Hilary Term
[2017] UKSC 8
On appeal from: [2013] NICA 54

JUDGMENT

In the matter of an application by Denise Brewster for Judicial Review (Northern Ireland)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Dyson

JUDGMENT GIVEN ON

8 February 2017

Heard on 24 November 2016

Appellant
Helen Mountfield QC
Chris Buttler
(Instructed by Deighton Pierce Glynn)

1st Respondent
Nicolas Hanna QC
Donal Sayers
(Instructed by Carson McDowell LLP Solicitors)

2nd Respondent
Tony McGleenan QC
Donal Lunny BL
(Instructed by Departmental Solicitor's Office, Department of Finance and Personnel)

LORD KERR: (with whom Lady Hale, Lord Wilson, Lord Reed and Lord Dyson agree)

Introduction

1. William Leonard McMullan, known as "Lenny" McMullan, and Denise Brewster lived together for some ten years before December 2009. On Christmas Eve that year, they became engaged. Sadly, Lenny McMullan died two days later. His death was sudden and unexpected; he was only 43 years old. He was found dead in the home that he shared with Ms Brewster in Lilac Avenue, Coleraine, County Londonderry. The couple had bought the house together in April 2005. Mr McMullan died intestate. He had no children.

2. At the time of his death, Mr McMullan was employed by Translink, the company which provides Northern Ireland's public transport services. He had worked for that company for approximately 15 years. Throughout that time Mr McMullan was a member of and paid into the Local Government Pension Scheme Northern Ireland (the scheme). The first respondent, the Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC), is the statutory body responsible for administering the scheme. When Mr McMullan died, NILGOSC administered the scheme pursuant to the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 (SI 2009/32) (the 2009 regulations). The second respondent, the Department of the Environment for Northern Ireland (DENI), made and was responsible for the 2009 regulations.

3. Among other things, the 2009 regulations provide for the payment of retirement pensions to members of the scheme and for the payment of pensions and other benefits to certain survivors of members. In April 2009, on the coming into force of the 2009 regulations, a cohabiting surviving partner became eligible for the first time, for payment of a survivor's pension. But, in order to qualify for payment of the pension, a cohabiting surviving partner had to be nominated by the member. Ms Brewster believes that Mr McMullan had completed a form in which he nominated her. NILGOSC says, however, that it did not receive the form and has refused to pay her a survivor's pension. The appeal has proceeded on the basis that the nomination was not made.

4. Ms Brewster applied for judicial review of NILGOSC's decision not to award her a survivor's pension, arguing that the absolute requirement of nomination imposed on unmarried partners as a condition of eligibility for a survivor's pension

under the 2009 regulations constitutes unlawful discrimination contrary to article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), when read in conjunction with article 1 of the First Protocol (A1P1) to ECHR. In a judgment delivered on 9 November 2012, (neutral citation [2012] NIQB 85) Treacy J held that the nomination requirement was "an instrument of disentitlement" (para 59) in relation to unmarried partners and that whilst the impugned regulations pursued a legitimate aim, there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. He therefore made an order declaring that the requirement of nomination of a cohabiting partner in the 2009 scheme was not compatible with article 14 ECHR read together with A1P1. He quashed the decision of NILGOSC dated 1 July 2011 by which it had declined to pay the appellant a survivor's pension.

5. NILGOSC and DENI appealed. On 1 October 2013, by a majority, Girvan LJ dissenting, the Court of Appeal (Higgins, Girvan and Coghlin LJJ, neutral citation [2013] NICA 54) allowed the appeal. Higgins LJ found that the nomination requirement was not unjustified or disproportionate; and Coghlin LJ also concluded that the requirement had not been shown to be manifestly without reasonable justification.

Survivor benefit schemes for unmarried partners of public service employees

6. In December 1998, the government in Westminster published a Green Paper on pension reform. It was entitled "A new contract for welfare: partnership in pensions". The Green Paper stated that occupational pension schemes were one of the great welfare success stories of this country (para 1, p 65). It was observed that, "[m]ost large occupational pension schemes in the private sector now provide survivors' benefits for the unmarried partners of the opposite sex of scheme members, although in the overwhelming majority of cases this is at the discretion of the trustees" (para 59, p 76). At the time of the publication of the Green Paper, in contrast to private sector schemes, public service schemes only provided survivors' pensions to the spouse of a deceased member (para 60, p 76).

7. The first public sector scheme to introduce survivors' pensions for unmarried partners was the Civil Service Pension Scheme in 2002. It included a requirement to "jointly [make] and [sign] a declaration in a form prescribed by the Minister". No evidence has been proffered as to why the requirement for such a declaration was included.

8. In October 2004 a consultation exercise was conducted into the operation of the England and Wales Local Government Pension Scheme: Facing the Future - Principles and propositions for an affordable and sustainable Local Government

Pension Scheme in England and Wales. This was carried out through the Office of the Deputy Prime Minister. It was proposed that survivors' benefits be extended generally to cohabiting partners, provided that members of individual schemes wanted this and were prepared to meet the extra cost involved. The consultation paper suggested that "certain considerations" arose because of the different situations of, on the one hand, married or civil partners and, on the other, cohabiting unmarried couples but the only consideration referred to in the paper itself was the nature of proof required in the latter case to establish "they were living together as if they were husband and wife or civil partners". Outlining the types of evidence that would be required to verify the authenticity of the relationship, the paper adumbrated a number of different requirements, including that there be a "valid nomination of a partner with whom there would be no legal bar to marriage or civil registration" - essentially an opt-in obligation: para B8.7. Once again, the consultation paper provided no explanation as to why it was thought that evidence of a valid nomination was needed in addition to objective evidence of the nature of the relationship. Moreover, there was no consultation question inviting response to the proposed evidence requirements.

9. In June 2006 a further consultation paper was issued setting out four options, all of which proposed survivors' pensions for cohabitants but none of which contained a nomination requirement: Where next? - Options for a new-look Local Government Pension Scheme in England and Wales. The consultation paper stated, however, that the Law Commission was conducting a project on cohabitation and that a final report was expected by August 2007. It was noted that the Law Commission was considering the case for "allowing cohabiting couples to 'opt-in' to a scheme imposing enforceable financial obligations … in the event of their separation": paras 6.14-6.15.

10. The Law Commission's inquiry into and subsequent report on cohabitation was, of course, conducted on a much wider plane than consideration of survivors' benefits for unmarried partners of public service employees. The consultation paper published in advance of the commission's consideration ranged over all manner of financial protection for unmarried cohabiting couples: Cohabitation: The Financial Consequences of Relationship Breakdown (2006) (Consultation Paper No 179). A key element of the discussion was whether an "opt-in" provision was required in order to anchor financial security for cohabiting partners. In its consultation paper the commission adverted to the fact that opt-in schemes had been introduced in several European states and elsewhere but that the "take-up for these schemes, even where open to both opposite-sex and same-sex couples, is generally low": para 5.45. The reasons for that were discussed in the consultation paper. It could be that one partner was unwilling to make the commitment or that the other, willing to make the commitment, was reluctant to raise it lest that jeopardise the relationship. As the consultation paper pointed out at para 5.28, it might be considered

> "… too harsh to deny all legal protection to the economically weaker party in the event of separation. Even if the failure to take that step were due to inertia, or a lack of proper appreciation of the legal significance of not taking that step, the harshness of the result in some cases could be regarded as a wholly disproportionate sanction for that inactivity."

11. The commission's provisional view was set out in paras 5.53 and 5.54 of the consultation paper:

> "5.53 In our view, a scheme that applied by default to eligible cohabitants, subject to a right to opt out, would create an appropriate balance between affording scope for party autonomy and securing fairer outcomes for individuals at the end of cohabiting relationships. It would mean that inactivity would not, as it currently does, leave the more vulnerable party unprotected at the point of separation: the scheme would apply by default in the absence of a valid opt-out agreement.
>
> 5.54 Many other jurisdictions have adopted this approach, following the trend set in 1984 by New South Wales, the first jurisdiction to create a statutory scheme for financial relief between cohabitants. That pattern has been replicated across other jurisdictions, including the rest of Australia, most of the Canadian provinces, New Zealand, some parts of Spain, Sweden and, most recently, Scotland."

12. After extensive consultation, the Law Commission's final report was duly published on 3 July 2007 (Cohabitation: The Financial Consequences of Relationship Breakdown (Law Com No 307) (Cm 7182)) and, having observed that most consultees had agreed with the commission's provisional view, it firmly rejected an opt-in requirement. The penalisation of cohabitants for their failure to subscribe to an opt-in scheme was discussed at para 2.88 of the report:

> "… research suggests that providing people with information about the law and what they should do to protect their legal position does not guarantee that they will take those steps, or even be able to do so. Indeed, while there was considerable support among respondents to the Living Together Campaign survey for opt-in regimes, the fact that so few of those individuals had taken action based on the information that they

had obtained suggests that few would in practice register their relationship or be able to do so."

13. A major underpinning of the commission's preference for the opt-out scheme was the protection of the vulnerable partner in the relationship and this might be considered to have more direct relevance to separation of cohabiting partners, rather than the death of one of them. The latter situation was discussed in the commission's report at para 6.13 where it was stated:

> "It is important … not to equate separation and death. Many consultees felt, and we agree, that there is a qualitative difference between a relationship cut short by death and a relationship terminated by separation. On separation, there has ordinarily been a failure of commitment by at least one of the parties. It is, therefore, legitimate when considering the eligibility of separating couples under our recommended scheme to ask whether the length of the relationship indicated that there was, at least at one time, sufficient commitment between the parties to justify bringing the relationship within the scheme. Where a relationship is terminated by death, however, the ending of the relationship does not of itself suggest that there was any lack of commitment on either side. This qualitative difference may well affect what should be regarded as reasonable financial provision on death and who should be eligible to make a claim under the 1975 [Inheritance (Provision for Family and Dependants)] Act."

14. It is, of course, the case that these comments were made in the context of whether cohabitants should be included in the categories of person entitled to make an inheritance claim under the 1975 legislation. But important general considerations underlie the observations. In the first place, it will be more readily deducible that the requisite level of commitment existed between the parties where the ending of the relationship is brought about by death rather than separation. Secondly, notions of fairness have an obvious role to play when one is considering whether it is right to deny financial benefit to a surviving unmarried partner when a married partner would have an automatic right to that benefit. These considerations bear on the justification for the preservation of the requirement of nomination in the impugned regulations.

15. The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166) (which, of course, applied in England and Wales) were laid before Parliament in April 2007, three months before the Law Commission's report was published. Notwithstanding the fact that no

proposal for a nomination requirement had been made in the consultation paper, such a requirement featured in regulations 24 and 25. The Explanatory Note to the regulations did not give a reason for the nomination requirement.

16. The Local Government Pension Scheme in England and Wales was revised in 2013 with effect from 1 April 2014 for claims arising after that date: the Local Government Pension Scheme Regulations 2013 (SI 2013/2356). The revisions included the removal of the opt-in or nomination requirement for unmarried couples. The same change was made to the Scottish scheme by the Local Government Pension Scheme (Scotland) Regulations 2014 (SSI 2014/164). The circumstances in which these changes took place and why they were not introduced in Northern Ireland are discussed in paras 24-28 below.

The background to the Northern Ireland scheme

17. In an affidavit filed in these proceedings on behalf of DENI, Marie Cochrane, a deputy principal in the department, stated that the scheme in Northern Ireland had mirrored the scheme in Great Britain because it was considered to be generally desirable that local government employees should have "equivalent pension benefits right across the UK". In August 2006, therefore, while the consultation in England and Wales was taking place, a separate consultation exercise was begun in Northern Ireland. Although the Northern Ireland exercise was separate from that which had started in England and Wales some two months before, the consultation paper for the latter formed the centrepiece of the documentation sent to consultees in Northern Ireland. Consultees were told that the Northern Irish scheme "maintains parity" with the scheme in Great Britain. As earlier noted, the consultation paper for England and Wales did not suggest a nomination requirement in any of the four proposals that it contained. Nor did the letter from Ms Cochrane which started the consultation process in Northern Ireland.

18. Despite the absence of any reference to a nomination requirement, NILGOSC, in its response to the consultation letter, raised the issue. In its letter of 9 October 2006 to DENI, it pointed out that the Civil Service Pension scheme stipulated that there be a valid nomination of a cohabiting partner to receive a survivor's pension. NILGOSC immediately referred to "a number of inequalities" that would arise from such a requirement and to the possibility of legal challenge if these were not addressed. These included:-

> 1. The fact that married or civil partners did not have to be living together in order to benefit from the scheme, whereas cohabiting unmarried partners did;

2. A married or civilly registered couple did not have to be in an exclusive, long term relationship established for a minimum of two years in order for a survivor pension to be paid; and

3. A survivor pension would automatically be paid to a married or civilly registered partner; no nomination was required in their case. The lack of a valid nomination form was likely to result in disputes where all the other criteria were met.

19. Since neither the consultation paper for the England and Wales exercise nor the letter from Ms Cochrane which set the Northern Ireland consultation in train contained any reference to a nomination requirement, it is unsurprising that no policy objectives that might be achieved by such a requirement were identified by DENI when it set up the consultation process. But the letter from NILGOSC certainly brought the question of the need for such a requirement to centre stage. The appellant has pointed out that no evidence has been produced by DENI to show that the matter was considered at all, even after the letter from NILGOSC was received. Indeed, the only policy driver which emerges from a consideration of contemporary documents is the need to "maintain parity" with the rest of Great Britain. No independent assessment of the need for or the viability of a nomination requirement was undertaken. It appears that no attempt was made to address the possible difficulties that NILGOSC's letter had identified.

The 2009 Regulations

20. The 2009 Regulations were made under powers conferred by the Superannuation (Northern Ireland) Order 1972 (SI 1972/1073 (NI 10)). Article 9 of that Order allowed DENI to make regulations providing for pensions, allowances or gratuities to be paid to or in respect of such persons, or classes of persons, as were to be prescribed. In general, these were persons employed by local authorities and other public service employees.

21. On 6 June 2008 DENI invited consultees to comment on the draft regulations. The draft regulations included the nomination requirement. The only reference to this in the 6 June letter was that survivor benefits would be payable to widows, widowers, civil partners and nominated cohabiting partners, but the letter did not provide any explanation for the reason for including a condition of nomination nor did it specifically invite comment on it.

22. The 2009 Regulations were made on 25 February 2009 and the new Pension Scheme came into effect on 1 April 2009. The relevant provisions are contained in regulations 24 and 25. The material parts of those regulations are as follows:

> "24(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 …
>
> 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 two 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 two years which includes the day on which the declaration is signed.

(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 two years immediately prior to A's death."

23. It is clear that mere nomination will not satisfy the requirements of regulation 25. By para (4) of the regulation, nomination has no effect if the condition specified in para (3) has not *in fact* been satisfied for the requisite period. And by para 6(b) the nominated partner is required to satisfy the committee that the condition in para (3) had indeed been fulfilled. So the applicant must show that she has been a cohabitant for two years before the date of declaration and been in that position for two years before the date of death. The provisions demand of the surviving cohabitant that she or he prove to the satisfaction of the committee that the stipulations in para (3) have been met. They are freestanding of the nominating procedure. The question therefore arises, what is the function of requiring nomination? The appellant says that it adds nothing to the process of establishing that the qualifying conditions have been met.

The 2013 Regulations in England and Wales and the 2014 Regulations in Scotland

24. The Local Government Pension Scheme in England and Wales was revised with effect from 1 April 2014 for claims arising after that date. The revisions included the removal of the opt-in requirement for unmarried couples. Survivors' pensions are now available to "cohabiting partners". They are defined in Schedule 1 to the Local Government Pension Scheme Regulations 2013 as follows:

> "'cohabiting partner' means a person whom the appropriate administering authority is satisfied fulfils the following conditions -
>
> (a) the person (P) has fulfilled the condition in paragraph (b) for a continuous period of at least two years on the date the member (M) died, and
>
> (b) the condition is that -
>
> (i) M is able to marry, or form a civil partnership with P,
>
> (ii) M and P are living together as if they were husband and wife or as if they were civil partners,
>
> (iii) neither M nor P is living with a third person as if they were husband and wife or as if they were civil partners, and
>
> (iv) either P is financially dependent on M, or M and P are financially interdependent."

As stated in para 16, the same change was made to the Scottish scheme by the Local Government Pension Scheme (Scotland) Regulations 2014.

25. The circumstances in which the nomination requirement in the England and Wales scheme was removed were explained in an affidavit of Chris Megainey, the deputy director (Workforce, Pay and Pensions) in the Department for Communities and Local Government (DCLG). He explained that the first consultation document

which was issued before the draft 2013 regulations were prepared had included a proposal that the nomination requirement be maintained but consultees were invited to address the question of the need for its retention in light of the decision of Treacy J in the present case. Seventeen of the responses which were received (a significant majority) expressed a wish that DCLG should explore the possibility of introducing "a less onerous system for determining a cohabiting partner's entitlement to a survivor's pension". In response to these replies, further consultations took place and it was decided that the nomination requirement should be removed. In a second affidavit, Mr Megainey said that, to the best of his knowledge and belief, "the nomination requirement was removed from the legislation because it was considered to be unnecessary."

26. Kimberley Linge, Policy Manager in the Scottish Public Pensions Agency (SPPA), explained the reasons for the change in the Scottish regulations. She said that after the Court of Appeal had given its decision in the present case, SPPA had sought advice from the Scottish Government Legal Department about the nomination issue. The advice received was to the effect that the nomination requirement was an overly burdensome one for cohabitants when compared with the requirements imposed on married partners and civil partners. Initially, that advice was not acted upon but following discussion at the Scottish Local Government Pension Scheme Advisory Group (a tripartite group comprising the unions, the Convention of Scottish Local Authorities and the Scottish Government) it was agreed to dispense with the nomination requirement.

The application to re-open the appeal

27. When the appellant's advisers became aware of the changes to the English 2013 and the Scottish 2014 regulations, they applied to the Court of Appeal for a re-opening of the appeal. This was against the background that in the draft amended regulations which had been proposed in Northern Ireland in 2014 the nomination requirement was to be retained. DENI opposed the application to re-open the appeal. In an affidavit filed to support DENI's opposition to the reopening of the appeal, Ms Cochrane stated:

> "I can confirm that the Department was not aware, at the date of hearing of this Appeal, of the intention of DCLG to amend the specific provision on the nomination requirement for a cohabiting partner survivor benefit. … The Department, which is not copied into consultations by DCLG, first became aware of the existence of the 20 June 2013 consultation document on or about 24 June 2013 through either the DCLG website or through a specialist pensions bulletin published by Pendragon. However, the Department did not become aware of the relevant

> part of the 20 June 2013 consultation until some point after 8 July 2013 … Having become aware of the relevant part of the 20 June 2013 consultation document, I did not consider that this could have any bearing upon the *Brewster* case because the said case had already been heard on 8 and 9 May 2013 and because the proposed changes were prospective and related only to England & Wales. Also a separate process for the development of proposals for the reformed Local Government Pension Scheme in Northern Ireland was underway. I was not aware of the need to advise Departmental Solicitors Office of a prospective change in another jurisdiction and consequently did not do so."

28. The application to re-open the appeal was refused on 22 May 2014 and the Northern Irish scheme was revised on 27 June 2014. The new scheme did not remove the nomination requirement for unmarried couples. No evidence has been offered of any contemporaneous consideration of the need to preserve this requirement or of the desirability of amending the Northern Irish scheme so as to bring it into line with the changes in the rest of the United Kingdom, notwithstanding that before Treacy J and the Court of Appeal, DENI had relied on the allegedly critical importance of parity with the England and Wales scheme.

The policy behind the nomination requirement

29. Ms Cochrane dealt with the policy objectives underlying the 2009 Regulations and, in particular, the procedural requirements for cohabitants claiming survivor benefit in para 13 of her first affirmation, dated 21 February 2012, where she said:

> "… the decision to introduce in Northern Ireland the same procedural requirements for claiming a survivor's benefit was heavily influenced by the reforms already introduced in England & Wales. The policy objectives of those requirements were those identified in the 2004 consultation paper issued by the Office of the Deputy Prime Minister. They were 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."

30. One can understand why the procedural requirements designed to establish that a genuine and subsisting relationship existed had been included in the regulations. But this does not explain why a nomination was required. If it was shown (as, for the reasons given in para 23 above, it had to be) that there was indeed a cohabiting relationship which satisfied the tests as to its genuineness and existence at the time of the death, why was a nomination process needed? This added nothing to the evidential hurdle which a surviving unmarried partner of a scheme member had to face.

31. If the requirements in regulation 25(3) (other than the making of a nomination) are satisfied, the only conceivable object of the nomination requirement was to find out what the scheme member wanted. But what had those wishes to do with the question of entitlement? It is not enough simply to state that the procedural requirements were designed to ensure that the wishes of the scheme member had been ascertained, in order to invest that aim with the necessary attribute of legitimacy. The confirmation of those wishes does not have some intrinsic, undeniable value. The purpose behind the avowed need to ascertain them must be stated.

32. It has been said that its purpose was not to permit a scheme member to prevent, for vindictive reasons, his cohabiting partner from receiving a survivor's benefit, although, on its face, it certainly had that potential. If that was not its purpose, what then was it? DENI adopted Higgins LJ's characterisation of the purpose of the scheme to be "to permit some cohabitants in certain defined circumstances to obtain the same pension provision as those who are married or in a civil partnership" - para 17 of his judgment. DENI expressly disavowed the legitimate aim of the regulations which Treacy J had identified *viz* to facilitate entitlement without discrimination on grounds of status. What the judge had said about the aim of the regulations appears at para 54 of his judgment:

> "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."

33. DENI's repudiation of the judge's description of the aim of the regulations (in so far as they relate to the treatment of surviving unmarried partners of scheme members) is, to say the least, surprising. It is especially so in light of DENI's proper - but inevitable - acceptance that the provision of a survivor benefit under the scheme engages A1P1 of ECHR and that the appellant's status, as a person who was in a cohabiting relationship other than a marriage or a civil partnership at the time of her partner's death, is a relevant status for the purposes of article 14 ECHR. The judge

had been careful to couch his description of the aim of this aspect of the pension scheme in terms which reflected the stability and long term nature of the relationship.

34. It surely must be the case that the regulations were geared to eliminate unwarranted differences of treatment between married or civil partner survivors on the one hand and, on the other hand, those unmarried long term partners who were in a stable relationship with the scheme member before death. Given DENI's acceptance that the provision of a survivor benefit engages A1P1 and that the appellant has the requisite status to rely on article 14, unwarranted (ie unjustified) difference of treatment (ie discrimination) would bring it into breach of its ECHR obligations if such unequal treatment was not eradicated. In my view, DENI simply cannot be heard to say that elimination of unjustified difference of treatment between, on the one hand, the survivor of a scheme member who establishes that they were in a stable long term relationship with that member and, on the other, a married or civil partner of a scheme member was not the aim of the inclusion of unmarried partners within the survivors' entitlement. This must have been its objective and, expressed in that way, it is no more than a rephrasing of the judge's formulation of the aim.

35. The error of DENI's submission on this point and, with respect, Higgins LJ's characterisation of the aim of the regulations on this aspect is to confuse the aim with the means employed to achieve it. Permitting some cohabitants in certain defined circumstances to obtain the same pension provision as married or civil partner survivors is the way in which unjustified discrimination is avoided. It is not an end in itself. The essential question, therefore, is whether imposing a nomination requirement in fact conduces to unwarranted difference of treatment or to its removal.

36. It is for this reason that it is relevant to note that the wishes of a married scheme member did not have to be stated or ascertained. If nomination was not required of a married survivor of a scheme member and if the overall aim of the amended regulations was to place a surviving cohabitant who was in a stable, long term relationship with the deceased scheme member on an equal footing with a surviving spouse or civil partner, the need for a nomination procedure in the case of the cohabitant is difficult to find. If it was designed to test the truth of a claim that the relationship was stable and long-lasting, that would be one thing. But it was not. The obligation to establish those features of the relationship was entirely independent of the nomination procedure. Nothing in the contemporaneous documentation suggests that this consideration underlay its inclusion in the scheme.

37. One must therefore look elsewhere to find out why the nomination procedure was considered to be needed. As to the averment in Ms Cochrane's affirmation that

the policy objectives of the procedural requirements were "those identified in the 2004 consultation paper issued by the Office of the Deputy Prime Minister", Girvan LJ correctly pointed out at para 6 of his judgment in the Court of Appeal, that that consultation paper provides no explanation as to why "nomination would or should be evidentially required". The 2004 paper is of no assistance, therefore, as to any objective which the nomination procedure might achieve. Moreover, as again Girvan LJ rightly observed in para 6, there was simply no evaluation of the "pros and cons" of having a nomination or opt-in procedure. The only discernible reason operating at the time the 2009 regulations were made was that it was considered necessary and/or desirable that they should mirror the provisions in England and Wales.

Post hoc justification for the nomination requirement

38. In para 15 of her first affirmation, Ms Cochrane alluded to the formal dimension that the nomination procedure brought to a claim for survivor's pension. She said:

> "It is the view of the Department that these [procedural] requirements are reasonable and proportionate measures designed to establish in a formal manner, the intentions of the deceased about a matter which has testamentary significance. Furthermore, cohabiting relationships are different from marriage and civil partnerships insofar as they may be commenced and ended without legal formality and do not involve a change of an individual's legal status. The Department is of the view that if a Scheme member chooses to have a cohabiting relationship which is neither marriage nor civil partnership, the requirements of the 2009 Regulations are an appropriate means by which to determine the existence, formality and status of the relationship in addition to obtaining independent verification of the deceased's wishes."

39. It has not been suggested by DENI that these considerations featured in its assessment of whether a nomination procedure was required before the 2009 Regulations were made. They must nevertheless be considered now in order to see whether they support the claim as to the reasonableness and proportionality of the measure. The value of "formality" in this setting is not explained. Since the regulations require a surviving cohabitant to establish that she or he had been in a long term relationship with the scheme member, it is difficult to see what formality adds to the question of entitlement. The same may be said of the circumstance that cohabitation does not involve a change in legal "status". It is in the very nature of cohabitation that there is no legal formality or change of status involved. But there

is no immediately obvious reason that some ersatz substitute for the legal formality of marriage or civil partnership would contribute to the assessment of a cohabitant's entitlement to a survivor's pension. That entitlement derives from the survivor having been in a longstanding relationship with the scheme member. In so far as the use of the word "existence" in the final sentence of the cited passage connotes some extra proof of the relationship, as I have already pointed out, the terms of regulation 25 require the survivor to establish by independent means that the relationship was of the nature and duration required to satisfy the scheme's requirements. There was no further need of proof beyond this. On the question of the verification of the deceased's wishes, I have already made clear in paras 31-36 above why I do not consider that this is a relevant consideration.

40. Before the Court of Appeal, both respondents took up the theme of testamentary significance, which had been foreshadowed in Ms Cochrane's affirmation. They submitted that by lodging a nomination form, the scheme member and her or his cohabitant were required to make a "public affirmation" akin to the "formal and public commitment" of marriage and that this added a necessary ingredient of correctness to the process. This argument found favour with the majority, Higgins LJ, describing it as "crucial" (para 19) and Coghlin LJ characterising the nomination form as a "public statement from both participants equivalent to the production of a certificate of marriage or civil partnership" (para 23).

41. The need for a formal or public affirmation is not explained. Certainly, in this context, it has no inherent value. It does not, of and in itself, make the survivor any more deserving of the pension. The essence of entitlement is that the relevant parties have lived together for a sufficiently long period and that one is financially dependent on the other or that they are financially interdependent. Being required to make a public declaration that these conditions obtain adds nothing to the objective inquiry as to whether they in fact exist.

42. Arguments were also advanced to the effect that administrative costs would increase if the nomination procedure was abandoned and that actuarial predictions were easier with that procedure in place. No evidence to support those claims was presented to the Court of Appeal and the arguments were not pursued before this court. Echoes of them might be found in the printed case of DENI to the effect that "the nomination requirement is a bright-line inclusionary rule of general application directed to workability and legal certainty" but again no material to establish the truth of these assertions was proffered.

43. It is clear, therefore, that the making of a nomination adds nothing to the evidential demands made of a survivor to show that she or he was in a longstanding relationship with the deceased scheme member and that they were either financially

dependent on or financially interdependent with the deceased. It is also evident that no intrinsic value attaches to the making of such a nomination.

The areas of agreement

44. It is not in dispute that the denial of a survivor's pension falls within the ambit of A1P1 which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

45. Although the right to a pension might not be regarded, in conventional terms, as a possession, it is well settled that A1P1 protects "possessions", which can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. It does not, however, guarantee the right to acquire property (see *Kopecký v Slovakia* (2004) 41 EHRR 43, para 35 (GC) and *J A Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 45, para 61 (GC)).

46. It is likewise not in dispute that the appellant, as a person who was in a cohabiting relationship other than a marriage or a civil partnership at the time of her partner's death, enjoyed a relevant status for the purposes of article 14 ECHR (*In re G (Adoption Unmarried Couple)* [2008] UKHL 38; [2009] AC 173, paras 8, 107 and 132). Article 14 provides that the enjoyment of the rights and freedoms in ECHR "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

47. It was also agreed that a surviving unmarried partner falling within regulation 25(6)(b) of the 2009 Regulations is in an analogous situation to a surviving married partner or civil partner. The single area of dispute between the parties, therefore, is

whether the interference with the appellant's right to property has been "objectively justified" - see para 13 of Higgins LJ's judgment.

The proper approach

48. The starting point in the analysis of whether there is objective justification for interference with the appellant's right to property must be the duty of the state to "secure" her entitlement to equal treatment. Unlike, for instance, the duty under article 8 of ECHR, which enjoins the state to respect the citizen's right to a private life etc, article 14 requires of the state that it should ensure that her rights under ECHR are in place unless there is objective justification for denying them to her. The European Court of Human Rights (ECtHR) has been careful to question whether discrimination in the enjoyment of survivors' rights based on some prior failure to "regularise" a relationship has been justified: *Marckx v Belgium* (1979) 2 EHRR 330. In that case ECtHR held that the limitations placed on the capacity of an unmarried mother to give and bequeath, and her child to take and inherit, property were discriminatory if they had no objective and reasonable justification in the sense that there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised: para 33. The obligation to secure rights must require a greater level of vigilance on the part of the state authorities than is animated by a duty to have respect for a particular species of right. The duty to secure rights calls for a more proactive role than the requirement to respect rights.

49. The question whether justification has been demonstrated must be assessed objectively - see *R (SB) v Governors of Denbigh School* [2006] UKHL 15; [2007] 1 AC 100, para 30, per Lord Bingham of Cornhill. That is not to say, however, that the court should substitute its view for that of the decision-maker. Indeed, it may be appropriate to accord a wide margin of discretionary judgment to the conclusion of a decision-maker, particularly where it is the legislature that makes the choice and where the conclusion lies within the field of socio-economic policy. Thus, for instance, in the case of *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] QB 373, where a claim pursuant to section 1(3)(b) of the Fatal Accidents Act 1976 was dismissed because, although the claimant was a cohabiting partner of the deceased, she did not meet the condition of having lived in the same household for a period of two years immediately before the date of death, it was held that Parliament was better placed than the courts to appreciate what was in the public interest on an issue of socio-economic policy (para 24).

50. But the margin of discretion may, of course, take on a rather different hue when, as here, it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken. In such circumstances, the court's role in conducting a scrupulous examination of the objective justification of the impugned

measure becomes more pronounced. An example of this is to be found in the case of *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420, paras 46-47, where Lord Mance asked:

> "… what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention? The court is then deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on Convention issues. The court's scrutiny is bound to be closer, and the court may … have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider."

51. The appellant has submitted that where the decision-maker has not made any judgment, in advance of its decision, about the factors which it later deploys in support of that decision, "no institutional deference can be due to such *post hoc* logic". Ms Mountfield QC, who appeared for the appellant, has argued that those factors must be judged on their own terms. They should be given only such weight as their cogency and any supporting evidence warrant. While accepting that such factors could, in principle, attract weight as a result of the particular experience or expertise of the deciding body, she argues that the court should not exercise restraint by virtue of the body's constitutional responsibility for taking the decision, because the factors advanced *post hoc* did not form any part of the reasoning behind the body's discharge of its function.

52. I am not prepared to accept this submission without qualification. Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made *bona fide*.

53. DENI has submitted that the correct legal test to be applied in determining whether the nomination requirement in the 2009 Regulations is justified and proportionate is that set out in *Stec v United Kingdom* (2006) 43 EHRR 47 at para 52:

> "... 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'."

54. Mr McGleenan QC, who appeared for DENI, pointed out that the "manifestly without reasonable foundation" test was adopted and applied by this court in *R (JS) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] UKSC 16; [2015] 1 WLR 1449 (also known as *R (SG) v Secretary of State for Work and Pensions*) where at para 11 Lord Reed, having cited the test enunciated in *Carson v United Kingdom* (2010) 51 EHRR para 13, stated:

> "That approach was followed by this court in *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18; [2012] 1 WLR 1545, where Lady Hale stated at para 19 that the normally strict test for justification of sex discrimination in the enjoyment of Convention rights gives way to the 'manifestly without reasonable foundation' test in the context of welfare benefits."

55. I am prepared to accept for the purpose of this appeal that the test to be applied is that of "manifestly without reasonable foundation". Whether that test requires adjustment to cater for the situation where the proffered reasons are the result of deliberation after the decision under challenge has been made may call for future debate. Where the state authorities are seen to be applying "their direct knowledge of their society and its needs" on an ex post facto basis, a rather more inquiring eye may need to be cast on the soundness of the decision. Since it does not affect the outcome of this appeal, however, I am content that the "without reasonable foundation" formula should be taken to apply in this instance.

56. Both DENI and NILGOSC drew heavily on the joint dissenting judgment of Lord Sumption and Lord Reed in *R (Tigere) v Secretary of State for Business Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820 in advancing the claim that where a person's status is not an immutable characteristic of the individual affected, the state should be accorded a correspondingly wide margin of appreciation when determining whether discrimination based on that status is justifiable and proportionate to its objective. The judgment was also cited in support of the "bright-line" rule that the nomination procedure is said to establish and in advancing the case that, in the socio-economic field, a broad area of discretionary judgment should be allowed to state authorities.

57. These principles, well-recognised as they are, depend heavily on the context in which it is sought to apply them. As it happens, I have no difficulty in accepting that each is worthy of close consideration in this case. But whether they impel the outcome for which the respondents contend must be subject to careful examination of the particular aspects of the case which they are said to affect. To set the scene for that examination, it is necessary to look at some passages from Lord Sumption and Lord Reed's dissenting judgment.

58. On the first of the arguments viz that where the status involved is not an immutable characteristic, there should be a commensurately broader discretion available to the decision-maker, it should, of course, be recalled that in *Tigere* the status concerned was one of immigration. But I accept that statements made concerning that status may apply to the present case where the status is one of cohabitant. At para 74 of the joint judgment, Lord Sumption and Lord Reed said:

> "The Strasbourg court has accepted that a person's immigration status can be an 'other status' for the purpose of article 14: *Bah v United Kingdom* (2011) 54 EHRR 773, paras 45-46. But it also made it clear that, because immigration status is not an immutable characteristic of the individual affected, the state should be accorded a correspondingly wide margin of appreciation when determining whether discrimination based on that status is justifiable and proportionate to its objective, at para 47:
>
> > 'The nature of the status on which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to contracting states … Immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice … While differential treatment based on this ground must still be objectively and reasonably justified, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality.'"

59. It is relevant that the appellant and Mr McMullan had chosen not to marry for the ten years that they lived together (although, of course, they had clearly decided to change that situation shortly before he died). The appellant's status is one which she chose and not one with which she was born or which she could not avoid. Unquestionably, that circumstance alters the approach that one takes to the difference in treatment to which she was subject vis-à-vis a married or civil partner. But should that bring about a markedly more benevolent review of the imposition

of the nomination requirement? After all, the essential purpose of the change in the scheme brought about by the 2009 Regulations was to include persons such as the appellant. Moreover, it was necessary for the authorities to bring about that change in order to secure her entitlement to equal treatment and, incidentally, to comply with their obligations under ECHR and the Human Rights Act 1998. The reason that it was decided to include the nomination requirement was to make the scheme congruent with that in England and Wales. No independent evaluation of the need for this particular procedure was undertaken. It was not present to the mind of the decision-maker that a wider discretion was available because the status of those affected was not "an inherent or immutable personal characteristic". For all these reasons, while this is a factor that should not be left out of account, it does not weigh heavily in the assessment as to whether the discrimination is "justifiable and proportionate to its objective".

60. On the bright-line rule argument, the respondents relied on para 91 of Lord Sumption and Lord Reed's judgment:

> "The advantages of a clear rule in a case like this are significant. It can be applied accurately and consistently, and without the element of arbitrariness inherent in the discretionary decision of individual cases. By simplifying administration it enables speedy decisions to be made and a larger proportion of the available resources to be applied to supporting students. Young people considering applying to universities need to know whether they will get a student loan or not. The Student Loan Company, which administers the scheme, needs to process a very large number of applications for loans in the relatively short interval between the acceptance of a student by a university and the start of the academic year."

61. The contrast between the situation in *Tigere* and the present case is immediately obvious. The authorities in *Tigere* had identified the difficulties in administration which they claimed would beset the student loan scheme if those whose immigration status was uncertain were included in it. That was central to the policy decision. The volume of applications for loans called for a clear rule, it was claimed, even though this might cause hardship in individual cases. This was a thought-through approach to what the authorities apprehended would be a considerable logistical problem.

62. In the present case, no thought was given to possible difficulties with administration that might arise if the nomination procedure was not included in the new scheme which the 2009 Regulations introduced. Indeed, even after the appellant's challenge was made, DENI has not been able to produce tangible

evidence that there would be significant problems in administering the scheme if the nomination requirement was abandoned. Vague suggestions as to the workability of the scheme and the advantages of actuarial predictions were made but these were not supported by evidence. It is also significant that in England and Wales, where a significantly greater number of applications require to be transacted, it is considered that the nomination procedure is not necessary. I consider, therefore, that the desirability of a bright-line rule is, at most, of marginal significance in this case.

63. On the argument that a broad margin of appreciation should be afforded to the decision to include the nomination procedure because it fell within the socio-economic sphere, the respondents relied on paras 75 and 76 of Lord Sumption and Lord Reed's judgment in *Tigere*, which quoted from a passage in *Stec* already referred to above at para 53.

> "75. Student loans are provided out of public funds on terms which are much more advantageous to students than any commercial alternative. They are a form of state benefit. Such benefits are almost invariably selective and the criteria for selection necessarily involve decisions about social and economic policy and the allocation of resources. For this reason, discrimination in their distribution gives rise to special considerations in the case law of the Strasbourg court. The test is to be found in the decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom*, 43 EHRR 1017, para 52:
>
> …
>
> 76. Commenting on this test in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, Lord Neuberger (with whom Lord Hope, Lord Walker and Lord Rodger agreed) remarked on its practical implications, observing that
>
> > 'the fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the

> state, the court will conclude that the policy is unjustifiable.'
>
> The test was reviewed and reaffirmed by this court in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, paras 15-21 (Baroness Hale of Richmond JSC). It has recently been applied by this court in *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, paras 11, 69 (Lord Reed JSC)."

64. Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are *par excellence* the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished. In this case, DENI was not concerned about socio-economic choices when it decided to mimic the nomination requirement that was in place in England and Wales. It was motivated solely by the desire to maintain consistency between the two schemes. Of course, after the appellant's challenge materialised, the department addressed possible advantages that might accrue if the nomination requirement was maintained and, as I have said, these are not to be dismissed solely because they are the product of hindsight - nor even because they have been put forward *post hoc* as a possible justification for discrimination in reaction to the appellant's claim. But the level of scrutiny of the validity of the claims must intensify to take account of the fact that the claims are made *ex post facto* and the claimed immunity from review on account of the decision falling within the socio-economic sphere must be more critically examined.

65. A suggestion that any matter which comes within the realm of social or economic policy should *on that account alone* be immune from review by the courts cannot be accepted. It must be shown that a real policy choice was at stake. While it is not essential that the policy options were clearly in play at the time the choice was made, obviously, when they were, the cause for reluctance by courts to intervene is enhanced. In the present case, however, for the reasons earlier given, not only were socio-economic factors not at the forefront of the decision-making process at the time that the decision to include the nomination procedure was made, but the attempt to justify retention of the procedure on those grounds was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the appellant's case. I do not consider, therefore, that this is a factor of any significance in this instance.

The test for proportionality

66. The test for the proportionality of interference with a Convention right or, as in this case, the claimed justification for a difference in treatment, is now well settled - see the judgments of Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at para 45, Lord Sumption in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 para 20 and Lord Reed in *Bank Mellat* at para 74. As Lord Reed said,

> "… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

67. For the reasons earlier given, I consider that the objective of the particular provisions in the 2009 Regulations which are involved here must have been to remove the difference in treatment between a longstanding cohabitant and a married or civil partner of a scheme member. To suggest that, in furtherance of that objective, a requirement that the surviving cohabitant must be nominated by the scheme member justified the limitation of the appellant's article 14 right is, at least, highly questionable. Be that as it may, I consider that there is no rational connection between the objective and the imposition of the nomination requirement and that this also fails to meet the third and fourth standards in Lord Reed's formulation.

Conclusion

68. I would allow the appeal; make a declaration that the requirement in the 2009 Regulations that the appellant and Mr McMullan should have made a nomination be disapplied; and that the appellant is entitled to receive a survivor's pension under the scheme.