a "trap" for those in the applicant's position. In support of this thesis the applicant referred to the low take-up of the scheme.

[31] The applicant also refers to a number of examples of public pension provisions:

(i) The definition of 'surviving adult dependent' in rule E.2(3) of the Armed Forces Pension Scheme 2005 (contained within Schedule 1 to the Armed Forces Pension Scheme Order 2005); and
(ii) The definition of 'surviving eligible partner' in article 23 of the Armed Forces (Redundancy, Resettlement and Gratuity Earnings Schemes) Order 2010.

[32] Accordingly the applicant submits that the requirement to complete a nomination form – in circumstances where there could only ever be one eligible recipient of a spouse's pension and where their substantive entitlement is required to be proven to NILGOSC independently in any event – is an unjustified burden on those who are unmarried cohabiting partners and does not exhibit the "reasonable relationship of proportionality between the aim and the means chosen to pursue it" which is required by Article 14.

[33] The applicant submitted in the alternative that it is disproportionate not to have any discretion as a 'safety valve' for cases such as the present and that the use of a 'one size fits all' requirement is often the cause of disproportionate results. The applicant also contrasted the use of discretion in relation to death grants. In relation to such grants, where there has been no 'expression of wish' form completed, NILGOSC simply investigates the circumstances and determines who is the appropriate person to whom the grant should be paid – see Reg 23(2).

[34] In relation to the issue of a survivor's pension, where there could only ever be one proper recipient, the applicant submitted that it was difficult to see why the provision of the nomination form – even if desirable in the majority of cases – could not legitimately be dispensed with in appropriate circumstances.

[35] The applicant challenged the Department's contention that the use of the nomination form is necessary and that the exercise of discretion is unworkable. It was submitted that this was inconsistent with the approach to death grants (with an infinitely wider range of potential beneficiaries). The applicant also relied on the fact that some other public pension schemes provide discretion to dispense with the strict requirements of eligibility for cohabiting partners e.g. Reg 40(3) of the Police Pension Regulations 2006 (allowing the police authority, in their discretion, to pay a pension, notwithstanding that the period of cohabitation was less than the required 2 years).

Respondent's Submissions

[36] Unlike Morrison the 2009 Regulations expressly provide for the payment to a cohabiting partner of a survivor's pension, in cases in which there is a *nomination* of a cohabiting partner [Reg25(2)] and fulfilment of a prescribed *condition* [Reg 25(2)-(4)]. Those requirements are described by the DoE at para 13 of Marie Cochrane's affidavit as having been:

> "… designed to ensure that the existence of a cohabiting relationship, equivalent to marriage or civil partnership was established in an objective manner and also that the *wishes* of the scheme member had been identified through the execution of a valid nomination form during his lifetime". [My emphasis]

[37] There is, the respondent says, therefore no question of the 2009 Regulations having failed to keep pace with policy. The respondent submitted that the dual requirements of ***nomination*** and ***condition*** proportionately pursue a plainly legitimate aim, given the absence in cohabiting relationships of the legal formality required for the formation and dissolution of marriage and civil partnership.

[38] The respondent challenges the applicant's characterisation of the nomination as a disproportionate and unnecessary formality submitting that it fails to recognise that the declaration is the mechanism by which a member *nominates* his or her cohabiting partner to receive a survivor's pension: Reg 25(2). It is however the fact of nomination (not of declaration) that informs NILGOSC of the *wishes* of the member.

[39] The respondent contends that if the applicant is correct that fulfilment of the Reg 25(3) condition is sufficient to engage eligibility for survivor benefits (without the additional fact of nomination), it follows that any cohabitation in such circumstances will have (perhaps unintentional) testamentary effect. Reg 25(5)(a), which provides that a *nomination* ceases to have effect if cohabiting partner gives written notice of revocation to NILGOSC, will furthermore be rendered otiose.

[40] The term "nominated cohabiting partner" is given a full statutory definition in Reg 25. The concept of "nomination" is integral to the statutory entitlement. Parliament could have chosen simply to use the phrase "cohabiting partner" but elected to expressly include the term "nominated" in the statutory formulation.

[41] Parliament did not seek to provide a specific definition of "cohabiting partner". As Mr McGleenan stated in his written argument there may be persons who "co-habit" in the sense of sharing a residence but who do not have a relationship akin to a marital relationship or civil partnership. Parliament, he said, has avoided the potential difficulties that could arise in drawing distinctions between competing or inappropriate claims of co-habitation by electing not to provide a precise definition of cohabiting partner but, rather, to seek instead to make eligibility conditional upon (a) election by the member ("may nominate") (b) valid

nomination "declaration signed by both.." and (c) the satisfaction of the empirical condition set out in Reg 25(3).

[42] The concept of nomination is not, therefore, an administrative formality confined to the execution of a signature on a document, rather it is integral to the definition of the statutory beneficiary. The law requires more than that a partner is simply cohabiting in a manner which meets the condition in Reg 25(3). The regulation requires that they be nominated formally in order to attain potential beneficiary status. It is the act of nomination that provides the NILGOSC administrator with the key indication of the member's intention for an open-ended benefit that will draw upon the member's fund.

[43] Mr McGleenan submitted that the policy initiative that led to the inclusion of the "nominated cohabiting partner" can be traced back to the 2004 consultation papers *Facing the Future.* Para B8.7-8 provides:

> "Certain considerations arise from the difference between cohabiting partners and married couples or civil partners. For married and civil partners, entitlement is easy to prove objectively and provisions should be simple to administer. For cohabiting partners, clear evidence would be necessary to show that they were living together as if they were husband and wife or civil partners. For the LGPS, as for other public service schemes, evidence of the following would be needed:
>
> - cohabitation;
> - an exclusive, long-term relationship established for a minimum of 2 years;
> - financial dependence or interdependence; and
> - valid nomination of a partner with whom there would be no legal bar to marriage or civil registration.
>
> B8.8 Administering authorities would need to satisfy themselves that the evidence demonstrates that the member and cohabiting partner were living together in a relationship akin to marriage or civil partnership."

[44] The Department's deponent avers at para 15 of her affidavit that the source for the evidential requirements for cohabitation in the 2009 Regulations was the Principal Civil Service Pension Scheme in England and Wales which provides at section E.2(3):

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

[45] Mr McGleenan submitted the nature of a cohabitee relationship is different from that of a marriage in that there is no formal legal mechanism objectively indicating the commencement or termination of the relationship. Accordingly, there was a need for objective verification of the status of a co-habiting relationship. It is said a member could be in a cohabiting relationship which meets the condition in Reg 25(3) but choose not to nominate the cohabiting partner as a beneficiary of the survivor benefit and that a presumption that afforded the benefit to a surviving cohabitee without the requirement of nomination could result in a benefit being afforded that was entirely contrary to the intentions of the member. It is also said the requirement for nomination is not onerous requiring no more than the formation of an elective choice and the execution of a joint declaration.

[46] In summary, the respondent, notice party and AGNI (in his written submissions) contended that the 2009 Regulations did not offend Article 14 ECHR read together with Article 1 of the First Protocol ECHR.

Relevant Case Law

[47] The court was referred to Humphreys v The Commissioners for Her Majesty's Revenue and Customs [2012] UKSC 18 where the Supreme Court considered the question of whether the payment of Child Tax Credit to one person only in respect of each child (even where the care of the child is shared between separated parents) constituted an unjustified difference in treatment within the ambit of article 1 of the First Protocol ECHR. Lady Hale (with whom the other Justices agreed) referred to Stec v United Kingdom (2006) 43 EHRR 1017 and said that:

"The Court repeated the well-known general principle that "A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (para 51). However, it explained the margin of appreciation enjoyed by the contracting states in this context (para 52):

> 'The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of *economic or social strategy*. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect *the legislature's policy choice unless it is 'manifestly without reasonable foundation.'*" [16]. [Emphasis added]

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

> "… well-established that bright line rules of entitlement to benefits can be justified, even if they

> involve hardship in some cases. Hence, this rule cannot be said to be unreasonable or 'manifestly without reasonable foundation'".

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

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

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

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

[51] In Ghaidan v Godin Mendoza [2004] 2 AC 557 at para19 Lord Nicholls of Birkenhead said of the role of the Court in such applications:

> "Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion only when it is apparent that the legislature has attached insufficient importance to a person's convention rights. The readiness of the court to depart from the view of the legislature depends on the subject matter of the legislation and of the complaint".

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

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

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

Conclusion

[54] Is the requirement for nomination in Reg 25 a proportionate and justified *means* of achieving a legitimate social policy aim? The unusual feature of this case is that the *means* appear to be inconsistent with the legitimate aim. The aim or underlying objective of this

aspect of the pension scheme is to place unmarried, stable, long-term partners in a similar position to married couples and those in a civil partnership to facilitate entitlement to a pension without discrimination on the grounds of status. To that extent the social and legal policy underpinning the scheme is clear.

[55] This is a case where, if the relevant pension is not paid to the applicant, the monies contributed by the deceased to his pension will, as far as the deceased and his surviving partner are concerned, simply be lost. It is little solace to them that, as the department argued, funds paid over many, many years might be used for the overall benefit of the pension fund or its contributors.

[56] In marriage and in civil partnerships the pension devolves automatically irrespective of the subjective frame of mind of the partner. The quality of the relationship and the intention of the parties is presumed by virtue of the status of the relationship. In the case of cohabitees the absence of legal formalisation has necessitated the introduction of the condition in Reg 25(3) to identify qualifying cohabitation for the purposes of entitlement on a similar basis to those who are married or in civil partnerships. Since the quality of the relationship of cohabitees clearly lacks the legal definition and certainty of marriage [and civil partnership] that deficiency was addressed by the requirement of *evidencing* the substantive conditions. In this way those in a 'permanent' relationship would not be discriminated against on the grounds of their marital status since satisfaction of the substantive conditions placed the relationship on a comparable footing with marriage and civil partnership.

[57] The justification for the impugned requirement of nomination is said to be the need to establish the wishes of the deceased. There can be no doubt that the impugned requirement constitutes an additional hurdle which must be surmounted which is not required of married and civil partners. In the present case there is some material suggestive of a low take-up by cohabiting partners. The failure by the deceased to utilise the nomination procedure appears to be inconsistent with the permanent nature of their relationship. Such a hurdle, whilst not designed to discourage take-up, may have that unintended consequence. 'Opting in' or 'opting out' requirements produce different results. One thing is however clear and that is it made no sense for the deceased to 'wish' disentitlement upon the woman to whom he was engaged. It is much more rational and proportionate to assume, as in the case of the comparator relationships, that the person paying into the pension fund would ordinarily wish his surviving partner and not the fund to benefit. It surely could not have been his desire to swell the pension fund for the benefit of mere strangers. It is irrational and disproportionate to impose a disqualifying hurdle of this kind on the applicant who was indisputably in a qualifying relationship in that it fulfilled the substantive conditions.

[58] There is considerable force in Mr Scoffield's submission that the different approach to unmarried cohabiting partners renders it much more likely that there will be a problem (as in the present case) with entitlement. For example scheme members may be unaware of the need to fill out a nomination form; the information informing them of this requirement may not have reached them (for instance, by the relevant notification being sent to the wrong address); completion of the nomination form may be forgotten about or insufficiently

prioritised; the same may be the case for the return of the form; there may be confusion as to where to obtain the form, or how to complete it; there may be further confusion as to whether the form should be submitted to one's employer or directly to NILGOSC; the form could be lost or misplaced in the post; and/or the form could be lost by NILGOSC or mis-filed, etc.

[59] The imposition of the additional hurdle in respect of cohabiting partners has had an effect in this case which appears to run contrary to the legitimate aim of the legislative scheme which was to facilitate entitlement to pensions without discrimination on grounds of status. In fact, in this case, the additional requirement, unique to qualifying cohabitees, has become an instrument of disentitlement.

[60] I can quite understand the desirability of a marriage or civil partnership certificate as proof of the fact of the formal relationship. Equally a nomination is a form of [self authenticating] certificate which will make the administration of the scheme easier. But if it is merely evidence of the fact of the requisite relationship (and that is accepted in this case as having been established) I fail to see how the absence of the requisite certificate can, proportionately, mandate refusal in all cases whatever the strength of the applicants claim. If, as the respondent has argued, the nomination is required as proof of *intention* the requirement is more obviously objectionable because on the grounds of status it is effectively being presumed that those in a comparator relationship would treat their partners (and family unit) less favourably – that is to say that they would wish to disentitle their partner. Such a presumption is irrational and likely in most cases to be contrary to the intentions of the scheme member. Yet it was the wishes of the scheme member which the respondent argued necessitated the imposition of the requirement. It seems more rational, once the quality of the relationship has been established to the legislative threshold, to treat the intention of the partner on a non-discriminatory footing and in a similar manner to those who are married or in a civil partnership.

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

[62] The judicial review is allowed and I will hear the parties as to whether, and if so what, further remedy is required.