Neutral Citation Number: [2022] EWHC 1286 (Admin)

Case No: CO/1863/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday 27th May 2022

Before:

MR JUSTICE FORDHAM

- -

Between:

(1) SHARON GREEN **(2) JACQUELINE ANDREA JENNINGS** **(3) PAUL ROBERT SNELLER**	**Claimants**
- and -	
METROPOLITAN POLICE COMMISSIONER	**Defendant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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Peter Edwards and **Professor Conor Gearty QC (Hon)** (instructed by Lexent Partners) for the Claimants
Andrew Waters (instructed by Metropolitan Police) for the Defendant
Richard O'Brien and **Tom Tabori** (instructed by GLD) for the Interested party

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Hearing date: 4/4/22 & 5/4/22

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

1. Introduction

Regulation C9 ("Cessation")

1. This case is about the human rights compatibility of a mechanism under which a police pension is 'switched off'. The provision at the heart of the case is Regulation C9 of the Police Pensions Regulations 1987 (SI 1987/257, as amended) ("PPR87"). PPR87 contain the scheme rules for the 1987 police pension scheme ("PPS"). Regulation C9 is entitled:

> ***Termination of widow's or civil partner's pension on remarriage or other event.***

The parties agree that, for the purposes of deciding the present case, it is sufficient to focus on Regulation C9(3). It provides:

> ***Where a widow … or a surviving civil partner … is entitled to a pension under this Part and – (a) marries or has married, (b) remarries or has remarried, (c) forms or has formed a civil partnership or new civil partnership, (d) with a person to whom she is not married lives together as husband and wife, or (e) with a person who is not her civil partner lives together as if they were civil partners, she shall not be entitled to receive any payment on account of the pension in respect of any period after her marriage or remarriage, or after the formation of her civil partnership, or after her cohabitation begins.***

I will use the word "Cessation" to describe the 'switching off' of a pension by the operation of Regulation C9, taking place by virtue of the phrase "shall not be entitled to receive any payment on account of the pension." The phrase "a pension under this Part" is a reference to Part C "widows' awards". The word "widow" is defined, in Part C generally so that it "includes widower and … surviving civil partner", and Regulation C9 so that it "includes widower" (PPR87 Schedule A). There is a discretionary power to recommence pension payments, after a Cessation, if the person in question "has again become a widow or her civil partner dies or that marriage or civil partnership has been dissolved or that cohabitation ceases" (Regulation C9(4)). I will use the phrase "Payable For Life" to describe the situation if the Cessation mechanism were absent or were disapplied. To do justice to this case I am going to need to consider, in some detail, the context and setting of Regulation C9 (§§4-28 below), and its impacts (§§29-35).

2. This legal challenge was commenced by Queen's Bench Division claim form on 12 August 2020. At that date the three Claimants – Ms Green, Ms Jennings and Mr Sneller – were all entitled to and in receipt of a PPS Part C pension. The 'focus in time' which they adopt for the purposes of their claim – as was clarified in argument – is as from that date of commencement of proceedings (12 August 2020). They say that, by and after that date, Regulation C9 – and its retention as a PPS scheme rule – had become unjustifiable and unlawful in human rights terms. These proceedings were transferred to the Administrative Court to continue as a judicial review claim, on pleaded judicial review grounds which were filed on 26 May 2021. By that date, Mr Sneller's Part C pension had been the subject of a Regulation C9 Cessation decision (21 December 2020). The remedy sought by the Claimants is a declaration that, in one or more respects, Regulation C9 is incompatible with their Convention rights as scheduled to the Human Rights Act 1998 ("HRA"). The Interested Party ("the Home Secretary") denies any incompatibility with a Convention right. But the following points are agreed

as to what the legal position would be if there were such an incompatibility: (1) it does not arise as a result of any provision of "primary legislation" nor by virtue of any provision of "primary legislation" which "cannot be read or given effect in a way compatible" with those rights (HRA s.6(2)); (2) there is no provision of "primary legislation" which would "prevent removal of the incompatibility" (HRA s.3(2)(c)); (3) it would not be "possible" to read and give effect to Regulation C9(3) in a way which would be compatible with the Convention right (HRA s.3(1)); (4) the declaration sought would be appropriate and sufficient. The Defendant, as PPS scheme administrator, adopts a neutral position in these proceedings and has accepted that – if the Court were to grant such a declaration – the Defendant would then disapply the Cessation provisions in Regulation C9 and would reinstate Mr Sneller's Part C pension payments backdated to the Cessation decision in his case.

Convention rights

3. The Claimants say Regulation C9 Cessation is incompatible with their Convention rights under Articles 12, 8 and 14 (read with A1P1). I will need to explain, in some detail, the essence of their claims (§§55-67 below), having considered the key authorities relied on (§§36-54), before analysing the issues (§§68-95 below). As regards the Article 14 claim, the parties agree that it is sufficient to focus on Article 14 being read with A1P1: the Home Secretary accepts that the "ambit" test (§36 below) is met for A1P1, and the Claimants accept that the Article 14 claim is no stronger if the "ambit" test is also met for Article 8 or Article 12. These are the Convention rights relied on:

> ***Article 12. Right to marry. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.***
>
> ***Article 8. Right to respect for private and family life. (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.***
>
> ***Article 14. Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.***
>
> ***A1P1. Protection of property. 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.***

The PPS

4. PPR87 were made by the Home Secretary, pursuant to powers conferred by Parliament in sections 1 to 8 of the Police Pensions Act 1976 ("the 1976 Act"), on 20 February 1987 and came into force on 1 April 1987. It is going to be necessary to see the PPS in

its context and setting, as to which I was greatly assisted by a House of Commons Library Briefing Paper (No. 07109, 23 April 2019) written by Djuna Thurley ("BP19"). The PPS was considered in Carter v Chief Constable of Essex Police [2020] EWHC 77 (QB) [2020] ICR 1156 (§§51-52 below) and the history of similar police pension schemes in England and Wales was summarised in a Table in Carter at §9. An equivalent 1988 Northern Ireland police pension scheme (governed by SR 1988/374) was the subject of In re Eccles [2021] NIQB 111 (§54 below). The PPS applies in respect of "Scheme Members" who have at a relevant time been – and may still be – serving members of the police force ("Active Scheme Members"). On their retirement from the police, a Scheme Member ceases to be an Active Scheme Member. Thereafter, their entitlement to a pension arises, payable in accordance with PPS scheme rules. Active Scheme Members pay contributions, payable in accordance with scheme rules. Pension entitlements of widows and other eligible beneficiaries – known as "Survivors' Pension Benefits" ("SPBs") – are payable in accordance with scheme rules. As the Table in Carter at §9 reflects: the level of contribution paid by an Active Scheme Member under the PPS was set at 11% (as it had been under predecessor schemes since 1982); the maximum PPS pension for a Scheme Member was two-thirds of final salary after 30 years (as it had been under predecessor schemes since 1948); the compulsory retirement age was 55 (as it had also been since 1948); and SPBs were one-half of the Scheme Member's pension for 'pre-retirement widows' (and a 'proportionate' pension for 'post-retirement widows' based on service after 6 April 1978: §10 below). The phrases 'pre-retirement widow' and 'post-retirement widow' are shorthand for whether a marriage was, or was not, at a time when the police officer was still an Active Scheme Member.

The NPPS and 2015 Scheme

5. There are two post-PPS pension schemes for police officers in England and Wales (also reflected in the Table in Carter at §9), which schemes have been described as having "eroded the value of a new officer's pension" (Carter at §10.3). The first is the "NPPS" (so-called "new police pension scheme"), introduced and governed by the Police Pensions Regulations 2006 ("PPR06") (SI 2006/3415, as amended). PPR06 were made by the Home Secretary, pursuant to the same 1976 Act powers as PPR87, on 19 December 2006 and came into force on 1 February 2007 (with effect from 6 April 2006 for the purposes of determining membership). A police officer who began their service after 5 April 2006 was not entitled to join the PPS but could only join the NPPS. A police officer who had retired before February 2007 (as had happened in Carter) could not join NPPS. Only officers who were Active Scheme Members of the PPS in and after February 2007 were entitled to transfer to the NPPS (an equivalent position arose in Eccles). Under the NPPS the maximum pension was one-half of final salary, after 35 years, only payable from age 55; the contribution was initially 9.5% and rose to 11-12.75% between 2006 and 2015; and SPBs were payable to pre-retirement and post-retirement widows. The second is the "2015 Scheme". This was a new police pension scheme for England and Wales, governed by the Police Pensions Regulations 2015 (SI 2015/445, as amended) ("PPR15"). PPR15 were made by the Home Secretary on 27 February 2015, pursuant to statutory powers found in the Public Service Pensions Act 2013, and came into force on 1 April 2015. Under the 2015 Scheme there is no maximum pension and when one-half of a "career-average revalued salary" can be achieved will depend on the rate of revaluation (by CPI + 1.25%) of each year's accrued pension.

Other public service pension schemes

6. As discussed in BP19, the PPS, NPPS and 2015 Scheme sit alongside other "public service" pension schemes. These include schemes for the civil service, teachers, NHS, local government, firefighters and armed forces. A local government scheme (governed by SI 1997/1612) was the subject of R (Harvey) v Haringey London Borough Council [2018] EWHC 2871 (Admin) [2019] ICR 1059 (Julian Knowles J, 30 October 2018) (§§47-50 below). A Northern Ireland local government pension scheme (governed by SI 2009/32) had been the subject of In re Brewster [2017] UKSC 8 [2017] 1 WLR 519 (Supreme Court, 8 February 2017) (§46 below). A Briefing Note by HM Treasury in December 1998 (§23 below) discusses SPBs in the context of "public service schemes". A Ministry of Defence Memorandum for the Defence Select Committee in December 2002 (BP19 p.5) had said a new "exception for former Service personnel … would require a change for all public service schemes". In the run up to the introduction of new April 2015 public service pension schemes in various sectors, the Government spokesperson Lord Astor told the House of Lords on 21 January 2014 (BP19 p.5): "Successive Governments have reviewed pensions for life, but changes cannot be taken in isolation from other public sector schemes, including those for the NHS, teachers, police and the fire service, which have similar rules in place for their older schemes."

Death in the Line of Duty (PIBR06)

7. Another scheme which features in the present case involves the Police (Injury Benefit) Regulations 2006 (SI 2006/932) ("PIBR06"). PIBR06 were made by the Home Secretary on 27 March 2006, pursuant to powers in the 1976 Act, and coming into force on 20 April 2006. Regulation 13 of PIBR06 provides for an "adult survivor's special award" applicable to the "surviving spouse or surviving civil partner" of a member of a police force "who dies or has died as the result of an injury received without his own default in the execution of his duty". I will call that "Death in the Line of Duty".

Cessation: an originating rationale (now socially outdated)

8. It is common ground between the parties that Regulation C9 is one of the provisions of the PPS which still had an identifiable rationale in 1987, but which subsequently came to be recognised as socially outdated. In a 2006 House of Commons debate on the equivalent civil service pension scheme, Cabinet Office Minister Jim Murphy said this (27 February 2006) (BP19 p.4):

> ***The intention behind the payment of pensions to widows and widowers was to provide some measure of financial compensation for the loss of financial support that the beneficiary had received from their late husband or wife. So, if the beneficiary remarried or cohabited, the expectation was that they would look to their new spouse or partner for financial support.***

As is acknowledged by Peter Spreadbury (Deputy Director for Police Workforce and Professionalism at the Home Office), in a witness statement filed on behalf of the Home Secretary in these proceedings:

> ***By … 2003, it was considered that an officer's surviving spouse or partner's pension should be paid for life under that scheme rather than cease because of remarriage or a new relationship, because social changes by 2003 were such that partners now tended to be financially interdependent.***

As a July 2003 Joint Report of Home Office and Treasury officials (§24 below) put it:

> ***The current system is based on the premise that the wife is, by definition, dependent on her husband and should be provided for unless she remarries and thereby becomes dependent on her new husband. This model has survived the extension of widows' benefits to widowers, but looks increasingly archaic now that couples are more likely to be financially interdependent. By the same token a surviving partner can be expected to contribute their share financially to any new relationship formed after the death of the other partner.***

As it was put in the December 2003 Home Office consultation document on the proposed NPPS (§24 below):

> ***The current system was originally based on the premise that a wife was, by definition, dependent on her husband and should be provided for unless she remarries and thereby becomes dependent on her new husband. This has survived the extension of widows' benefits to widowers, but looks increasingly outdated now that couples are more likely to be financially interdependent. By the same token a surviving partner can be expected to contribute their share financially to any new relationship formed after the death of the other partner.***

Enhanced pension benefits: who pays?

9. The evidence before the Court explains that there are in principle three potential sources to pay for the pensions and SPBs under the PPS, including to pay for any new or 'enhanced' benefits: (i) Active Scheme Member contributions; (ii) employers' contributions (by the police service); and (iii) central Government (by way of a 'top-up'). Sources (ii) and (iii) are described as involving "the taxpayer". These three sources are described in the Joint Report by Home Office and Treasury officials (July 2003) (§24 below) and a Members' Guide to the PPS (2006 version). The HM Treasury Briefing Note (December 1998) (§23 below) explained that any costs of improvements in SPBs would need to be met by the membership of the scheme (either by the scaling back of pension benefits or increasing employee contributions) or by increasing expenditure by "the taxpayer".

2. PPS Features: examples of change and retention

PPS SPBs and post-retirement widows (post-5.4.78 service): no change

10. This part of the judgment looks at some features of the PPS which have been changed, or which have been retained, over time. Many of these relate to scheme rules which could be said to have had a social rationale seen later to have become outdated. The first feature concerns SPBs and 'post-retirement widows' (§4 above). Pursuant to PPR87 as made in 1987 (Carter §6), a 'pre-retirement widow' is entitled to SPBs (regulation C5(1)), but a post-retirement widow is entitled only to "a proportionate pension in respect of any service after 5 April 1978" (regulation C5(3)). This restriction has been retained in the PPS throughout. It was the subject of the Carter case. It replicates a restriction found in predecessor schemes back to 1978, when the relevant change had taken place. Pensionable service after 5 April 1978 was part of the design of the post-retirement widow's "proportionate pension" when it was first introduced into the 1973 scheme, with effect from 6 April 1978 (by SI 1978/1348) (Carter §§6, 12.3). The Active Scheme Member's contribution rate did not in fact increase until 1982 (Carter §10.2). This restriction in enhanced pension benefits, to service post-dating the scheme change, exemplifies what I will call "Complete Prospectivity" (§15 below). Other similar pension enhancements had taken place in 1956 and 1973 (Carter

§§12.1-12.2). These were all "prospective" scheme reforms, in accordance with the "usual practice of making changes prospectively" (Carter §§12, 24).

PPS SPBs for widowers (post-17.5.90 service): from 1992

11. The Police (Pensions and Injury Benefit) (Amendment) Regulations 1992 ("AR92") were made by the Home Secretary on 30 September 1992 and came into force on 1 November 1992 (SI 1992/2349). By virtue of AR92, SPBs under the PPS became payable to a widower. That change took effect through an amendment of the redefinition of "widow" (in PPR87 Schedule A) to include a "widower" (see AR92 reg.12). This was another proportionate pension referable to service postdating the scheme change: the SPBs to which a widower was entitled involved taking "no account… of any pensionable service before 17 May 1990" (AR92 regs.13 and 14). Women's contributions were raised (by 2%) to the same rate as men's with effect from 1 September 1992 (AR92 reg.10). Previously, "women police officers paid a lower contribution rate reflecting the inferior nature of their pension benefits" (Carter §7). The choice of 17 May 1990 appears referable to the date when the European Court of Justice in Luxembourg gave its judgment in Barber v Guardian Royal Exchange Assurance Group [1991] 1 QB 344 (to which the parties made reference). As the Explanatory Note to AR92 put it:

> ***Regulations 12 and 18 introduce, for deaths occurring after 16th May 1990, widowers' benefits of the same kinds as those provided for widows. For benefits calculated by reference to service, only service after that date counts (regulations 13 to 16). Regulations 3 to 5, 7, 8 and 11 make related amendments. Regulation 10 raises women's contributions to the same rate as men's with effect from 1st September 1992.***

PPS SPBs for civil partners: from 2005/6

12. The Police Pensions (Amendment) Regulations 2006 ("AR06") were made by the Home Secretary on 14 March 2006 and came into force on 5 April 2006, but with effect from 5 December 2005 (SI 2006/740). By virtue of AR06, SPBs under the PPS became payable to a civil partner; and Cessation of SPBs pursuant to Regulation C9 became triggered by entry into a civil partnership. The definition of "widow" in the PPS was widened to include "surviving civil partner" (AR06 reg.13) and the Cessation provisions of Regulation C9 were amended. The choice of 5 December 2005 was referable to the date on which civil partnerships first came into existence under UK law. As the Explanatory Notes to AR06 put it:

> ***The amendments ensure parity of treatment between police officers who form civil partnerships and those who marry … In particular, these Regulations make amendments consequent on the coming into force of the Civil Partnership Act 2004 with retrospective effect from 5th December 2005, which is the date on which the substantive provisions of that Act came into effect. Provisions which apply to married couples are amended so as to apply to couples who form a civil partnership.***

No PPS SPBs for cohabiting partners: no change

13. When PPR87 were made the PPS has contained no provision for SPBs to be paid to those who were cohabiting partners – unmarried and not in a civil partnership – of Scheme Members. That feature of the scheme rules has been retained ever since. The equivalent restriction in the equivalent 1988 Northern Ireland police pension scheme was the subject of the Eccles case. An equivalent restriction in the 1997 local

government pension scheme for England and Wales was the subject of the Harvey case. A case about formalities within a scheme which included cohabiting partners as beneficiaries to SPBs is the Brewster case.

PPS SPBs Payable For Life after Death in the Line of Duty: from 2015/2016

14. The Police Pensions and Police (Injury Benefit) (Amendment) Regulations 2015 ("AR15") were made by the Home Secretary on 14 December 2015, pursuant to the powers in the 1976 Act, and came into force on 18 January 2016. By AR15, the Cessation provisions of Regulation C9 of the PPS were amended (by insertion of Regulation C9(5) and (6)) so that there would be no Cessation in the case of an Active Scheme Member's Death in the Line of Duty. SPBs would be Payable For Life, notwithstanding a marriage, civil partnership or cohabitation which took place after 1 April 2015. The background was an announcement in the 2015 Budget (18 March 2015), made in the context of the new, reformed public service pension schemes including the 2015 Scheme, that the Government would "ensure that all widows, widowers and civil partners of police officers and firefighters who are killed on duty will no longer lose their survivor benefits if they remarry, cohabit, or form a civil partnership" (BP19 p.14). Cases involving Death in the Line of Duty were identified by reference to the entitlement to an award under PIBR06 regulation 13 (§7 above). A similar change had been made years earlier, in October 2000, in the context of the armed forces (BP19 p.18). Then in 2017 the equivalent change was made in the context of firefighters who died on duty (see BP19 pp.3, 11-12) by SI 2017/892 made on 7 September 2017, which came into force on 6 October 2017, and which amended the 1992 firefighters pension scheme with effect from 1 April 2015. The choice of 1 April 2015 was to coincide with the date on which the armed forces pension scheme 1975 rules changed to provide for SPBs Payable For Life (§19 below). As the Explanatory Notes to AR15 put it: "This change will come into force retrospectively from 1st April 2015". This is the only class of case in which SPBs under the PPS can be Payable For Life.

3. Prospectivity

"Complete" Prospectivity and "Basic" Prospectivity

15. The idea of non-'retrospective' changes to scheme benefits looms large in this case. But there are two different senses of 'prospectivity'. By "Complete Prospectivity", I mean a pension enhancement which is applicable only in respect of Active Scheme Members at the date of the rule change and which takes effect as an enhancement "proportionate" to service after that date. A good example of Complete Prospectivity is the post-April 1978 service "proportionate pension" for post-retirement widows (§10 above). By "Basic Prospectivity", I mean a pension enhancement which is applicable only in respect of Active Scheme Members at the date of the rule change, albeit that it does not also take effect only as an enhancement "proportionate" to the service after that date. The critical, shared precondition for both species of Prospectivity is this: the Scheme Member to whom enhanced pension benefits are referable was an Active Scheme Member at the time of a scheme change enhancing the benefits. That means both species of Prospectivity allow for contributions to be levied on Active Scheme Members, to pay for the new benefits introduced by the scheme rule change. This is done in a tailored way in the case of Complete Prospectivity. It is done in an "as a whole" way in the case of Basic Prospectivity. Basic Prospectivity – as Julian Knowles

J put it in Harvey – allows that "changes in the benefits applicable … can be applied to active members for both current and past service" because "contribution levels" can be "set on the basis of assumptions and actuarial calculations which mean that the active membership as a whole will have both taken the benefit of the change, and ensure that it is paid for" (Harvey §55). This means "active member contributions taken as a whole going forward cover the cost of the benefit for the period of past service" (Harvey §60). The 'core' of Prospectivity – in the principle of Basic Prospectivity – is the idea that the benefit is applicable only to "paying members" (Harvey §60). A change which does not adhere even to Basic Prospectivity means "retrospective improvements to benefits for non-active members" (Harvey §65). As the Government spokesperson Lord Astor told the House of Lords on 21 January 2014 (BP19 p.5):

> ***it is a fundamental principle, which has been applied by successive Governments… that public service occupational pension schemes should not be improved retrospectively for those who are no longer active members of these pension schemes or for their dependents…***

16. As BP19 explains (p.3), although reforms to public service pensions in the mid-2000s included changes in eligibility to SPBs to reflect changes in social patterns of behaviour, including the introduction of pensions for civil partners and nominated unmarried partners and the removal of rules ending pensions on remarriage, such new rules were not generally changed with "retrospective" effect:

> ***This reflected a long-standing policy applied by successive governments that improvements to public service schemes should be implemented from a current date for future service only …***

The same point was made by the Ministry of Defence in the Memorandum to the Defence Select Committee (12 December 2002) (BP p.5) (§6 above). As Ian Moir of the Home Office Police Pensions and Retirement Policy Section said in a letter (27 November 2002), countering an article in the NARPO (National Association of Retired Police Officers) magazine about SPBs being made Payable For Life in respect of those no longer Active Scheme Members:

> ***The reason for this policy of no retrospection for existing pensioners is that under a contributory pension scheme such as the police scheme the scale of benefits is linked to the contribution rate payable by the police officer when he or she was serving as such.***

Prospectivity and 'new schemes'

17. There is a link between non-'retrospectivity' and changes to enhance SPBs being "most effectively achieved by developing a new pensions scheme", as it was put in the December 1998 Green Paper (§23 below). The link between the "new scheme" and Basic Prospectivity is that the "new scheme" is open to Active Scheme Members – "active members in the old scheme" (Harvey §§16, 49) – who are still in service and still paying contributions; but the new scheme is not open to those who have ceased to be Active Scheme Members (Harvey §§50, 85). This "new scheme" aspect of non-'retrospectivity' was encapsulated by Scoffield J in Eccles at §55:

> ***it has been a consistent and long-standing feature of government pension policy that changes to a pension scheme should not be retrospective and that changes, where desirable, should be made by way of introduction of a new scheme as a matter of fairness – both to scheme members and inter-generationally.***

This was the pithy encapsulation of Counsel's explanation in Harvey of SPBs for unmarried cohabitees being addressed only through a new scheme, and not by 'retrospective' change to the old scheme (Harvey at §142(a)):

> ***The approach taken … to creating a new … scheme which did not retrospectively extend the right to … pensioner members of previous schemes was justified by reference to a number of important legitimate aims. Those included (i) the establishment of a new scheme which implemented desired benefit structures at a stable and affordable cost; (ii) managing and reflecting inter-generational fairness through the provision of benefits only to those who would pay for them through contributions; and (iii) adopting a scheme which could readily be administered and which protected existing active members. It applied a clear, but necessarily bright line, rule in order to create a suitably funded overall package of benefits and costs.***

The link between non-'retrospectivity' and a "new scheme" can be seen in an HM Treasury Briefing Note (December 1998) (§23 below) (and see Harvey at §54), in addressing SPBs in public service pension schemes in a context where there was no Government commitment to increase expenditure by the taxpayer on pension benefits:

> ***The principle which Ministers have agreed to guide policy in this area is that the costs of any improvement in survival pensions should be met by the membership of the scheme either by scaling back other benefits or by increasing employee contributions… This has three practical consequences: (i) schemes should not make a change unless it is clear that the membership is willing to pay for it and that on balance the impact on employee net pay of higher contributions would not have adverse effects on recruitment and retention; (ii) there can be no retroactivity in the application of any new benefit; and (iii) changes to survivor pension rules, where desirable, may best be managed in the context of introducing a new scheme… The principle of no retroactivity is fundamental to the development of pensions policy. Otherwise each evolution in the detail of pension benefits would carry a potentially huge cost in terms of accrued liabilities at the point of change, as well as higher costs accruing in the future.***

A 'retrospective' change: PPS/firefighter SPBs Payable For Life after Death in the Line of Duty

18. Mr Spreadbury's witness statement acknowledges – as does BP19 p.3 – that two measures adopted in the context of public service pensions schemes in England and Wales are "exceptions" to the principle of non-'retrospectivity'. That is because they did not involve even Basic Prospectivity. The first acknowledged "exception" concerns the changes providing for SPBs Payable For Life in the context of police officers and firefighters who were Active Scheme Members who Died in the Line of Duty (§14 above). The SPBs designed to be Payable For Life under the PPS, by virtue of the AR15 amendments, were designed to be applicable in the case of any Active Scheme Member who Died in the Line of Duty, where a marriage, cohabitation or civil partnership took place on or after 1 April 2015 (Regulation C9(5)). The scheme change with the enhancement was made on 14 December 2015 and came into force on 18 January 2016. There were no SPBs Payable For Life reinstated in relation to a deceased police officer (or firefighter) whose survivor had already married, cohabited or entered a civil partnership before 1 April 2015 (Regulation C9(6)) (unless the pension were brought back into payment after an April 2015 pursuant to Regulation C9(4): Regulation C9(7)). The point is that the Scheme Member could have Died in the Line of Duty, and ceased to be an Active Scheme Member, before – indeed, long before – the scheme change in December 2015/January 2016. Where that was so, these were enhanced pension benefits for which the Member did not and could not have contributed.

A 'retrospective' change: SPBs Payable For Life under the 1975 armed forces scheme

19. The second recognised "exception" to non-'retrospectivity' was the change which made SPBs Payable For Life in the 1975 armed forces pension scheme. The Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions (Amendment) Order 2015 was made on 11 February 2015 (SI 2015/208). SPBs became Payable For Life from 1 April 2015. There were no SPBs For Life reinstated where marriage, cohabitation or civil partnership had taken place prior to 1 April 2015. Article 2 – as the Explanatory Note explained – made "amendments to stop the Cessation of pensions to surviving spouses and civil partners in the event that they co-habit or remarry" on or after 1 April 2015. This was 'retrospective' in applying to cases where the Scheme Member's Active Scheme Membership had stopped before – perhaps long before – February/April 2015. As BP19 explains (p.3), this change was made "in recognition of the particular challenges" which survivors of members of the Armed Forces "face building up an occupational pension in their own right". The context was that a new Armed Forces Pension Scheme 2005 had (like the NPPS for the police) provided for SPBs to be Payable For Life and members of the pre-existing 1975 scheme could (as with PPS members and the NPPS) have transferred into 2005 Scheme. The problem being addressed concerned those who had chosen to remain in the 1975 scheme, who remained the subject of Cessation provisions (BP19 p.19). After a long-running campaign, the change had been announced on 8 November 2014 (BP19 p.20), a decision which was described as one which "highlights the Government's commitment to the Armed Forces Covenant by recognising the difficulties many partners of Armed Forces personnel face in earning their own occupational pensions, often due to having to relocate their homes within the UK as well as overseas".

Basic Prospectivity and Other PPS changes

20. Mr O'Brien submitted that all other changes to the PPS have secured at least Basic Prospectivity. Mr Edwards did not dispute this. But it is right that I record that I wonder whether there was some (limited) 'retrospectivity' in the case of widowers of a woman police officer who ceased to be a PPS Active Scheme Member after 17 May 1990 and before 1 September 1992 (§11 above), and in the case of a person who entered a civil partnership after 5 December 2005 but ceased to be a PPS Active Scheme Member between that date and 14 March 2006 (§12 above). Perhaps. I am satisfied that nothing, in the end, turns on whether these are further examples of changes of a degree of departure from Basic Prospectivity.

Retrospectivity: repeal of police pension Cessation (Northern Ireland)

21. Looking beyond England and Wales there is a clear example of a 'retrospective' scheme amendment, in the context of police pension schemes, SPBs and Cessation. In March 2014 the Northern Ireland Justice Minister David Ford announced that all survivors of Scheme Members of RUC (Royal Ulster Constabulary) pension schemes should retain their SPBs For Life. By virtue of the Public Service Pension Act (NI) 2014 sections 30-31 and the Police Pensions Regulations Northern Ireland (SI 2015/113), with effect from 1 July 2014, the Cessation provisions in the RUC Pension Scheme 1988 were repealed. That was the Northern Ireland equivalent to Regulation C9 in the PPS. The Cessation provisions in the predecessor 1949 and 1973 RUC Pension Schemes were also repealed. This had the consequence that any marriage, cohabitation and civil partnerships after 1 July 2014 would not trigger any Cessation of SPBs under those

police pension schemes. The 2014 legislative instruments went further, making provision for the reinstatement of SPBs, payable again with effect from 1 July 2014, in the case of those survivors of Scheme Members whose pre-July 2014 remarriage cohabitation or civil partnership had triggered a Cessation (BP19 p.17). Had such a change been made for England and Wales in July 2014, none of the Claimants would have faced Cessation since then. But that did not happen. The Home Office Minister reminded the House of Commons (16 June 2015) that this was a devolved matter, and that it was the Northern Ireland Executive who was responsible for the design and funding of police pensions in Northern Ireland (and the Scottish Government for Scotland). Similar changes were not implemented in England and Wales, nor in Scotland (BP19 p.18).

4. A 'timeline' illustrating policy consideration

October 1998: consideration of PPS SPBs and post-retirement widows

22. In this part of the judgment I will identify in sequence events which reflect policy consideration being given to features, including SPBs, of the PPS and other relevant pension schemes. First, as at October 1998 the position was addressed of post-retirement widows under the PPS, given the restriction on them (§10 above) to a proportionate pension referable to post-5 April 1978 service (the restriction which became the subject of the Carter case). The issue had been raised in a letter written by Bob Laxton MP (24.6.98) and a Parliamentary question posed by Sir Teddy Taylor MP (6.4.78) asking whether the Home Secretary would introduce legislation to ensure that the PPS would provide a pension for the widow of a policeman who married after retirement but before 6 April 1978. By written answer (29.10.98) the Home Secretary (Paul Boateng) responded: "We have no plans to do so. To extend retrospective changes to pensions in the way suggested would be contrary to the principles of a contributory public service pension scheme".

December 1998: consideration of all SPBs and unmarried partners

23. As at December 1998 the position was addressed of unmarried partners under all public service pension schemes (including the PPS) who remained ineligible for SPBs. A December 1998 Green Paper on Pensions had said this:

> ***The public service schemes at present provide survivor pensions only for the legal spouse of a deceased member. If the general membership of a public service scheme wanted, in future, to extend eligibility for survivor pensions to unmarried partners and were prepared to meet the additional costs, the Government would be prepared to consider how practicable arrangements could be devised for achieving this in the context of a statutory scheme. In many cases this would be most effectively achieved by developing a new pensions scheme.***

The December 1998 Green Paper is discussed in Brewster at §6 and Harvey at §§53, 64, 198. Costings had been undertaken by the Government Actuary's Department ("GAD") as to the extra costs which would be incurred in public service occupational pension schemes "if survivors pensions were to be extended to unmarried partners of the opposite sex, and to partners of the same sex". There were also GAD costings produced in respect of extending SPBs in the context of public service occupational pension schemes to post-retirement marriages and spouse's pensions Payable For Life (Harvey §63). All of this was the context for the Briefing Note written by HM Treasury in December 1998 about the provision of SPBs in public service schemes. The Briefing

Note emphasised the "principle of no retroactivity" (§17 above). It referred to GAD's estimate (£10bn) if SPBs were extended to unmarried partners and backdated (§12). This HM Treasury Note (December 1998) is emphasised in Harvey at §54 and Eccles at §58.

2003/2004: Home Office consultation on a "new scheme": the NPPS

24. In July 2003, a Joint Report by Home Office and Treasury officials outlined the proposed NPPS including as one of its "main elements" "lifelong" SPBs (with no Cessation mechanism) as well as SPBs for "unmarried partners". In December 2003 the Home Office (with the Scottish Executive and Northern Ireland Office) published a Consultation Document, entitled "Government Proposals for a New Police Pension Scheme for Future Entrants". The key aims of the proposed NPPS were said to include modernisation of the scheme (including in the light of major developments in the social framework of society), adaptation to increasing life expectancy and they need to ensure that a pension scheme to the police provided value for money and remained affordable to members and taxpayers. The Consultation Document referred to GAD estimates, to contribution rates for officers (officer contributions) and the service (employer contributions) being "more affordable", and to a Government "top up" mechanism. Key elements of the proposed NPPS included (as "issue 11" in the Consultation Document):

> ***It is proposed that the new scheme should extend survivor benefits to unmarried and same-sex partnerships and that all survivor benefits be payable for the lifetime of the survivor.***

The Home Secretary has placed before the Court the only two March 2004 consultation responses which are said to have addressed SPBs relevantly to the issues in the present case.

25. The first relevant consultation response was by the charity Care of Police Survivors ("COPS") (6 March 2004) which advocated a change to the PPS to remove Cessation in the case of "existing survivors" who, at the time of the NPPS, were already the survivors of deceased PPS Scheme Members. In terms of Cessation, "existing survivors" fell into two groups: (i) those already "penalised" by being "stripped of pension by reason of remarriage or cohabitation" (Deprivation); and (ii) those "currently still in receipt of pension" who "continued to be penalised" in efforts to "rebuild their lives" (Inhibition). "Existing survivors" were compared with "future survivors". It was "unfair to existing survivors" that Group (ii) would "continue to be vulnerable to loss of pension on the basis of remarriage or cohabitation", unlike "new survivors will escape such penalty", since existing survivors "have no avenue of transfer to the conditions of the new scheme". The COPS response advocated change (which was not adopted) in respect of "existing survivors", removing Cessation and reinstating previously forfeited pensions (Group (i)), so as to bring "parity with new survivors". The COPS response did not call for the removal of Cessation from the PPS in relation to those who were Active Scheme Members of the PPS at the time of the introduction of the NPPS. COPS recognised that Active Scheme Members could choose to transfer to the NPPS, to then enable their future survivors to escape the "penalisation" of Cessation. The Response said this:

> ***The proposed new scheme provides for death benefits to be retained for life by survivors, regardless of re-marriage or co-habitation. This will affect survivors of officers who enlist after the introduction of the new scheme. It would be a benefit also provided to survivors of officers presently serving, who elect to transfer into the new scheme. The effect of that will be***

> ***to introduce a two tier benefit, where life payment will be made to survivors of some officers, but not to those who have not transferred to the new scheme. The decision on whether to transfer, inheriting conditions that appear more demanding in terms of service length, [is] of course a matter for individual officers. We would recommend to them that they should seriously consider the welfare of their dependents when considering such a proposal. Human nature however dictates that the officers go to work every day considering the fact that they may never return home. Regardless, it is within the reach of serving officers to grasp an opportunity to better secure the future of their survivors, and that is a positive element of the new scheme is proposed.***

26. The second relevant consultation response was that of the Police Negotiating Board Staff Side ("Staff Side") (12 March 2004). This response advocated change (which was not adopted) by amending the PPS to include SPBs for unmarried cohabitees. The response criticised transfer to a "new less beneficial scheme" as being the price for 'unmarried cohabiting partners' obtaining SPBs (a point which could equally be made in relation to SPBs Payable For Life). The Staff Side Response said this:

> ***We are pleased to observe the Government's intention to provide survivor benefits for married and same-sex partners. Staff Side has long sought partner benefits for police officers. It is unfortunate that we appear to have achieved this only for members who are prepared to transfer to a new less beneficial scheme. The current proposals for the new scheme we believe are inadequate in occupations such as policing in terms of survivor benefits. However we remain of the opinion that survivor benefits should be extended to current members of the current scheme, both unmarried partners and same-sex partners, on the basis of fairness.***

July 2006 and 2015: consideration of PPS SPBs Payable For Life (Death in the Line of Duty)

27. A Briefing (24 July 2006) for the Home Secretary addressed the option of lifting the Cessation of SPBs for widows, widowers and civil partners of police officers after Death in the Line of Duty. One of the topics considered was as to whether such an extension of SPBs Payable For Life would be "divisive" when viewed alongside deaths other than in the Line of Duty. At this time, costs projections were provided for the capital cost of backdating SPBs For Life of all Scheme Members for the police, armed forces, fire and other public service schemes. As has been seen (§18 above), PPS SPBs Payable For Life after a Death in the Line of Duty was a step taken a decade later – after policy consideration – in December 2015, applicable to any marriage, cohabitation or civil partnership after April 2015.

2016/2017: consideration of PPS SPBs Payable For Life

28. In light of the Northern Ireland repeal and reinstatement (§21 above), in June 2014 NARPO had begun a campaign to achieve SPBs Payable For Life under the PPS (BP19 pp.15 and 18). After the introduction of the 2015 Scheme, and the PPS change introduced in December 2015 in respect of Death in the Line of Duty, the issue was raised by Steve McCabe MP in this Parliamentary Question on 9 November 2016 (BP19 p.15):

> ***To ask the Secretary of State for the Home Department, for what reasons the Government plans not to reinstate police widow pensions for widowers who have had their pensions revoked due to remarriage or co-habiting under the Police Pension Regulations 1987; and if she will bring forward new proposals to ensure that all police widows are treated equally for the provision of such pensions.***

The Response of the Home Office Minister (Brandon Lewis) was:

> ***Successive governments have been clear that we have a general presumption against making retrospective changes to public service pension schemes. However the Government believes that the arguments for making this change in respect of police officers who died on duty are sufficiently compelling to allow a limited exception in this case. The changes to survivor benefits in the police, firefighters and Armed Forces pension schemes have a common implementation date and it is not possible to reinstate the pensions of those who have married before this. There are no plans to make any further changes to survivor benefits for police pension schemes.***

There was then a Westminster Hall debate on this subject (15 March 2017), at which the Minister (Mr Lewis) addressed Cessation under the PPS by reference to the contrasting position of SPBs Payable For Life in relation to the armed forces, in relation to police officer/ firefighter Death in the Line of Duty, and under the NPPS and 2015 Scheme (BP19 pp.15-17). Reference was also made at that Westminster Hall debate to GAD's "estimate of the costs of retaining benefits for all police survivors and of reinstating pensions already surrendered", with the Minister stating (BP19 p.17):

> ***We have estimated with the Government's Actuary's Department, by using historical actuarial data, that the total cost of retaining benefits for all police survivors would increase the police scheme liabilities by around £144m. Reinstatement of pensions already surrendered, would increase the police scheme liabilities to around £198m.***

5. The impacts of Regulation C9 (Cessation)

"Deprivation" and "Inhibition"

29. In this part of the judgment I will seek to identify, by reference to the materials before the Court, the impacts in human terms of the Cessation mechanism in Regulation C9. It impacts in two principal ways, which I will call "Deprivation" and "Inhibition". By "Deprivation", I am referring to the direct loss of income because the survivor (widow, widower or former civil partner) is now no longer paid SPBs, by operation of Regulation C9. Deprivation is exemplified by Mr Sneller's position after 21 December 2020, and by the loss of the £18,400 in SPBs (calculated as at the time of the hearing before me) which he would have received in SPBs had he not acted in a way which triggered Cessation. Deprivation is an impact experienced by those who lose their SPBs. By "Inhibition", I am referring to the ways in which the prospect of Deprivation can detrimentally affect those who are in receipt of SPBs, in relation to the ways in which they live their lives, and specifically their approach to private life and relationships. Inhibition is an impact experienced by those who retain their SPBs, making choices which avoid Deprivation. Inhibition is exemplified by the evidence of all three Claimants (in Mr Sneller's case, prior to November 2020).

Solitude and Financial Security

30. When AR15 amended PPR87 so that SPBs under the PPS became Payable For Life after a Death in the Line of Duty (§14 above), the Home Secretary Theresa May said this to Parliament (12 October 2015, emphasis added):

> ***A week ago, in the small hours of the morning, Police Constable David Phillips was killed in the line of duty. PC Phillips' death serves as a terrible reminder of the real dangers that police officers face day in and day out as they put themselves in harm's way to deal with violent criminals and dangerous situations. The murder investigation is ongoing, Merseyside police***

> ***have made arrests and I am sure that the whole House will agree on the importance of bringing his killers to justice. Police officers put themselves in danger doing a vital job and it is important that we ensure that their families are looked after if the worst happens. As the law stands, widows, widowers and surviving civil partners of police officers who are members of the 1987 Police Pension Scheme stand to lose their partner's pension if they remarry, form a civil partnership or cohabit. In recognition of the level of risk that police officers face in the execution of their duty, the Government have pledged to reform the 1987 police pension scheme. We will reform the scheme to ensure that the widows, widowers and civil partners of police officers who have died on duty do not have to choose between solitude and financial security. The Government will lay these regulations in the coming weeks and the change will be backdated until 1 April 2015.***

Mr Edwards for the Claimants adopted Mrs May's resonant phrase – about "widows, widowers and civil partners" being in a position that they "have to choose between solitude and financial security" – as encapsulating the impacts and implications of the Cessation mechanism in Regulation C9 Cessation. Inhibition means "solitude", endured in order to retain the "financial security" which would be lost through Deprivation. Another way of expressing the choice is that 'the price of Financial Security is Solitude'.

Security, new relationships and own needs

31. In the consultation response by COPS (6 March 2004) (§25 above), responding to a Home Office consultation document (December 2003) relating to the proposed NPPS (§24 above), the implications of Regulation C9 were encapsulated in this way:

> ***The current policy of depriving such spouses of pension upon re-marriage is punitive and damaging to the efforts of survivors in rebuilding their lives. The fact that pensions can be removed at any stage of organised co-habitation further impedes development of any such relationship. In general, police survivors are wary of developing new relationships, based solely on the impact that pension removal would have on their life and those of any children. In the aftermath of death, this financial independence, paid for by the officer over many years, is much valued by survivors. Coping as it often does with providing continued education and lifestyle for children, survivors place it above their own needs.***

A 'price' on 'love'

32. When Madeleine Moon MP spoke at a Westminster Hall debate on 15 March 2017 (§28 above), raising the case of a constituent whose SPBs had been withdrawn upon remarriage, Ms Moon referred to SPBs being Payable For Life under the PPS in the case of Death in the Line of Duty, and to SPBs being Payable For Life under changes made to the Armed Forces pension schemes, describing Cessation under Regulation C9 as (BP19 p.16) "a harsh financial penalty", adding that:

> ***For me, this boils down to a simple issue: we have to stop putting a price on love.***

The Claimants' lived experience of Regulation C9

33. The practical, real life impacts and implications of the Cessation mechanism in Regulation C9 have been powerfully described in the Claimants' evidence in this case. There is no reason to doubt that evidence. I am going to try to encapsulate in this summary the lived experience which they describe. I start with my encapsulation of the evidence of Sharon Green:

> ***I am now 55. I married Kevin Green in March 1989. Kevin was a serving police officer in the Met for 28 years between May 1982 and March 2010 when he died of renal failure, linked to an alcohol problem which I attribute to the traumatic nature of his 13 years working in the paedophile unit. When Kevin died, we had been married for 20 years and our teenagers were 14, 16 and 18. In the 12 years since Kevin's death I have lived as a single person. I now have a partner. But I am prevented from cohabiting with or marrying my partner because of Regulation C9.***
>
> ***My children are all in their twenties and I have two grandchildren. My police widow's pension and my full-time salary enabled me to maintain the family home and support our children through school and university. One of my biggest concerns is financial security as I get older. My partner lives in the same street and our relationship has grown from a friendship. I would like the opportunity to live with my partner and have a normal relationship. But I am worried about my financial future. I receive just over £1,000 a month in widow's pension. When the children were living at home, I was very protective of them and did not want any change in the household that would impact on their lives. Now that they have moved away, I don't feel free to do what I want to do. I have an ongoing realisation that I have to make a choice about whether my priority is financial security or love. I should not have to get involved with such a balancing act. I often sit in my house and watch the world outside go on around me. I cannot allow anyone to live in the house with me and I am left confined within my house alone. I get very emotional when I think or talk about these issues.***
>
> ***To want to live with someone is normal. But the practical reality is that I just can't do that, because of the financial impact it would have on me. My children and my friends don't understand. They want me to be free and to move on to be able to move in together with my partner. But for me the risk of losing financial security is too great. I would like to fill the future with somebody. My partner and I don't necessarily want to get married (he doesn't really believe in that), but I know he would like us to live together. Living together is something we have spoken about in the past. But it has never been a possibility. My partner is aged 57. He has had periods of ill-health which have brought this all home to me. I too have faced periods with health problems where I have needed reassurance in times of uncertainty and distress and where I have found it particularly difficult that my partner cannot stay over with me. When I spend time with my partner at his house, or he comes to see me at mine, I worry about who is looking at us or watching us as we come out of our houses. I live in a constant sense of fear that someone is going to watch over us and suggest at some stage that I am committing fraud.***
>
> ***As matters stand, I don't have a choice. I have to live alone or else I would suffer immense financial hardship. I want to be together with my partner or at the very least be able to make a free choice without having to worry about the consequences. But without the widow's pension I feel like I have no security for the future, and to sell the family home for my own personal financial benefit and security would feel like taking my children's inheritance away from them.***

34. This is my encapsulation of the lived experience of Regulation C9 of Jacqueline Jennings:

> ***I am now aged 55. My husband David Jennings was 48 and a serving police officer in the Met when he died in March 2016, after losing control of the car he was driving along a motorway. David had served in the police for 23 years from August 1992. When he died, our children were aged 17, 15 and 11 (they are now aged 23, 21 and 17). I too had been in the Met too, which is how David and I met, but I had to retire on medical grounds (a back injury) in 2010. I was a clerk working in a local authority education department when David died, but I then gave up work to be a homemaker. I found out about Regulation C9 after David's death when I started receiving a regular form to fill in for the pensions administrator, requiring me to confirm that I had not remarried and was not cohabiting with anyone. I have found that process demeaning. It began to dawn on me that if I was to decide to marry or live with someone new, I would be required to give up the financial security of my police widow's pension.***

> ***Regulation C9 prevents me from progressing on with my life. The fact that I cannot now share my life with anyone is restrictive, controlling, demeaning, archaic and very depressing. It is so negative. At the moment I don't have any option or intention of living with someone or getting married to them. My children are still in school or higher education and my priority and focus is really on them. But at some stage in the future all three of my children will no longer be living with me and I will be on my own. I may want to live with someone, but I'm just not prepared or able to do that now, because if I was to move in with or marry someone, I would have to become financially dependent on them. That is completely wrong. I am not some sort of chattel or property. I am an independent woman who was married and through no fault of her own lost her husband.***
>
> ***The fact that my husband has died and is gone should not mean that my life effectively has to stop and be put on hold. Regulation C9 makes getting over David and his death much worse and far more difficult. It is almost like a stranglehold around my neck. It has stopped me from trying to feel positive about life. I worry about making plans for myself and the children going forward and for the future. I want to try to be positive and I know that David would have wanted for me to be like that. If I moved in with or married another man, I would immediately lose my widow's pension and in turn my regular monthly income.***
>
> ***I have now been seeing someone for two years. My children know, as I do, that at some stage my new partner and I will want at least to think about moving in and living together. But that just isn't going to be possible or feasible for as long as Regulation C9 still bites. There are no plans at the moment of moving in or marrying. But I know that is something we would both want to be able at least realistically to consider. Regulation C9 creates an irreconcilable tension and dilemma between financial security and happiness. My partner lives half an hour away from me. Since we started seeing one another we have to observe what is a pretty ridiculous regime. We can never stay over at each other's homes for any protracted length of time. It is almost as though we are young teenagers, having some kind of secret relationship, away from the attention and knowledge of our parents and others. That does not help to develop a relationship. It has been very damaging. I cannot see any scenario or situation where I would be prepared to give up the financial security of my police widow's pension to move in with my partner. Unless Regulation C9 is changed it will never be possible for me even to think about the possibility of that. There is no possibility for me to have a relationship in any way similar to the one David and I had before he was taken away from the children and me.***

35. This is my encapsulation of the lived experience of Regulation C9 of Paul Sneller:

> ***I am now 60 years of age. My circumstances have changed during the course of these proceedings. My wife Sharon Sneller was a serving officer in the Met, which was how we met. I had joined the Met in 1978 aged 16 and served for 30 years, retiring in August 2010. Sharon joined the Met in 1977 and retired in 2007 after 30 years' service. We were in our 19th year of marriage when Sharon died in January 2012 from an aggressive breast cancer. Throughout our married life Sharon and I had an equal wage and split everything 50-50 financially. My own police pension is around £1,700 a month and my widower's police pension was around £1,100 a month. These pension entitlements left me financially secure.***
>
> ***In February 2019 I met my partner Llara, a teaching assistant at a special needs school, and we started dating in March 2019. Llara lived a few miles away from me with her son (now aged 16) who attends local school. Llara has an older son who is 25 and living with his own partner and son. I became aware of Regulation C9 through paperwork after Sharon's death. I found having to complete a form every year, answering questions to certify that I was not cohabiting with anyone and was not married, very intrusive. Regulation C9 put me in a predicament. It meant I was left in the position that if I wanted to move on with my relationship with Llara I would be financially penalised and would have to make big life changes to accommodate the reduction in income. But if I did not, the likelihood would be that the relationship would, over time, stagnate and could well come to an end. Losing my widower's pension entitlement would make contributing financially to Llara and her teenage son much more difficult. It would significantly impact on our standard of life and decisions we would and could make. It would take away choices from us. As at June 2020, my position***

> ***was this. I did not know how long I could put off the decision about Llara and I moving in together. I was concerned that the longer I delayed making a decision to move in together, the more difficult things would become. I really did not want to lose Llara, and I knew that Sharon would have been furious about the position that I was in, having implored me weeks before she died to find someone to share the rest of my years with.***
>
> ***In November 2020, Llara and her teenage son moved into my house, and we have lived there together ever since. I informed the authorities that we were now cohabiting, and my widower's pension was stopped on 21 December 2020. On 27 August 2021 Llara and I were married. What had happened was that the Covid lockdown restrictions of March 2020 had prevented us from even staying over at each other's houses. Being unable to stay together as one household was extremely hard, putting attention and strain on our relationship, and we were really missing human touch and human contact. When the lockdown restrictions eased to allow us to visit one another again I came to the realisation that being together with Llara and her son as a family unit was far more important to me than money. I concluded that it was necessary for my happiness and there is for us all to be together and that we would just have to adapt our lives to losing the money.***
>
> ***Following the loss of my widower's pension we have had to make financial sacrifices and adapt. I felt so much happier to be able to be a proper family, but it feels that I have been financially punished for finding a new partner in life and forming a new family. In the end I started to resent the widower's pension because it meant I could not be with those who I loved and had to be alone and miserable. I chose future happiness over money. The intrusion and effect of Regulation C9 got to the point where I began to resent the police for whom I worked for over 30 years and for whom Sharon worked for 33 years. The loss of the £1,083.66 per month is a significant reduction in monthly income, solely due to losing the pension entitlement, which means a loss of £18,422.22 as at 31 March 2022.***

6. Some key authorities

Two Basic Four-Stage Disciplines

36. I will start with two Four-Stage Disciplines. The first is the Basic Four-Stage Proportionality Discipline. This description comes from Brewster at §66 (Lord Kerr), citing an Article 8 case (Quila).:

> ***The test for the proportionality of interference with a Convention right or … the claimed justification for a difference in treatment, is now well settled: see the judgments of Lord Wilson JSC in R (Quila) v Secretary of State for the Home Department [2012] 1 AC 621, para 45, Lord Sumption JSC in Bank Mellat v HM Treasury (No 2) [2014] AC 700, para 20 and Lord Reed JSC in Bank Mellat, at para 74. As Lord Reed JSC 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 …"***

The second is the Basic Article 14 Four-Stage Discipline, for assessing a question of Article 14 compatibility. The following description is from In re McLaughlin [2018] UKSC 48 [2018] 1 WLR 4250 at §15 (Lady Hale). As can be seen from it and the passage above, it adopts as stage (4) the Basic Four-Stage Proportionality Discipline:

> ***[Article 14] raises four questions, although these are not rigidly compartmentalised: (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights? (2) Has there been a difference of treatment between two persons who are in an analogous situation?***

(3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"? (4) Is there an objective justification for that difference in treatment?

Article 12 cases

37. Key cases cited to me in relation to Article 12 were (in date sequence): Hamer v UK (1979) 24 DR 5 (EComHR, 13 December 1979); Draper v United Kingdom (1980) 24 DR 72 (EComHR 10.7.80); F v Switzerland (1987) 10 EHRR 411 (18 December 1987); Goodwin v United Kingdom (2002) 35 EHRR 18 (11 July 2002); and R & F v United Kingdom App. No. 35748/05 (28 November 2006); R (Baiai) v Secretary of State for the Home Department [2008] UKHL 53 [2009] 1 AC 187 (30 July 2008); and its sequel in Strasbourg O'Donoghue v United Kingdom (2011) 53 EHRR 1 (14 December 2010). A good place to start is the judgment of the House of Lords in Baiai, where most of the earlier Article 12 cases were discussed (§14).

Baiai

38. Baiai was an Article 12 case about three couples who had applied in 2005 to the Home Secretary for permission to marry (PTM) (§§2-4). Section 19 of a 2004 Act prohibited a registrar from registering any marriage unless specified evidence had been produced which, in the case of those with the claimants' immigration status, meant the Home Secretary's written PTM (§9). This was part of an overall scheme whose other elements were: 2005 Regulations (made pursuant to statutory powers in the Act) prescribing information required of a PTM applicant and an application fee which (since April 2007) was now £295 (£590 for a couple both subject to immigration control) (§§10, 30); and Immigration Directorates Instructions (IDIs) identifying general immigration status criteria for refusing PTM (§§11, 31). The High Court had granted a declaration of incompatibility based on Article 14 breach (the scheme gave a blanket green light for Anglican marriages). The House of Lords concluded: (i) that the scheme, by virtue of the criteria in the IDIs, was incompatible with the Article 12 right to marry (§§23-24, 31, 44), making a declaration as to the Article 12-compliant meaning of the primary legislation (§32); and (ii) that the level of fee under the Regulations could itself constitute a breach of the Article 12 right to marry (§§30 and 40). A prominent feature was the crystallised intention to marry, identified on the part of the claimants (§§2-4) and in the previous cases discussed (§§14, 17-21). The analysis supports the following propositions. (1) The right to marry in Article 12 is a "strong" right (§§13, 16) described as "fundamental" (§14). (2) There being no Article 12 equivalent of Article 8(2) (§13), Article 12 cannot be qualified on grounds simply because they could be relied on under Article 8 (§§15, 46). (3) The Article 12 right to marry is "subject only to national laws governing its exercise" (§13) – picking up on the language of Article 12 which speaks of the right to marry "according to the national laws governing the exercise of this right" (§1) – which may be rules of substance or of procedure (§§14, 16). (4) A "restrictive" approach is taken towards "national laws governing the exercise of the right to marry" (§14). (5) National laws governing the exercise of the right to marry cannot, whether by rules of substance or procedure, impose conditions which "impair the essence of the right to marry" (§§14, 16, 30): such laws and conditions must not "injure or impair the substance of the right", or "deprive a person or category of person a full legal capacity of the right to marry", or "substantially interfere with their exercise of that right" (§14). (6) As a matter of "accurate analysis" of the "law" (§25), a permissible objective which national laws governing the exercise of the right to marry can pursue is the imposition of reasonable conditions on a third country national's right to marry in order to identify

and prevent a marriage of convenience, because Article 12 exists to protect the right to enter into a genuine marriage (§§20-22). (7) As a matter of "accurate analysis" of the "scheme" (§25), the criteria in the IDIs went beyond identification and prevention of marriages of convenience and were therefore necessarily disproportionate (§§23-24, 31), as well as arbitrary and unjust (§44). (8) Propositions (6) and (7) did not turn on "considerations of broad social policy" but on the "accurate analysis of the law and of the scheme" (§25). (9) Even in the context of identification and prevention of marriages of convenience, the fee under the Regulations would be incompatible with Article 12 if its level "impaired the essence of the right to marry" (§30) or unreasonably inhibited the exercise of the right to marry (§32), which a fee of £295 (£590 for a couple) which "a needy applicant could not afford" could be expected to do (§30).

O'Donoghue

39. In O'Donoghue the Strasbourg Court dealt with questions about the Article 12 compatibility of three versions of the same scheme considered in Baiai: (i) the 2005 version; (ii) the April 2006 version; and the May 2007 version (§§5-8, 25-28). Article 8 gave rise to no separate issue (§112). There was a distinct breach of Article 14 (read with Article 12) because (§103) a person with no leave to remain who was willing and able to marry according to the rights of the Church of England was free to do so unhindered, whereas a person with no leave to remain who was unwilling or unable to do so could not. That meant, in the case of persons in "relevantly similar" situations, a difference in treatment for which no justification had been provided (§§101-102). As to Article 12, the Court endorsed Baiai and concluded that all three versions of the scheme were inconsistent with Article 12 and the right to marry (§§88-89). That was because the schemes, as designed, went beyond the Article 12-permissible purpose of identifying and preventing marriages of convenience (§87). Article 12 did not involve the permissible grounds of interference seen in Article 8(2), with their accompanying test of "necessity" or "pressing social need" (§84). National laws governing the right to marry could include formal rules and substantive provisions but could not – compatibly with Article 12 – introduce limitations which "restricted" or "reduced" the right to marry "in such a way or to such an extent" that "the very essence of the right is impaired" (§82). In applying that test, the question was whether, having regard to the state authorities' latitude (in Strasbourg, the "margin of appreciation"), the impugned interference with the right to marry was "arbitrary or disproportionate" (§84). The Court found a breach of the applicants' Article 12 right to marry in two ways (§91). The first was that the very essence of the right to marry was impaired by the eligibility criteria under the IDIs, with their blanket prohibition and absence of any attempt to investigate the genuineness of the proposed marriage (§§80, 91). The second was that the very essence of the right to marry was impaired because the level of fees of £295 from April 2007 (§45) was such that the applicant as a "needy applicant could not afford" (§90); it being no answer that the applicants' friends had rallied round to pay the fee (§§37, 91); it being no answer that he might later receive a refund; the imposition of the fee acting as "a powerful disincentive" to marriage (§§90-91). A conspicuous feature of O'Donoghue was the Court's examination of the changing picture as to the applicants' relationship. They had cohabited in a long-standing and permanent relationship from December 2005 and the intention to marry had been formed in May 2006 (§85). The UK Government argued that this chronology affected which version of the scheme affected them (§68). The Court concluded that it was not the first version (2005), but only the post-April 2006 second version (§25) which had affected the applicants (§86),

on the basis of a clear finding as to when they had formed the intention to marry (§85). The ultimate finding of breach of their Article 12 rights was based on the operation of the scheme from the date of forming the intention to marry (§91). The Court did not find them to have been "victims" of the first scheme's identified incompatibility with Article 12. So, the Court was – in that case – treating the forming of an intention to marry as an essential element of breach of their Article 12 rights.

Hamer and Draper

40. In each of Hamer and Draper serving prisoners who wished to marry were prevented from doing so by the combined effect of "national law" and "administrative action" which substantially delayed the exercise of the right to marry and which the European Commission of Human Rights ruled constituted an "injury to the substance of" that right (Hamer §73, Draper §63).

F v Switzerland

41. In F v Switzerland the Swiss civil court which granted the applicant's divorce (on 21 October 1983, with effect from 21 December 1983) had imposed a three-year prohibition on his remarriage (§13). That was pursuant to a provision of the Swiss Civil Code which required the court to fix such a period (§22). The Swiss courts had interpreted that provision so that such a course was appropriate only in cases of 'serious violations of essential conjugal duties' of 'exceptional gravity' playing 'a decisive role in the breakdown of a marriage' (§23). The 3-year prohibition was due to expire on 21 December 1986 (§36). The applicant was cohabiting with a new partner whom he wished to marry (§44), an intention which he stated on 14 March 1986 (§18). The new partner was herself free to marry under Swiss law from 22 May 1986 (§§36, 45). The applicant claimed that the three-year prohibition, and the provision of the Civil Code, violated Article 12 (§30). The Court articulated two key principles. The first (§31) was that in proceedings originating in "an individual application" the Court had to "confine its attention, as far as possible, to the issues raised by the concrete case before it", its "task" thus being "not to review in abstracto under the Convention the domestic law complained of but to examine the manner in which the law has been applied to the applicant or has affected him". The second (§32) was this core proposition, based on the previous case-law:

> ***Article 12 secure the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is "subject to the national laws of the Contracting States", but "the limitations thereby introduced must not restrict or reduce the right in such a way order such an extent that the very essence of the right is impaired".***

Accepting that the stability of marriage is a legitimate aim in the public interest for the purposes of Article 12 and the right to marry (§36), the Court did not accept that the prohibition, viewed in the context of present-day conditions (§33), was appropriate for achieving that aim, nor did it serve to preserve the rights of others, and protection of the applicant 'from himself' was not of sufficient weight to justify the impugned interference (§§36-37). The prohibition affected the very essence of the right to marry and was disproportionate to the legitimate aim pursued (§40). The Court did not identify precisely when the violation had arisen. However, in the context of "non-pecuniary damage" and "just satisfaction", it emphasised that damage did not arise until 22 May 1986 (§45), that being the date on which there was the intention to marry and the new

partner was free to marry. The judgment is noteworthy for present purposes for a number of reasons. (1) It illustrates a national measure "affecting the very essence of the right to marry" which was "disproportionate". (2) It illustrates a national measure which had an original 'historic rationale', which was now outdated. (3) It emphasised the need to focus on the "concrete" manner in which the law had been applied to the applicant or had affected them. (4) It illustrated a lack of proportionality where the means was found not to be appropriate for achieving the legitimate aim. (5) It was consistent with the need for a present intention to marry.

Goodwin

42. In Goodwin the applicant was a post-operative male-to-female transsexual (§12), registered at birth as male, who had undergone gender reassignment surgery in 1990, and who since 1985 had lived in society fully as a female (§§13, 76). For legal purposes the applicant remained a male (§76). That was essentially because the birth certificate which recorded the historical fact of her biological criteria at birth was not subsequently updatable (§§23-25). It was the basis for a raft of arrangements relating to marriage (§§21-22), social security, employment and pensions (§27). The Strasbourg Court found violations of Article 8 and Article 12 (§§93, 104). Central to the case was the recognition, in the application of human rights standards, of the need to have regard to "changing conditions" within the state and other states (§§74, 92, 98, 100). In the context of Article 12 and the right to marry the Court restated (see §99) the same core proposition as seen in F v Switzerland. The Court concluded that "the allocation of sex in national law to that registered at birth" constituted "a limitation impairing the very essence of the right to marry" in which "a very essence of [the applicant's] right to marry has been infringed" (§101). That conclusion was referable to the right to marry "in this case", arising out of the concrete facts of the applicant who "lives as a woman, is in a relationship with a man and would only wish to marry a man" and "has no possibility of doing so" (§101). Noteworthy features for present purposes are these. (1) Like F v Switzerland, Goodwin is an example of a national measure with an outdated social rationale. (2) The Court concluded that the applicant's "right to marry has been infringed" without recording any finding that there was a present intention to marry (there may or may not have been evidence of such an intention); albeit in answering an argument that the applicant remained 'free to marry (a woman)', the Court focused on the applicant's position "in a relationship with a man" with "no possibility" of being able to marry a man, the recorded facts being that she currently enjoyed a full physical relationship with a man, who she could not marry (§§95, 101).

R & F

43. In R & F the applicants were a married couple. One partner, having been born biologically male, had undergone gender reassignment surgery in November 2003, 5 years into the marriage. The provisions of a 2004 UK statute allowed those who had acquired a new gender to apply for a Full Gender Recognition Certificate ("Full GRC"), a statutory precondition of which was that the applicant was not married. That precondition flowed from domestic legal provisions prohibiting same-sex "marriage", although domestic law by now provided for "civil partnership". The claim was that the Article 12 rights of the couple were being violated because they would be required to bring an end to their marriage in order for the Full GRC to be obtainable. The claim was rejected by the Strasbourg Court as "manifestly ill-founded". The Court's decision focused on the latitude (the Strasbourg "margin of appreciation") of the UK authorities

to regulate the effects of a change of gender in the context of marriage. The Court considered there to be no viable argument that the "very essence" of the right to marry had been "impaired" by the measures in place, having regard to that margin of appreciation. This is an admissibility decision, which focused on questions of justification. But it is noteworthy that the Court did not reason its decision on the basis of non-interference, or non-victimhood, for the purposes of the Article 12 right to marry. The UK Government had argued that "Article 12 rights were not interfered with by the [2004 Act] as the applicants were not required to bring an end to their marriage. It was a matter of choice for the second applicant as to whether to obtain a Full GRC". The applicants had argued in response that "there was no element of choice, or proper, choice involved". The Court recorded that the legislation clearly put an applicant who wished to obtain a Full GRC "in a quandary – she must, invidiously, sacrifice her gender or her marriage". R&F is an illustration that it may, in principle, be possible to invoke Article 12 and the right to marry in circumstances which the measure in question more directly concerns something other than marriage (in R&F, the obtaining of a Full GRC), securing which would by statutory design entail sacrificing the ability to marry (or, in R&F, to remain married).

'Victim' cases: Norris, Siliadin and Monnat

44. I turn to describe three cases which were given particular emphasis in relation to "victim" status (HRA s.7(1)(7) and ECHR Article 34). The first was Norris v Ireland (1991) 13 EHRR 186 (26 October 1988). That case was about Irish statutory provisions which breached Article 8 rights. The applicant was an active homosexual (§9) who succeeded in claiming that Irish legislation criminalising certain homosexual practices between consenting adults (§§12-14) interfered with his Article 8 right to respect for private life (§38) without justification (§47). The Irish Government unsuccessfully argued (§28) that, as the impugned legislation had never been enforced against the applicant, he was not a victim. The Court referred to the absence of prosecutions and the "minimal" risk of the applicant being prosecuted (§33), but found him to be a "victim" of a law which violated his rights because of the "risk" of his being directly affected (§31), the position in which the law placed him of having to respect it by refraining from consensual adult homosexual acts in private or committing such acts and becoming liable to prosecution (§32), running the "risk" of being directly affected because a criminal law was on the statute book and could be enforced at any time (§33). The second was Siliadin v France (2006) 43 EHRR 16 (26 July 2005). That case concerned French statutory provisions which breached Article 4 rights (freedom from slavery and servitude). The applicant had been an irregular migrant child in France, subjected to forced labour and servitude by families for whom she had for years worked, who successfully claimed that the French legislation did not afford practical and effective protection (§148) to discharge positive obligations under Article 4 (§149). The French Government unsuccessfully argued that the applicant was "no longer" a victim given certain measures and decisions taken which were "favourable" to her (see §§53-57). The Court reasoned that the applicant could be "directly affected" without necessarily having suffered "prejudice" (§62) and whether she was a "victim" was bound up with the merits (§63). The third was Monnat v Switzerland (2010) 51 EHRR 34 (21 September 2006). That case concerned a violation of Article 10 (freedom of expression) by virtue of the application of Swiss statutory provisions. The applicant was a broadcaster whose report criticising the Swiss government during the Second World War (§6) had resulted in a "legal embargo" on further broadcast or access (§17).

He successfully claimed that the embargo violated his Article 10 rights (§71), including by reference to the deterrent effects for journalists contributing to public discussion on issues of major public concern (§70). On the question whether he was a "victim", the Court emphasised that the "victim" requirement served to exclude a challenge to general legal arrangements alleged to breach the Convention, by requiring that an applicant "is or has been directly affected by the act or omission in question or runs the risk of being directly affected by it" (§31).

Key Article 14 cases: SC

45. I turn to discuss key authorities which were cited to me in relation to Article 14. I have described the Article 14 analysis in O'Donoghue (§39 above). It makes best sense to start with the most recent Supreme Court case which was relied on: R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26 [2022] AC 223 (9 July 2021). SC was an Article 14 challenge to the individual element of child tax credits being statutorily-limited to two children. I mention that the Court emphasised, in the context of an Article 12 claim, that the claimants had no present intention of marrying (§35); and, in the context of an Article 8 claim, that to "discourage people on lower incomes from having larger families" was not a "purpose" of the measure (§§31-32). The key takeaway statements or reminders from SC so far as the present case is concerned are these. (1) The "status" element of a viable Article 14 claim involves a difference in treatment which is "based on an identifiable characteristic" (§37(1)); where "status" must not be "defined solely by the difference in treatment complained of" but need not have "social or legal significance for other purposes or in other contexts" (§§69, 71); and where "other status" is not generally difficult to satisfy and "children living in households containing more than two children" did so (§§70-71). (2) "Status" refers to the "ground of the difference in treatment" and "certain grounds, such as sex, nationality and ethnic origin" involve "'suspect' grounds" and lead to a "strict standard of review" requiring "very weighty reasons" (§§71, 100-101), albeit that a "less intense standard of review" may be appropriate in particular circumstances (§103). Where the difference in treatment is on a "non-suspect ground", there is "less strict scrutiny, other things being equal" (§114). An argument that a measure "treats women differently from men" constituting "discrimination on the ground of sex" invokes sex as a relevant "status" (§44), including a neutrally-expressed measure which "affects more women than men" giving rise to "indirect discrimination" (§46) involving "a disproportionately prejudicial effect on a group characterised by a salient attribute or status" (§49). (3) The 'comparability' element of a viable Article 14 claim involves that there be "a difference of treatment of persons in analogous, or relevantly similar, situations" (§37(2)); and "children" and "adults" were not in relevantly similar situations (§186). (4) The 'justification' test under Article 14 has as its ultimate question the Basic Four-Stage Proportionality Discipline (§36 above), applied to the difference in treatment, asking whether there is "no objective and reasonable justification", meaning that the difference in treatment "does not pursue a legitimate aim or … there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (Brewster §§37(3), 98). Control of expenditure in the context of resource-implications and ensuring a benefits system which was fair and reasonable, in the context of helping those in need, were aspects of legitimate objectives (§202). (4) An Article 14 challenge to policy choices of the executive or legislature in relation to "general measures of economic or social strategy" attracts more "nuanced" approach than encapsulated simply by "manifestly without reasonable foundation" (§§142, 158),

involving a flexible approach (§159) focusing on the width of the margin of judgment (§161), in which there are "a range of factors which tend to heighten, or lower, the intensity of review" from which the Court has to make "an overall assessment" (§§99, 116, 130), other particular factors including (§§115, 129, 158): "suspect grounds" (heightened: §§139, 146), common standards (heightening or lowering), historic-inequality elimination (lowering) and other particular circumstances (heightening or lowering) such as the impact on children's best interests (§158). (5) "Manifestly without reasonable foundation" as a formulation may not be a determinative test but rather an indication of the intensity of the review, other things being equal (§151), where "a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the fields of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation" (§158) and a substantial degree of weight will normally be afforded to the judgment of the primary decision-maker in fields such as economic and social policy (§161).

Brewster

46. I will discuss the other key Article 14 cases in sequence. Brewster (Supreme Court, 8 February 2017) is a case about SPBs in a new contributory public service pension scheme, where a disentitling regulation was found to violate Article 14 (read with A1P1). A new Northern Ireland local government pension scheme, governed by 2009 Regulations (§22), had been adopted from April 2009 with Lenny McMullan as an Active Scheme Member. The regulations made unmarried cohabitees eligible (for the first time) for SPBs but required a cohabitee nomination form (CNF) written by the Active Scheme Member (§3). Mr McMullan died in December 2009 (§1) without having written a CNF (§3). Denise Brewster was his surviving cohabiting partner. She challenged the decision not to award her SPBs, arguing that the CNF condition imposed on unmarried partners violated Article 14 (§4). Her claim succeeded (§68). Denial of SPBs fell within the "ambit" of A1P1 (§§44-45). Being in a cohabiting relationship other than marriage or civil partnership at the time of a partner's death was an "other status" (§46). As to comparability, surviving unmarried partners were in an "analogous situation" to surviving married partners or civil partners (§47). The test was "manifestly without reasonable foundation" (§55), where the relevant "status" was not "an inherent or immutable personal characteristic" such as sex or race (§§56-59). The identifiable objective of the new scheme eligibility rule was to include unmarried cohabitees as beneficiaries of SPBs (§67), eliminating unwarranted differences of treatment between married/civil partner survivors and unmarried long-term partners (§34). But there was no rational connection between that objective and imposing the CNF (§67). It was appropriate for the 2009 Regulations to include procedural requirements for establishing a genuine and subsisting relationship of cohabitation (§30). But that did not justify the CNF, a formality now said to pursue objectives of verifying the relationship and the deceased's wishes (§§38-39) but which, in fact, added nothing to the prescribed enquiry made of a survivor to show the genuine and long-standing relationship of financial dependence or inter-dependence (§43). Although appropriate to accord a wide margin of discretionary judgment to a rule-maker's choice and conclusion which lay within the field of socio-economic policy (§§49, 63), socio-economic factors had not been at the forefront of the decision-making process or the subject of a deliberate decision (§§64-65) and the claims now made to justify the nomination requirement (§§38-43) were general claims unsupported by concrete

evidence and disassociated from Ms Brewster's circumstances (§65). Brewster is in essence a case where the claimant was in a category who was intended to benefit from SPBs under the design of a scheme, who had fallen foul of a formal procedural requirement which did not promote – but rather impeded – the legislative purpose and had been unconvincingly explained, ex post facto.

Harvey

47. Harvey (Julian Knowles J, 30 October 2018) is a case about SPBs in an old contributory public service pension scheme, where an ineligibility regulation was found not to violate Article 14 (read with A1P1). The 1997 local government pension scheme made provision for SPBs, but not for an unmarried cohabiting partner (§24). The new 2008 scheme provided for such SPBs (§30), but the 1997 scheme was unamended. A previous scheme amendment to include "civil partners" in 2005 had operated 'retrospectively', having taken effect from April 1998, and moreover in respect of any service after April 1988 (§§23, 41(a), 61). These were "funded" schemes with a pot of invested assets (§43), paid for by contributions from scheme members, scheme employers and returns on the invested assets (§15). Stephen Roe was unable to join the 2008 scheme (§§16, 29) having ceased to be an Active Scheme Member of the 1997 scheme on his redundancy in October 2003 (§5). When Mr Roe died in 2016 the local authority refused SPBs (§6) to his surviving unmarried cohabiting partner Catherine Harvey (§4). Ms Harvey's Article 14 claim (§2) impugned the failure to revise the 1997 scheme to include unmarried partners (§193). Two of the ways in which the challenge were put were these. First, that there was an unjustified difference of treatment of unmarried partners of former 1997 scheme members compared to married partners of former 1997 scheme members (§149). Alternatively, secondly, that there was an unjustified difference of treatment of unmarried partners of former 1997 scheme members compared to unmarried partners of former 2008 scheme members (§172). The claim failed (§221). The circumstances fell within the "ambit" of A1P1 (§145). There was a difference in treatment (§146). Being unmarried was an "other status" (§150). And "being the cohabitee of a pensioner member of the 1997 scheme" was also an "other status" (§175). So far so good.

48. The claim in Harvey failed for two reasons. (1) It failed as to comparability. An unmarried partner of a former 1997 scheme member was not in a "relevantly similar" and "analogous" position to a married partner of a former 1997 scheme member (§170). Nor was an unmarried partner of a former 1997 scheme member in a "relevantly similar" and "analogous" position to an unmarried partner of a former 2008 scheme member (§176). The reason was essentially the same (§176): benefits had been designed-in and costed-in and contributed-towards (by the deceased scheme member) in the case of the married partner of a former 1997 scheme member, and in the case of the unmarried partner of a former 2008 scheme member, but not in the case of the unmarried partner of a former 1997 scheme member (§§166, 170, 176, 182). (2) The claim also failed, in any event, because there was objective justification for the differences in treatment (§§193-220). The test was manifestly without reasonable foundation (§§196, 213) and there was no "status" of a "suspect" nature (§§194, 197-198, 102). The impugned act of not extending the 1997 scheme (§193), 'retrospectively' (§210), to include SPBs for unmarried cohabitees – a category included for SPBs within the new 2008 scheme – was conscious decision-making (§198, 125) in a socio-economic policy context (§218, 115). These were "bright line rules" (§181), in a context

where there was a need for "fixed and predictable rules" (§51). They suitably (§209) and proportionately (§§214-220) achieved the legitimate objectives – which a 'retrospective' extension would undermine (§212) – of avoiding unexpected pension liabilities with their implications for the public purse and unfairness in terms of the rules under which active members contributed (§§201-206). Undertaking an assessment involving "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 conclusion was that "the impact on the claimant" was "not disproportionate to the benefits of the absence of any [SPBs] in her case and that of others similarly situated" (§215). This was a "package … designed to reflect the particular needs of the time, having regard to the need to recruit and retain employees, to be affordable for employers and the taxpayers who ultimately fund the scheme, and to operate fairly between members" (§51). The "central and core justification" was the design-in, costing-in and contribution-towards pension benefits (§203), viewed in the context of the established general non-'retrospectivity' principle (§210).

49. Harvey is in essence a case about the Article 14-compatibility of declining to make a 'retrospective' change to an old scheme, enhancing scheme benefits beyond what was designed, costed and contributed-towards, in terms of eligibility to SPBs. The judgment in Harvey has two resounding themes. The first theme concerned Basic Prospectivity (§15 above) as a convincing and coherent Government policy (Harvey §210). This policy included that "those who have left the [scheme] should not be eligible for new benefits because they have not paid for them" (§166); which was a consistent and unquestioned Government policy that new benefits in public service pension schemes should only be applied prospectively, save in wholly exceptional circumstances (§210). This was why retired scheme members were not transferred into a new scheme "to receive a package of benefits only applicable after their retirement", and "active [scheme] members cannot be expected to pay contributions to fund benefits for someone who only ever paid contributions for a different package of benefits and liabilities" (§50). It was unobjectionable in principle (§60) not to have Complete Prospectivity (§15 above): for new benefits to become applicable to contributing Active Scheme Members, albeit partly relating to "past service" when they were "not paying contributions at a level assessed to cover that benefit", since current contribution levels could be set to ensure that the change is "paid for" by the "active membership as a whole" (§55). SPBs for Ms Brewster was incompatible with Basic Prospectivity, because "changes conferring new benefits upon persons who have left active membership" of the scheme (§55), so that Active Scheme Members are asked "to subsidise the benefit for a generation of pensioner members who have made no contribution towards the cost of that benefit" (§56), which was what was "objectionable, and what the Government through its policy approach has set its face against" (§60).

50. The second theme concerned conscious and contemporaneous policy decision-making. The difference in treatment was conscious and deliberate, with the positions of unmarried cohabitees of 1997 scheme members being "kept consistently different" (§166). The Secretary of State had given "detailed consideration at the time" to whether spouses and cohabitees should be treated in the same way and the circumstances in which that should happen, being "fully aware" of the difference in treatment in the 1997 scheme and having from 1998 onwards indicated the "willingness to bring forward

proposals to extend coverage to cohabiting partners if that was what the membership of the [scheme] wanted and were willing to pay for" (§98). The new 2008 scheme was a "package … designed to reflect the particular needs of the time, having regard to the need to recruit and retain employees, to be affordable for employers and the taxpayers who ultimately fund the scheme, and to operate fairly between members" (§51). There had been consultation: the Green paper in December 1998 (§64) (§23 above), policy work in the early 2000s (Harvey §65), representations by trade unions in 2003 (§66), a 2005/2006 consultation (§§67, 69). The responses did not advocate 'retrospective' cohabiting partner pensions for non-Active Scheme Members (§§66, 67 and 71), so that "no consultee suggested that new benefits should be extended retrospectively to pensioner members (§210) and "no one suggested it should be extended to pensioner members partners" (§166). This was the conscious decision-making (§§198, 125) in a socio-economic policy context (§§218, 115). Unlike Brewster (§171), where the applicable scheme had been designed, costed and contributed-towards to include an unmarried cohabitee like Ms Brewster, in Harvey the 1997 scheme had been designed and maintained to exclude an unmarried cohabitee like Ms Harvey.

Carter

51. Carter (Pepperall J, 21 January 2020) is a case about SPBs in the PPS, where an ineligibility regulation was found not to violate Article 14 (read with A1P1). The context was this: SPBs for widows who had married Scheme Member after the Member's retirement (post-retirement widows) had been excluded from the police pension scheme by conscious policy decision-making in 1949, 1971 and 1973 (§§13-20). Then in April 1978 SPBs for post-retirement widows were included but only (proportionately and) in respect of the Scheme Member's service after 5 April 1978 (§12.3). Eric Carter had retired from the police service in February 1977. Mr Carter's wife of 25 years, Jean Carter, died in 1979. In 1981 Mr Carter married June. In 1987 Mr Carter's pension became governed by the PPS, governed by PPR87, which retained the post-April service requirement for PPBs for post-retirement marriages (§§5-6). The 'date of marriage' restriction was removed in the NPPS and 2015 Scheme (§9) which Mr Carter could not join. Mr and Mrs (ie. June) Carter brought a claim that the restriction on SPBs for widows of post-retirement marriages breached Article 14 read with A1P1 (see [2020] ICR 1156 at 1159D). The Article 14 claim failed, in the first place because the crystallised position as to SPBs had pre-dated the HRA (§§44.1, 47), but in the second place because there was in any event no Article 14 incompatibility (§84). An age discrimination claim also failed (§91). The Article 14 analysis in Carter was as follows. There was no dispute or discussion as to "ambit". (1) June Carter's position as a "post-retirement spouse" was an "other status" for Article 14 purposes (§57). Her position as "should she outlive her husband, a post-retirement widow" was a "potential status" which was also an "other status" for Article 14 purposes (§57). (2) The claim did not fail on comparability: the Court treating as sufficient that there was "an analogous position to pre-retirement widows" (§58), declining to adopt the Harvey approach that "a costed benefit … paid for by contributions" defeated comparability (§§61-64), and preferring to "decide the matter on the basis of justification" (§64). (3) The "test of justification" was "manifestly without reasonable foundation" (§66) a test operating as a means of affording latitude when assessing proportionality (§68). (4) There was no lack of justification when the exclusionary rule was introduced and maintained while Mr Carter was an Active Scheme Member (up to 1977), in light of the prioritisation of pension benefits, and the approach to contributions and costs (§§79-

84), and it followed that the rule maintained in the PPS and impugned in the claim involved a justified difference in treatment.

52. It is significant to note that the Article 14 claim in Carter was built on alleged unjustified discrimination in the period up to 1977, the period while Mr Carter had been an Active Scheme Member. It was accepted that the change that had been made in April 1978 and maintained for the PPS after that – involving SPBs only for post-April 1978 service – was justified. That was because the post-1978 legislative design involved "following" the "usual practice of making changes prospectively to the pension scheme" (§§74, 24). The focus was on the scheme that had "applied throughout Mr Carter's police service" (§§74, 24) and whether, during that time, it "was always, or at least became, unlawful" through having "discriminated against post-retirement widows" (§74). It was on the basis of that pre-1978 analysis – that the rules had involved unjustified discrimination all along, while Mr Carter was an Active Scheme Member – that the subsequent retention of the exclusion in the PPS was impugned as a breach of Article 14. That is why the Court focused on the decision-making in 1949, 1971 and 1973 when dealing with the facts (§§13-20) and in considering justification (§§79-84). It may also provide the context for the Court's thinking as to crystallisation pre-dating the HRA.

Lennon

53. Lennon v Department for Social Development [2020] NICA 15 (Northern Ireland Court Appeal, 26 February 2020) is a case about Cessation – on cohabitation, marriage or civil partnership – but in relation to a particular species of welfare benefit. After the death of her husband in October 2012 the claimant and her 8 year old child became the beneficiaries of widowed parent's allowance ("WPA"). Pursuant to a Cessation mechanism in section 39A of the Social Security (Contributions and Benefits) (Northern Ireland) Act 1992, WPA payments would be suspended if the surviving spouse cohabited with a new partner (as the claimant did in October 2014) and would be terminated on marriage (as took place on August 2015) or civil partnership. The Article 14 claim failed. The circumstances fell within the "ambit" of A1P1 and Article 8 (§57). The difference in treatment was on the ground of "other status" as "a widow who is cohabiting" and then "a widow who has married" (§60), these being personal or identifiable characteristics "not defined solely by the difference in treatment of which complaint is made" (§61). As to comparability, it was "obvious" that the claimant and those treated differently were not "in analogous situations" (§66), there being "an obvious, relevant difference" (§43) between a household in which a child was cared for and looked after by two adults able to make flexible arrangements to secure an income without needing childcare services from third parties (§3) and a household in which a child was cared for and looked after by the single adult who could not do so (§6), which were "completely different" (§§66-67). In any event, there was objective justification for the different treatment. This was a long-standing policy not an 'ex post facto' justification (§71) where the legitimate aim was the equitable distribution of finite public funds targeting financial support to surviving spouses and civil partners and their children during a period when their need would be expected to be greatest while discontinuing such support when circumstances altered so that the earlier need would generally be expected to be dissipated (§§16, 72), in the context of an earnings replacement welfare benefit designed to replace lost earnings of a spouse, which the spouse could not replace by virtue of their particular difficulties in accessing the labour market due to childcare responsibilities, with a reasonable relationship of

proportionality, ensuring public funding is allocated as effectively as possible in line with the purpose of the benefit, making appropriate use of assumptions and generalisations, and with an objective and reasonable justification which was not "manifestly without reasonable foundation" (§72). Lennon is in essence a case about Cessation in the context of a welfare benefit addressing likely lost financial support for a bereaved spouse or civil partner, during the period of greatest need given anticipated difficulties in accessing the labour market due to child-care responsibilities.

Eccles

54. Eccles (Scoffield J, 3 December 2021) is a case about SPBs in the Northern Ireland equivalent of the PPS, where an ineligibility regulation was found not to violate Article 14 (read with A1P1). The context was that the Northern Ireland 1988 police pension scheme (governed by SR 1988/374) provided for SPBs for widows, widowers and civil partners, but not for unmarried cohabitees. Sgt Gary Dempster was a police officer who joined in 1992 and was an Active Scheme Member of the 1988 scheme until his death in June 2019. The later Northern Ireland 2006 police pension scheme had provided for SPBs for unmarried cohabitees (§17), as had the Northern Ireland 2015 scheme (§15), but Sgt Dempster had decided not to join the 2006 or 2015 schemes (§55). His unmarried cohabiting partner Joanne Eccles was refused SPBs under the terms of the 1988 scheme and brought a claim (§18) alleging breach of Article 14 (read with A1P1). The claim failed. The analysis in Eccles was as follows. (1) Pension entitlements were within the "ambit" of A1P1 (§25). (2) There was a difference of treatment under the 1988 scheme of cohabiting partners compared with surviving spouses or civil partners (§25). (3) Being an "unmarried cohabiting partner" was an "other status" (§§28, 31). (4) As to comparability, being an unmarried cohabiting partner was "sufficiently analogous" to being a married partner (§§34, 37): the analysis in Harvey on this issue (§48(1) above) was not followed (Eccles §§41-42), it being appropriate to focus on justification (§§43, 48). (5) The claim failed because the onus (§50) of justifying the differential treatment was discharged (§73). (6) Post-SC, and absent "a suspect status" calling for a "heightened justification" the approach was "manifestly without reasonable foundation" (§50), but there was justification even applying a more intense level of scrutiny (§62). (7) As to the need "to reflect social change", Government had "moved with the times" by having "created new schemes which reflect the fact that many police officers may wish to ensure financial provision for partners who are neither spouses nor civil partners" (§73), acting in accordance with the "consistent and long-standing" policy was that "changes … should not be retrospective and …., where desirable, should be made by way of introduction of a new scheme as a matter of fairness – both to scheme members and inter-generationally" (§§55, 57). Unlike in Brewster the 1988 scheme, by design, did not include SPBs for this class of beneficiary (§55). The new 2006 and 2015 schemes provided SPBs for unmarried cohabiting partners "through schemes where they are properly costed, planned and paid for" (§73), which constituted "a reasonable and permissible foundation for the differential treatment" (§71). Sgt Dempster "had not joined any of those schemes" having "remained within the 1988 scheme" with its "additional benefits as compared with the 2006 or 2015 schemes" but under which "pension was not payable to a surviving cohabitee (§55), "transition" having been "open" to members of the 1988 scheme (§68), albeit that Sgt Dempster's choices had predated his relationship with Ms Eccles (§70). (8) It was "unfair that a scheme member should avail of a benefit of a type for which they had neither bargained nor paid" and "similarly unfair for other scheme members

(or the taxpayer) to have to subsidise that unanticipated and unfunded benefit" (§56). As in Harvey, the difference in treatment was justified, being rationally connected to and a proportionate means of achieving "the objectives of avoiding unfairness … and avoiding a 'windfall'" as well as serving to "ensure relative predictability and certainty" and "allow for the maintenance of separate [and] more up-to-date schemes, which strike a proper balance of benefits and liabilities which will assist in the recruitment and retention of employees, whilst still being affordable for employers and the taxpayers who ultimately fund the scheme, as well as being fair as between members" (§59) and where the "objectives of adhering to the non-retrospectivity principle included that changes were implemented at a stable and affordable cost, within a fixed costs envelope, whilst also providing an attractive package of benefits; that unexpected liabilities were avoided in respect of individual schemes; and that unfairness to existing scheme members was avoided by ensuring that members were only entitled to benefits which were costed into the relevant scheme and paid, so avoiding unfair subsidisation by some and unfair windfalls for others" (§61). (9) In addition, there were the "very significant further costs" that would be incurred for public service pension schemes (§66), GAD estimates having been provided (§64), and there was the permissibility of "bright-line rules" (§§66-67).

7. The Claimants' case

55. Having described the factual and legal landscape, I can turn to the contours of the legal challenge. Each of the Claimants' arguments as to why Regulation C9 Cessation is incompatible with their Convention rights involved a two stage analysis: (i) that various standards of justification are needed; and (ii) which standards the Home Secretary is unable to meet. In this part of the judgment I am going to seek to encapsulate the essence of the Claimants' arguments – as I saw them – by reference to the key points which they made and the key authorities to which they invited my attention. In seeking to 'tune in' with the arguments I will include such amplification or embellishment as fits within the substance of what was presented to the Court. I will start (§§56-58 below) with the Claimants' case at stage (i): why and in what context the various standards of human rights justification need to be met by the Home Secretary. I will then turn (§§59-67 below) to the Claimants' case at stage (ii): why the various standards of justification have not been met by the Home Secretary.

Need for justification: the Article 12 argument

56. As to the need for justification and Article 12 the Claimants' argument, as I saw it, is as follows. Viewed in terms of Deprivation, Regulation C9 constitutes a "substantial financial penalty", imposed where the recipient of SPBs marries, forms a civil partnership, or cohabits (as husband and wife or as if civil partners). Viewed in terms of Inhibition, Regulation C9 also constitutes a clear restriction – an active prohibition – which deters the recipient of SPBs from taking any of those steps. Marriage is identified expressly as one of the three types of conduct which triggers Cessation. The impact of Cessation is akin to imposing a penalty of more than £1,000 per month, for the rest of the Claimants' lives, as the price of any marriage (or civil partnership or co-habitation). This burden is imposed as the price of retaining SPBs, just as the burden in R & F was as the price of obtaining a Full GRC. These impacts are a clear and serious interference with the substance of the right to marry. Adopting the approach in the "victim" cases, all of the Claimants are "victims" of an Article 12 interference. Ms Green and Ms Jennings have no settled present intent to marry their current partners

but a settled present intent to marry a partner is not a precondition, any more than it was in Goodwin. As in that case (Goodwin §101), it is sufficient that the concrete facts include a wish to marry in future which – in the cases of Ms Green and Ms Jennings – Regulation C9 means there is no practical "possibility" of doing. A 'ban on relationships' would be broader than, but could breach, the right to marry. The fact that Mr Sneller has married Llara does not undermine his "victim" status any more than did the fact that the friends had rallied round to pay the fee in O'Donoghue. It is no answer that, by the time Mr Sneller married (or had a settled intention to marry) Llara, there had already been a Cessation of his SPBs by reason of their prior cohabitation: an Article 12 claim cannot turn on the sequence of whether cohabitation preceded or was simultaneous with marriage. The "victim" test is satisfied where there is a "potential" victim, in respect of whom a "clear risk" of violation of Article 12 arose, a test which all three Claimants meet. The Claimants have, throughout, been "victims" of a law which violate their rights, because of the "risk" of being directly affected (Norris §§31, 33; Monnat §31), even though only Mr Sneller has directly suffered Deprivation. Victims need not have suffered "prejudice" (Siliadin §62), though here each Claimant plainly has. They are placed in the position of having to respect Regulation C9 by refraining from marriage and cohabitation, or of marrying or cohabiting and becoming liable to the penalty (cf. Norris §32). In the context of the "fundamental" nature of Article 12 rights (Baiai §14, F v Switzerland §32) and the "restrictive" approach to be taken (Baiai §14) the question is whether Regulation C9 affects the substance of the right to marry in a way which "impairs the very essence of the right" (Baiai §14, 16, 30; O'Donoghue §82; F v Switzerland §32; Goodwin §99). That involves asking whether the effect on the substance of the right to marry is "arbitrary or disproportionate" (O'Donoghue §84), or "arbitrary or unjust" (Baiai §44) where "disproportionate" is an objective test and part of the single 'composite' question (whether the restriction "impairs the very essence of the right" to marry). The Article 12 objective test of proportionality is distinctive from the test found in Article 8 cases. It involves a balance of benefits and burdens (as Mr Edwards put it in his reply, the Court asks "whether the factors weighing against the measure outweigh the factors relied upon by the State"). The focus is on the concrete impacts on the Claimants (F v Switzerland §31) and present-day social conditions (F v Switzerland §33; Goodwin §§74, 92, 98, 100). The Article 12 proportionality test does not involve the latitude afforded to interferences with qualified rights such as Article 8 (Baiai §§13, 15, 46; O'Donoghue §84). And it does not turn on considerations of broad social policy (Baiai §25). It is by reference to this "restrictive" test of proportionality that the Home Secretary must demonstrate a justification for Regulation C9. When the points relating to justification come to be examined, it will be seen that the Home Secretary cannot demonstrate the necessary justification.

Need for justification: the Article 8 argument

57. As to the need for justification and Article 8 the Claimants' argument, as I saw it, is as follows. The test of justification is the Basic Four-Stage Proportionality Discipline (§36 above). Even if the features relied on in the context of Article 12 were insufficient to constitute an interference with the substance of the right to marry, those same features plainly suffice to constitute an interference with private and family life, and the Claimants are plainly "victims". Regulation C9 substantially interferes with the Claimants' rights to respect for private and family life in two distinct ways. The first is by reference to Deprivation and Inhibition: the imposition of the substantial financial

penalty; the threat of that penalty; the effect which that threat has in terms of marriage, civil partnership or cohabitation. The substantial financial penalty is illustrated by the penalising consequences against Mr Sneller upon his act of cohabitation in November 2020 with Llara. The serious and significant impact of Inhibition – by virtue of the threat of Cessation – in deterring and frustrating important, natural choices in the development of relationships, and in imposing Solitude, are seen in the cases and circumstances of Mr Sneller (up to November 2020) and of Ms Green and Ms Jennings (throughout). These impacts of Regulation C9 (§§29-35 above) are a clear and very substantial interference with private life. The second distinct way in which Regulation C9 interferes with the right to respect for private life concerns the intrusive mechanism for supervision and enforcement which are necessarily inherent in its design and operation and part and parcel of it taking effect. Recipients of SPBs are required annually to provide intimate details, witnessed by third parties and under threat of criminal penalties. They also live in the shadow of being scrutinised in their private lives and how they come and go from their own and their partners' homes. Both of these aspects, separately and in combination, need cogent justification demonstrating necessity and proportionality in order to withstand scrutiny under Article 8. That is the test which the Home Secretary must meet in demonstrating a justification for Regulation C9. When the points relating to justification come to be examined, it will be seen that the Home Secretary cannot demonstrate the necessary justification.

Need for justification: the Article 14 (with A1P1) argument

58. As to the need for justification and Article 14 the Claimants' argument, as I saw it, is as follows. The denial of SPBs falls within the "ambit" of A1P1 (Brewster §§44-45). Applying the other components of Article 14 analysis, there are two distinct differences in treatment which the Home Secretary needs to justify. Each involves an "other status" and "relevantly similar" groups to satisfy the requirement of comparability. The first is the difference in treatment between recipients of SPBs under the PPS who form a new stable relationship with a partner: (a) who wish to marry, form a civil partnership or cohabit with that partner; and (b) who do not so wish. The second is the difference in treatment between recipients of SPBs under the PPS (a) where the deceased Scheme Member Died in the Line of Duty and (b) where they did not. Viewed in either and each of these distinct ways, the onus is on the Home Secretary to justify the difference in treatment (as at 12 August 2020). Whether there is a justification involves the application of a "nuanced" test of "manifestly without reasonable foundation". One factor in the Court's evaluation of justification is the disparate impact on women which – although sex is not the "ground" and "status" relied on in this case – affects the application of the justification test, leading to a heightened level of scrutiny. Here again, when the points relating to justification come to be examined, it will be seen that the Home Secretary cannot demonstrate the necessary justification.

Absence of justification: the argument

59. As has been seen, each of the three justification tests arises by a distinct route. Each involves looking through a distinct legal prism. That which has to be justified is different: the effect on the right to marry; the effect on private and family life; and each relevant difference in treatment. There are dangers in eliding these. But, having said that, this is a case in which the same features and themes were treated – by both parties – as informing the application of the test for justification, however and wherever any need for justification may arise. I will set out here what were, in essence – as I saw it –

the key features and themes of the case from the Claimants' perspective at stage (ii) of the arguments (absence of justification):

Regulation C9 (Cessation) now has a socially-indefensible rationale

60. First, Regulation C9 is a Cessation provision which was introduced with a rationale which, as the Home Secretary's own evidence has had to accept, is historic and socially outdated (§8 above). The 'focus in time' for this case is on the present: the period since the proceedings were commenced (§2 above). Temporally, this is a case about the present and ongoing failure to revise the old scheme (as with Harvey at §193), not about justification in decades gone by (as with Carter at §§74 and 24: §52 above). That is important. It means that the original historic social rationale cannot provide the justification which the Home Secretary needs to show. Regulation C9 continues to bite, and is intended to bite for decades to come, despite being underpinned by an obsolete social rationale. The fact that social circumstances have changed is a key aspect of justification. The focus on "present-day conditions" and "changing conditions" was a key reason why the Swiss and UK legislation breached Article 12 in F v Switzerland (at §33) and Goodwin (at §§74, 92, 98, 100). Article 8 justification requires a "pressing social need" and a measure can hardly be "pressing" if its historic rationale is spent. In Article 14 terms the inclusion of unmarried partners within the police pension scheme in Brewster was emphasised to be addressing "unwarranted" differences of treatment (at §34) and it those "unwarranted" differences which remain for the PPS, having been recognised as outdated and unjustifiable in the NPPS and the 2015 Scheme. The absence of a present-day social rationale for a Cessation provision seriously undermines the Home Secretary's ability to justify Regulation C9 as pursuing any legitimate objective. The historic rationale is known and accepted to have become outdated and anachronistic by 2002/2003, and yet it has been maintained as a feature of the PPS for a further 20 years.

Regulation C9 has burdensome impacts, at an invidious axis of basic human happiness

61. Secondly, the impact and implications of Regulation C9 are serious and significant (§§29-35 above) for recipients of SPBs, as well as for their children. Viewed in terms of Deprivation and the threat of Deprivation, the survivor of a deceased Scheme Member stands to lose more than £1,000 per month, every month, for the rest of their lives. This is a "heavy financial penalty". Looking at the scale of the income stream, and using their ages and projected life expectancies, Deprivation would mean in excess of £300,000 for each of the Claimants. It is also an "active prohibition". Viewed in terms of Inhibition there is the serious impact in the development of relationships, forcing an invidious and unjustifiable choice which presents Financial Security at the price of Solitude (§30 above). Added to these, there are the demeaning and intrusive implications of enforcement. In Article 12 terms, there is the seriously penalising impact of Deprivation and the "a powerful disincentive" to marriage of Inhibition (O'Donoghue §§90-91). These are "concrete" impacts for the Claimants, on which the Court must focus (F v Switzerland §31, Goodwin §101). In both Article 8 terms and Article 14 terms (Brewster §66: §36 above), these feature as "the severity of the measure's effects on the rights of the persons to whom it applies" for the purposes of a proportionality balancing exercise. These impacts arise in the context of 'forfeiture' of a benefit, not the failure to qualify as 'eligible' for a benefit in the first place. The impact is therefore necessarily 'penalising' in nature. The human cost and burden of Regulation C9, in terms of loss of security (Cessation) and in terms of human isolation, loneliness

and frustration (Inhibition), is palpable and immense. Viewed in terms of the differential treatment of survivors of PPS Scheme Members having developed stable relationships with new partners who do – and who do not – marry, cohabit or enter civil partnerships, the axis for the differentiation imposes the burden of disadvantage (Deprivation and Inhibition) at the point of taking natural and significant steps in the experience of human beings, at the heart of human life, autonomy and the pursuit of happiness. That differentiating axis is unjustifiable in all the circumstances.

Disapplying Regulation C9 creates no new PPS SPBs eligibility category

62. Thirdly, there is no question of changing eligibility rules to identify a new category of survivor beneficiaries entitled to SPBs. Some new categories of survivor beneficiaries have been introduced (widowers and civil partners). Others have not (post-retirement widows and unmarried cohabiting partners), which led to the cases of Harvey, Carter and Eccles. In this case, no new survivor beneficiary would be added. That trilogy of cases is plainly distinguishable. Here, Cessation is necessarily faced by those already recognisably eligible under the scheme rules. This case is about the Deprivation and Inhibition impacts on those recognisably eligible under the scheme. The impacts are felt by those who are intended by design to be beneficiaries of SPBs under the PPS, as was the position in Brewster (where there was found to be no Article 14 justification), and as was not the position in Carter or Harvey or Eccles (where there was found to be an Article 14 justification).

'Retrospectivity' undermines no policy imperative and has an express statutory power

63. Fourthly, although the Home Secretary relies on the principle of non-'retrospectivity', that reliance needs to be treated with circumspection. This is a general principle, not an inalienable rule. The force of its logic is best seen in its purest form – Complete Prospectivity – but that force is undermined by the fact that an absence of Complete Prospectivity is not seen as objectionable in principle (§49 above). There have been exceptions to Basic Prospectivity, including in the PPS in the case of SPBs and Cessation. The disapplication of Cessation 'retrospectively' is an exemplified change. It has been made for the PPS SPBs in the context of Death in the Line of Duty, and for SPBs generally in the context of the armed forces pension scheme (§§18-19 above). The Northern Ireland equivalent police pension scheme was amended 'retrospectively' (§21 above) to make all SPBs Payable For Life, without discernibly damaging any cardinal principle or policy imperative. In none of those situations were the implications of revising those schemes in those ways, or any financial burden (whether for Active Scheme Members, employee contributions of Government top-up) arising from protecting SPBs from Cessation, and reinstating them as appropriate, considered to be a good and sufficient reason for refusing to address the seriously deleterious effects, including as to Solitude and Financial Security. Parliament had, moreover, thought about retrospectivity and the statutory powers conferred on the Home Secretary in the 1976 Act specifically include provision for revisions of scheme regulations to be made with retrospective effect, with section 5(1) providing that: "Regulations made under this section may be framed so as to have effect as from a date earlier than the making of the regulations". Indeed, in the cases of Ms Green and Ms Jennings a change could be 'prospective' in the sense that the burden of Cessation as an Inhibition could be lifted for the future, and even Mr Sneller's lost SPBs from Deprivation could be restored for the future.

PPS SPBs Payable For Life (Death in the Line of Duty) involves a divisive differentiation

64. Fifthly, the treatment of recipients of SPBs under the PPS where the deceased Scheme Member Died in the Line of Duty and where they died otherwise than in the Line of Duty is divisive. The human need is no different. The logic as to 'retrospectivity' is no different. The implications for human relationships, Solitude and Financial Security are no different. The harsh financial penalty which puts 'a price on love' (as Ms Moon MP described it in March 2017: §32 above) is the same. Indeed, when previous consideration was given to a PPS amendment to allow SPBs to be Payable For Life in the context of survivors of Scheme Members who have Died in the Line of Duty the point made in the Briefing (24 July 2006) for the Secretary of State was that the Police Staff Associations had indicated that such a change would be "divisive", so that the same position should apply to all recipients of SPBs. That is precisely what it is. This further (or alternative) differentiation of treatment is unjustifiable in all the circumstances.

Taking Deprivation cases, disapplying Regulation C9 means modest additional scheme costs

65. Sixthly, so far as concerns any additional financial burden which may need to be met by those who pay (§9 above) – through Active Scheme Member contributions, nominal employer contributions (imposed on the Met), or Home Office "top up" contributions – these ought not to be overstated. These costs would arise only in relation to Deprivation cases. That means those like Mr Sneller who act to trigger Cessation, notwithstanding that Regulation C9 (Cessation) is in place. It is SPBs for this category which would constitute 'new scheme costs'. This is a group with ascertainable size. Evidence from the Claimants and the Home Secretary put at around 30 per year the number who like Mr Sneller – notwithstanding Regulation C9 being in the scheme rules and notwithstanding any Inhibition – do and would nevertheless marry, cohabit or enter civil partnerships so as to trigger Cessation. GAD provided illustrative costs in March 2015 and February 2017 (§28 above) which, focusing on this category, put at £144m the cost of disapplying Regulation C9 plus £54m as potential reinstatement costs. In seeking to appreciate the practical implications it is right to bear in mind that the Defendant as the scheme administrator for the Met Police, who would bear any 'employee contributions', has said that a declaration of the Court would be respected and Mr Sneller's Deprivation (more than £18,400) would be reinstated, without any suggestion of unaffordability for Active Scheme Member contributions or 'employer contributions'. It is also helpful to see GAD's actuarial valuation as at 31 March 2012 (dated 11 December 2014) produced for the purpose of calculating contribution levels which said (at §11.13) that 131 reported remarriages over a four-year period (2008-2012) could be taken to represent 0.1% of salaries from 2015 which was described as an "impact" on the "standard contribution rate" which would be "immaterial". So, the scale of the loss of income and Financial Security for the individuals who, like Mr Sneller, lose their SPBs to Deprivation is severe and significant. But the true additional costs, for the PPS and those who underwrite it, are modest.

Taking Inhibition cases, disapplying Regulation C9 means zero additional scheme costs

66. Seventhly, there is no additional financial burden <u>at all</u>, so far as concerns those for whom Regulation C9 Cessation stands as an Inhibition. This group is exemplified by Ms Green and Ms Jennings, by Mrs May MP's description of those who face Solitude to retain Financial Security (§30 above) and by the description by COPS (March 2004)

of those who place the financial independence of the SPBs "above their own needs" in terms of personal relationships (§31 above). With Regulation C9 in place, SPBs will in fact be paid "For Life" for the Inhibited. That is a constant. If Regulation C9 were removed or disapplied, SPBs would still be paid "For Life" for this group. The financial impact for the scheme, and those paying for it (§9 above), is zero. This is particularly striking. The human impact for those affected, who would be free from the Inhibition, and could develop their personal relationships, without being overseen, and able freely to cohabit, marry and form civil partnerships would be huge. For this group, the price and cost of Regulation C9 is all one way. For this group "the severity of the measure's effects on the rights of the persons to whom it applies" involves a zero cost to the scheme and its underwriters (including "the taxpayer"), which demonstrates in clear terms that it achieves precisely zero in terms of public interest or benefit.

Overall

67. In light of these seven key features of the case, and in all the circumstances, the Home Secretary is quite unable to discharge the onus of justifying as proportionate: the substantial interference with the Article 12 right to marry; the clear and direct interference with Article 8 respect for private and family life through the Deprivation and Inhibition impacts of Regulation C9, as well as the intrusive nature of its implementation; the difference in treatment between those survivors of PPS scheme members who (having developed stable relationships with new partners) marry, cohabit or enter civil partnerships and those who do not; and of justifying the difference in treatment between those survivors of PPS Scheme Members who have Died in the Line of Duty and of Members who have died otherwise than in the Line of Duty. In all of these respects, Regulation C9 is incompatible with Convention rights. Any one of them is sufficient for the claim to succeed. That is the Claimants' argument.

8. Analysis: justification

68. In the next part of the judgment I will address, head-on, the arguments about whether the Home Secretary can demonstrate an objective justification for Regulation C9, viewed against the human rights standards of justification which apply in the context of the Convention rights relied on. It would be troubling if Regulation C9 could not withstand scrutiny under those objective legal standards. It is common ground that there is an Article 8 interference which requires justification. Questions of "victim" status can be bound up with the merits (Siliadin §63) and it is to be noted that Mrs Carter was a 'contingent' victim (Mr Carter was still alive at the time of the claim). It can be preferable to decide Article 14 cases on the basis of justification (Carter §64, Eccles §§43, 48). I recognise that there are important prior questions, many hotly contested, in the legal 'gateways' and the legal 'flowcharts' which can lead to applying standards of justification. I also recognise that features in the prior analysis – the nature of the interference – can influence the way in which justification is approached. And I recognise, as Mr Edwards submitted and Mr O'Brien accepted, that Article 12 breach can be said to involve a 'composite' question. I have needed ultimately to look at the case in the round. I shall come in the final part of this judgment to deal with all of the other key issues. But I am going to address justification here. I have endeavoured to encapsulate in some detail the essence of the key points made about the absence of justification, reflecting the forceful and sustained nature of those arguments (§§59-67 above). Particularly striking among them, in my judgment, are the points about the serious implications for private life, happiness and companionship of Inhibition seen in

the evidence of the Claimants' lived experience; put alongside the point about the zero additional scheme costs in relation to those who are Inhibited in those serious and significant ways, if Regulation C9 were removed. The Inhibited could be freed to live their lives and develop relationships fully and naturally, all at no additional cost to the scheme, since SPBs are always going to be Payable (For Life) to those for whom Regulation C9 endures as an Inhibition. It is time to say what I have made of the arguments.

My conclusion on justification

69. Notwithstanding these and all of the points made – and their combined force – I am unable to accept that Regulation C9 lacks objective justification by reference to any of the Convention rights relied on. In my judgment, applying the standards of proportionality and justification which arise by reference to the Convention rights invoked, this is a case where the Home Secretary has discharged the onus of demonstrating that Regulation C9 – in its retention in the PPS and its application to the Claimants – is objectively justified and proportionate (as to any Article 8 or Article 12 interference) and that differences in treatment between comparable groups are objectively justified and proportionate. I will explain the key features of the case that have led me to that conclusion.

Justified scheme SPBs rules may subsist despite socially outdated originating rationales

70. First, there can in principle be an objective justification for retaining, within a public service pension scheme, a restriction whose historic social rationale is demonstrably outdated. This is accepted by the Claimants. To take an example, until 1992 there was a PPS eligibility rule which allowed SPBs for married wives of male police officers, but not for any married husbands of female police officers. This was changed in September 1992 with effect from May 1990 (§11 above). But widowers of a female police officer and PPS Scheme Member who had died before 17 May 1990 never benefited from this scheme rule change. Nor could they transfer into the NPPS or the 2015 Scheme in order to obtain SPBs. They would undoubtedly have been able to say that the rationale for the continuing restriction which denied their SPBs was socially obsolete. To take another example, until 2006 there was a PPS eligibility rule which allowed SPBs for spouses of police officers, but not for same-sex partners of police officers. This was changed in March 2006 with effect from December 2005 to include civil partners (§12 above). But the former same-sex partner of a police officer and PPS Scheme Member who had died before December 2005 never benefited from this scheme rule change. Nor could they transfer into the NPPS or the 2015 Scheme in order to obtain SPBs. They too would undoubtedly have been able to say that the rationale for the continuing restriction which denied their SPBs was socially obsolete. Or to take the most obvious example, an 'unmarried cohabiting partner' of a PPS Scheme Member – who was never married or in a civil partnership – has never been brought within the scope of SPBs under the PPS. Very clearly, the historic rationale for the original pension scheme rule has long since become socially outdated. Indeed, this "unwarranted" distinction was what was recognised by the Supreme Court as having been eliminated by the new scheme in Brewster (§34). This, socially outdated, and ongoing exclusion in the NPPS was the subject of the Staff Side consultation response of March 2004 (§26 above). It was the subject of the Harvey case in the context of the equivalent local government pension scheme and of the Eccles case in the context of the equivalent 1988 Northern Irish police pension scheme, where the present design of

each scheme withstood Article 14 scrutiny. Mr Edwards did not context the outcomes in those cases as wrongly decided.

SPBs are benefits referable to an officer's service and contributory Active Scheme Membership

71. Secondly, it is important to keep in mind that the pension scheme benefits under the PPS (and other public service pension schemes) are benefits referable to the Scheme Member's prior service and Active Scheme Membership within a contribution-based scheme, to which they paid their assessed contributions. This applies to SPBs arising in respect of the Scheme Member after their death. Such schemes have rules and parameters, benefits and triggering circumstances, set out with clarity within the design of the scheme. Fundamentally, they are linked to an officer's service, the officer's Active Scheme Membership, and so the position of the officer as a contributing Scheme Member. The Active Scheme Member's contribution and contribution rates are part of the rules and parameters of the scheme.

The analysis focuses on the non-introduction of SPBs Payable For Life into PPS

72. Thirdly, in considering justification in the context of the human rights-compatibility of Regulation C9 (Cessation), the focus is on the retention of the rule in the PPS. Put another way, the focus is on the non-introduction into the PPS of universal SPBs which are Payable For Life. I say universal, because SPBs Payable For Life were introduced in respect of Scheme Members who Died in the Line of Duty (§14 above). In focusing on the non-introduction of a scheme rule change, this claim is like Harvey, where the Article 14 claim (§2) impugned the failure to revise and extend the 1997 scheme (§193); and not like Carter, where the Article 14 claim had a deliberate, historical focus on the scheme as designed up to 1977 (§52 above). The Claimants accept that there was an historic social rationale (§8 above) for Regulation C9 (Cessation) when it was included in PPR87. They accept that its retention involved a justified prioritisation of benefits historically, something unsuccessfully contested in Carter (§§79-84). Their 'focus in time' for the claimed human rights-incompatibility is the commencement of these proceedings in August 2020 (§2 above). The question is whether it is unjustified and disproportionate for the Home Secretary not to have amended the PPS to repeal Regulation C9 (Cessation). That question arises in respect of a pension scheme which closed to new Active Scheme Members in 2006. It arises in respect of the Claimants whose deceased spouses – former Members of the Scheme – ceased to be Active Scheme Members in 2007 (Sharon Sneller), 2010 (Kevin Green) and 2016 (David Jennings).

The integrity of scheme rules (designed, costed and contributed to) and Basic Prospectivity

73. Fourthly, there is a policy coherence and an integrity in holding to pension scheme rules which have been designed and costed, and to which Active Scheme Members have contributed. This is the "central and core justification" of the design-in, costing-in and contribution-towards pension benefits (Harvey §203). There is a linked policy coherence and integrity in not making changes which would, in classes of case where there is no longer Active Scheme Membership, enhance – or deplete – pension scheme benefits. Changes of that nature involve a departure from the core principle of Basic Prospectivity (§15 above). These policy objectives have clear legitimacy. If SPBs were to be Payable For Life to the Claimants, this would change the scheme rules to enhance pension benefits in respect of Scheme Members whose Active Scheme Membership

ceased in 2007, 2010 and 2016. There was no such departure in Brewster (§46 above). In that case, the 2009 local government pension scheme – of which Lenny McMullan was an Active Scheme Member – was designed, intended and costed to provide SPBs to a cohabiting partner like Denise Brewster. Lenny McMullan, as an Active Scheme Member, "had paid for her to have that benefit via his contributions" (Harvey §171); had "paid for [the] pension benefits" but "simply failed to complete the relevant form" (Eccles §55). There had been no contemporaneous policy decision-making which had addressed the 'writing out' of those with cohabiting partners who did not write a CNF. The need for a departure from Basic Prospectivity made Harvey "fundamentally different" from Brewster (see Harvey §171). In Harvey (§47 above), Stephen Roe had not been an Active Scheme Member of the 1997 local government pension scheme since 2003 and he had never paid contributions into a scheme which provided for SPBs for unmarried cohabitees, because the scheme rules remained designed, intended and costed to provide SPBs to a widow but not an unmarried cohabitee. Catherine Harvey was able to say that this scheme design, as had been recognised in Brewster, was based on an outdated social rationale, and that the human realities for a former cohabiting partner are no different from those of a former spouse. But the central point in the justification – as to why her claim failed for both reasons (§48 above) was the same: it concerned the design-in, costing-in and contribution-towards pension benefits (Harvey §203), viewed in the context of the established general non-'retrospectivity' principle (§210). And the judgment explained in detail, as a resounding theme (§49 above), that Prospectivity was a convincing and coherent Government policy. In Carter, any challenge to the non-introduction of SPBs into the PPS for post-retirement widows, would have involved a departure from Basic Prospectivity. Eric Carter had retired and ceased to be an Active Scheme Member in 1977. The PPS, made by PPR87, had never included and never been amended to include enhanced SPBs for post-retirement widows in respect of pre-April 1978 service (§10 above). Any challenge to impugn that position would have run up against the Basic Retrospectivity point which underpinned Harvey and Mr and Mrs Carter expressly disavowed such a claim (§52 above), recognising the non-extension of SPBs in respect of former Active Scheme Members involved "following" the "usual practice of making changes prospectively to the pension scheme" (Carter §§74, 24). In Eccles, there would also have been a departure from Basic Prospectivity, in extending scheme benefits under the 1988 Northern Ireland police pension scheme. Like Ms Harvey, Joanne Eccles was able to say that this scheme design, as recognised in Brewster, was based on an outdated social rationale, and that the human realities for a former cohabiting partner were the same as those of a former spouse. SPBs sought in Eccles had never been "costed, planned and paid for" (§73) in the 1988 scheme. These points are critical to the justification of the difference in treatment between those in receipt of PPS SPBs who do – and those who do not – cohabit, marry or enter a civil partnership with a new partner.

Disapplying Cessation (SPBs Payable For Life) is a type of enhanced pension benefit

74. Fifthly, Cessation is an aspect of eligibility to receive SPBs, under the scheme rules. The Claimants are right to point out that an exclusion from SPBs of unmarried cohabitees (Harvey, Eccles), or of post-retirement widows in cases where there was no pre-April 1978 service, are situations where no PPS SPBs are ever payable, by reference to what had happened in the past. Cessation, on the other hand, concerns an eligible category under the design of the scheme (as in Brewster), who are in receipt of SPBs, but whose entitlement is curtailed by reference to what happens in the present and

future. This is a 'forfeiture' scenario. Those points are well made. But the fact remains that Cessation is an aspect of eligibility to SPBs; it is part of the integrity of the scheme rules, with their deliberate design, costings and contributions; it attracts the Basic Prospectivity. It is also an aspect which was the subject of conscious policy decision-making, through a "new scheme", which Active Scheme Members were given the right to choose to join, to which points I will turn next.

Issues were addressed in conscious policy decision-making, and through a "new scheme"

75. Sixthly, this is a case in which there is good evidence of relevant conscious and contemporaneous policy decision-making, and where a key part of the conscious policy response was the design of a "new scheme" which addressed the issue of SPBs Payable For Life together with the fact that its historic rationale had become socially outdated by the early 2000s (§8 above). In the context of PPS SPBs and Cessation, there was the conscious policy decision-making of 2003/2004 (§§24-26 above) which led to the NPPS (§5 above). As the Joint Report of the Home Office and Treasury officials (July 2003) and the Home Office consultation (December 2003) explained (§24 above), one of the main elements and policy objectives for the NPPS was that SPBs would be Payable For Life. In the context of PPS SPBs being Payable For Life in respect of Death in the Line of Duty there was conscious policy consideration in July 2006 and policy decision-making in 2015 (§14 above). Cessation and PPS SPBs was the subject of further conscious policy consideration in 2016/2017 (§28 above). Conscious and contemporaneous policy decision-making on the relevant issues is significant for the reasons explained by the Supreme Court in Brewster, a case in which the justification put forward was 'ex post facto' (§§38-43, 64-65). One of the resounding themes in Harvey was the conscious and contemporaneous decision-making (§50 above), which had included consultation. In that case, the new 2008 scheme was a "package … designed to reflect the particular needs of the time, having regard to the need to recruit and retain employees, to be affordable for employers and the taxpayers who ultimately fund the scheme, and to operate fairly between members" (Harvey §51). The same is true of the NPPS in the present case. The link between principles of Prospectivity and adopting a "new scheme" is well recognised (§17 above). In Harvey, the new scheme had been preceded by consultation, the responses to which did not advocate that the extended SPBs found in the new scheme should be extended by amendment of the old scheme in the case of those who had already ceased to be Active Scheme Members (Harvey §§64-71, 166, 210). In relation to the consultation on the NPPS two responses advocated changes to the PPS (§§25-26 above), but neither of those changes would have applied to the Claimants. There was conscious policy decision-making at the relevant time (up to 1977) in Carter (§§13-20, 79-84), a case in which the issue had also been addressed in a "new scheme" in 2006 (the NPPS), and that policy decision-making was not impugned (§52 above). Similarly, in Eccles, there was the conscious policy decision-making which had "moved with the times" by creating "new schemes" (§73), where "changes … where desirable" were "made by way of introduction of a new scheme", through "separate [and] more up-to-date schemes" (§§55, 57, 59). The Claimants do not submit that Harvey, Carter or Eccles are wrongly decided. Designing a "new scheme" shows active policy consideration and decision-making involving 'alternative means' of addressing issues, in the context of issues such as outdated social rationales, the integrity of scheme rules and Basic Prospectivity.

Active Scheme Members at 2006 were given the choice to join the NPPS

76. Seventhly, there is the fact that the conscious policy decision-making which introduced SPBs Payable For Life did so, consistently with Basic Prospectivity, by means of a "new scheme" in 2006 which gave the Claimants' former spouses the opportunity to join the NPPs and achieve those benefits if they wished to acquire that package of benefits. This feature was absent in Harvey and Carter. In those cases, the justification for addressing problems of socially-outdated scheme rules as to SPBs, by designing a "new scheme", was one which held firm even though Stephen Roe (in Harvey) had been excluded from joining the "new scheme" of 2005, and Eric Carter (in Carter) had been excluded from joining the "new scheme" (the NPPS) of 2006. It was enough that there was conscious policy decision-making which took a justifiable policy course to the problem of socially-outdated scheme rules relating to SPBs. In the present cases, there is an additional feature, as was also present in Eccles. It is the same feature which led the COPS response of March 2004 to focus on "existing survivors" (§31 above). By design, the NPPS entitled all who (prior to 6 April 2006) had been PPS Active Scheme Members to transfer into the NPPS if they wished to do so. For an initial 3-month transfer period (1 November 2006 to 31 January 2007) "special terms" were applicable to such a transfer. Those entitled to transfer if they chose to do so included Kevin Green, David Jennings and Sharon Sneller. A Booklet entitled "Understanding your choice" explained that it was designed to help eligible serving police officers decide whether to stay in the PPS or transfer to the NPPS. It explained the right to transfer. It contained an "at a glance" guide which compared PPS and NPPS by reference to 10 questions, the 8th of which was "what pension will my spouse or civil partner get?", which was clearly answered for the PPS (including that the pension would end "if he/she remarries or forms a new civil partnership or cohabits with anyone") and for the NPPS (including that the pension was "payable for life"); the substance of which was repeated in a separate section later in the Booklet. On the evidence, PPS Active Scheme Members predominantly decided against transfer to the NPPS, and it is said that there were reasons relating to the overall package of benefits and triggering circumstances which would have made that choice appear preferable. This fits with what was said about an "eroded … value" under the NPPS (Carter at §10.3); what COPS said in March 2004 about "more demanding" conditions (§25 above); and what Staff Side said in March 2004 about a "new less beneficial scheme" as the price for 'unmarried cohabiting partners' obtaining SPBs (§26 above). But all of this reflects the fact that a contribution-based pension scheme is "a suitably funded overall package of benefits and costs" (Harvey §142(a))); a "package … designed to reflect the particular needs of the time, having regard to the need to recruit and retain employees, to be affordable for employers and the taxpayers who ultimately fund the scheme, and to operate fairly between members" (Harvey §51). As the COPS response of March 2004 (§25 above) recognised – in advocating a PPS amendment only for those who at the time of the NPPS were "existing survivors" – it was for "individual officers" who were still Active Scheme Members of the PPS to make the decision whether to transfer and obtain the new package of benefits including SPBs Payable For Life making it "within the reach of serving officers to grasp an opportunity to better secure the future of their survivors" which was "a positive element of the new scheme". Designing a "new scheme" – which Active Scheme Members had the right to choose to join – again shows active policy consideration and decision-making involving 'alternative means' of addressing issues such as outdated social rationales, the integrity of scheme rules and Basic Prospectivity.

Disapplying Cessation has significant economic implications for this (and other) schemes

77. Eighthly, there would be significant economic implications of disapplying PPS Regulation C9. Accepting that costs of paying SPBs are a constant in respect of the Inhibited who would not act to trigger Cessation, and focusing on those who do and would, the best information before the Court as to economic implications is the GAD estimate of £198m (the past split being £144m Cessation and £54m reinstatement) which was convincingly regarded as substantial when provided in March 2015 and again in February 2017. Caution is needed as to the word "immaterial" in GAD's actuarial valuation assumptions (December 2014), and even taking that rate of 0.1% of salaries would presumably be £1 for every £1,000 earned by every Scheme Member (presumably from 2015), now needing to be found. If I take a figure of £1,000 a month (£12,000 a year) for each of the 30 new people who are survivors and who would marry, cohabit or enter civil partnerships even though Regulation C9 remained in place, each new year's cohort of 30 would bring an ongoing cost of £360,000. These ongoing costs would need to be borne from Active Scheme Members or employer contributions or a Government 'top up'. In addition, no material before this Court supplies any reason why exactly the same logic and conclusion would not equally be applicable in the context of other public service pension schemes: civil service; teachers; NHS; local government and firefighters.

Cessation is not a "penalty" or "levy" on marriage etc; nor does it mean poverty

78. Ninthly, although it is understandable that reference is made to the 'penalising' implications of Regulation C9, it is not right (or fair) to characterise the Cessation mechanism as being in the nature of a penalty; still less in the nature of a direct levy or penalty on marriage or cohabitation. In SC the point was made (§§31-32) that the purpose of the measure was not to "discourage people on lower incomes from having larger families". Similarly, in Lennon, the curtailment of the welfare benefit was not intended to deter people on such benefits from cohabiting or marrying or entering a civil partnership. Nor were those measures "penalties" for such conduct and life choices. Similarly, in Harvey and Eccles the relevant pension scheme rules were not a "penalty" on someone because they had chosen unmarried cohabitation rather than marriage or civil partnership. In Carter, the rule was not a "penalty" imposed on Mr Carter for not continuing to work after April 1978. Nor is Cessation a "penalty" for the choice of Active Scheme Members in 2006 not joining the NPPS. Regulation C9 constitutes part of a suite of provisions in the design of the contributory PPS, which closed to new members in 2006. It is maintained in circumstances where its disapplication would mean enhanced pension benefits after all relevant service and contribution has ended. It was based on ideas of financial reliance on a working husband (from 1990/1992 a working husband or wife: §11 above) which called to be addressed on an ongoing basis for a widow (or widower), but not if they were in a new married or cohabiting relationship. It was absent from a new suite of provisions in the design of a "new scheme" in 2006. None of this makes it a "penalty". And it is in no sense fairly the equivalent to the state imposing a £1,000 per month levy or licence fee – for example, to swell the public coffers – on the right to marry of cohabit of persons or a class of persons. Deprivation is undoubtedly an impoverishment. It involves the loss of an important income and an important form of financial security. The income stream is of a nature and at a level which stands as Inhibition. The threat of its loss brings an invidious dilemma. The impacts are serious and significant. But, as Mr O'Brien

convincingly submitted by reference to the Claimants' witness statement evidence, the impacts cannot be equated with placing them into poverty. The impacts are not fairly comparable to the fee in Baiai and O'Donoghue which a needy irregular migrant could not afford to pay.

Death in the Line of Duty is coherently differentiated

79. Tenthly, there is a coherent basis for treating Deaths in the Line of Duty as different. It is right to confront the change made by AR15 in December 2015 to the PPS (and in September 2017 to the equivalent fire service pension scheme) to remove Cessation and allow SPBs Payable For Life in the context of any post-1 April 2015 marriage, cohabitation or civil partnership entered into by the survivor of a PPS Active Scheme Member who Died in the Line of Duty (§14 above). This – together with the change made in February 2015 to the armed forces scheme (§19 above) – shows the express retrospectivity statutory power (§63 above) in action. It shows that there is no inalienable rule or imperative arising from the integrity of scheme rules with design, costing and contribution, or arising from the principle of Basic Prospectivity, or arising from the need to underwrite new scheme costs. A change – and the source of funding for it – can in principle be made for a public service pension scheme and specifically for the PPS. The same point can be made by reference to the February 2015 change to the armed forces scheme and the 2014 change to the Northern Ireland police pension schemes (§§19, 21 above). Having said that, the Claimants accept that they have no Article 14 discrimination complaint based on differences of treatment of the PPS compared with the armed forces (§19 above) or Northern Ireland (§21 above). It also means there is a difference in treatment in the design of PPS SPBs, with Cessation maintained for survivors generally, but with Cessation disapplied (and SPBs Payable For Life) for survivors of officers whose Deaths are in the Line of Duty. But there are convincing answers to these points. The fact that some 'retrospective' changes have been made (as was acknowledged in Harvey at §§23, 41(a), 61) does not undermine – as important general principles – the points about integrity of scheme rules with their design, costing and contribution; and about Basic Prospectivity. The position regarding Cessation and Deaths in the Line of Duty, alongside SPBs more generally, was the subject of conscious policy consideration in July 2006, in 2015 (§14 above) and in 2016/2017 (§28 above). There are good policy reasons justifying treating SPBs after Death in the Line of Duty as different under the PPS, with limited 'retrospective' effect. A police officer's Death in the Line of Duty is a particular kind of loss, viewed in terms of the police service and the end of that service through death, where the death has been directly caused by the discharge of that service. Indeed, the ability to continue to contribute to service and pension as an Active Scheme Member has been lost by a death caused in that way. The debt that is owed by the police service is a special one. In this sub-group of deaths of police officers who were PPS Scheme Members, considerations of 'fairness' can properly be approached in a different way in such cases, as can questions regarding the underwriting of additional scheme costs, including by colleagues who remain in service, the police service as the employer and the taxpayer. As Mr Spreadbury explains, this distinction within the legislation can be traced back to the Police Act 1890, which provided for automatic SPBs only in the case of Death in the Line of Duty (and discretionary SPBs in the case of deaths within a year of receiving a pension). The nature of a Death in the Line of Duty provides a policy justification for making a change in the nature of awards, and the certainty of their durability and imperviousness to change, for those who are left behind by a loss of this kind, which is

capable of explaining a limited 'retrospective' change – using the powers conferred by Parliament – in which a coherent and sustainable line is being drawn. These points are critical to the justification of the difference in treatment between those in receipt of PPS SPBs by reference to a Scheme Member's Death which was – or was not – a Death in the Line of Duty.

'Bright-line' rules, and inherent-enforceability, are also justified

80. Eleventhly, the other features of the retained scheme rules are justified. The adoption of "bright line rules" is justified in the context of a contributory pension scheme, where there is a need for "fixed and predictable rules" (Harvey §§51, 142(a), 181; Eccles §§66-67). The intrusion of enforcement is relevant in impugning Regulation C9 (Cessation) only to the extent that it is a necessary consequence of the design of the scheme rules. If not, it is a matter of the lawfulness of the actions of the scheme administrator. What is necessitated by Regulation C9 is a sufficient enquiry to ascertain whether the person being paid SPBs has married, formed a civil partnership or "lives together" with a person "as husband and wife" or "as if they were civil partners". The intrusion necessitated by that enquiry is part and parcel of Regulation C9 and part and parcel of the evaluation of justification. Relevant though this feature is to the overall picture, it does not undermine the justification for Regulation C9 if otherwise justified. As to intrusion going beyond this, its lawfulness, reasonableness and proportionality would arise in a challenge to the measure adopted by the police service who adopted it. So far as the Met Police is concerned, I record that the certificate of continued entitlement placed before the Court requires a witnessed declaration that "I have not remarried" and "I am not cohabiting with a partner" which is then described as "living together as a couple where household expenses may be shared".

This is a policy choice, in a socio-economic context, involving Governmental latitude

81. Twelfthly, the policy nature of the decision – with its conscious and contemporaneous policy decision-making – and the economic and social nature of the policy choice, are significant. My statutory duty under the HRA is to decide a 'yes' or 'no' question of whether Regulation C9 (Cessation) breaches legally-applicable objective standards. If, for example, the correct analysis of the law and the scheme demonstrates that Cessation does not achieve the legally permissible objective – as with the IDIs criteria and the legitimate objective of detecting marriages of convenience in the Article 12 case of Baiai, and as with the CNF under the 2009 Regulations and the legitimate objective of identifying unmarried cohabitee relationships in the Article 14 analysis in Brewster – the Court's duty is to say so. The same duty arises if other applicable standards of justification have not been met. But the law gives to the Home Secretary – and not to the Court – the statutory function of designing and amending PPR87 and the discretionary power to make appropriate 'retrospective' regulations (§63 above). The law – including the case-law which delineates the principled application of human rights – also affords to the Home Secretary a latitude as to the making of policy choices. For example, I do not doubt that it would have been a legitimate policy choice for the Home Secretary to revise the PPS in 2006 to include SPBs Payable For Life, at least for Active Scheme Members at that time. A change of that kind could have been enough for the Claimants. The Home Secretary could, by the same token, have made changes as to 'unmarried cohabiting partners'. Or the Home Secretary could have revised the PPS 'retrospectively' in 2015/2016 to include SPBs Payable For Life in all cases and not just Deaths in the Line of Duty, in line with the Northern Ireland legislation of 2014

(§21 above). The Scottish Government could have made such changes too. Regulation C9 could be amended now, if the Home Secretary were to respond to the position of Sharon Green, Jacqueline Jennings and Paul Sneller in the way that the Home Secretary evidently responded in 2015 to the case of the survivor of PC David Phillips (§30 above). The Home Secretary could commit the taxpayer to any necessary employer contribution or Government 'top-up' to underwrite such outcomes. These other legitimate policy options are illustrative of Governmental latitude. But they do not undermine Regulation C9 as unjustifiable in public law terms. PPR 87 and Regulation C9 within it are instruments whose design and retention, engage questions of social and economic policy for central Government. A healthy respect for such policy choices, and a suitable measure of latitude, are legal imperatives in the application of the HRA. I do not have a substitutionary jurisdiction.

Justification: Overall

82. I recognise the impacts and implications for the Claimants (and others like them), including the serious impacts and implications of Deprivation and of Inhibition. I recognise that the Inhibited pay a very high price and would gain hugely in human terms from a disapplication of Regulation C9 Cessation, in circumstances where scheme costs are, in relation to them, a constant: §66 above. I recognise the force of these and the other arguments which the Claimants are able to marshal as to justification (§§59-67 above). I have recognised the appropriateness of addressing those arguments head-on. But in doing so I have reached the conclusion, by reference to the twelve key features and themes discussed above that the Home Secretary has discharged the onus of justifying Regulation C9 and its retention, viewed in terms of its impact and implications in relation to the right to marry, in terms of its impact and implications in terms of the right to respect for private and family life, and in terms of the differences in treatment of survivors of public service pension scheme members who do (or do not) marry, cohabit or enter civil partnerships; and whose spouse or civil partner's death was (or was not) a Death in the Line of Duty.

9. Analysis: the picture as a whole

83. I have chosen to 'cut to the chase' and go straight to the questions of justification. In the final section of this judgment, in the light of (and not repeating) all that has gone before, I will explain what I consider to be the correct legal analysis on all of the arguments. Each Convention right brings its own legal 'flowchart', and I will now work through them in turn. I think it makes best sense to start with Article 8.

The Article 8 analysis

84. In my judgment, the correct Article 8 analysis is as follows. Regulation C9 (Cessation) and its retention as a PPS scheme rule constitutes a significant interference in the right to respect for private and family life. The Claimants' lived experience of Regulation C9, in particular in terms of Inhibition, shows that it is a measure which has a concrete and serious "chilling" effect on the development of personal relationships, because of the heavy price which Deprivation would mean for the Financial Security of the recipients of SPBs who face it. In addition, the effective enforcement of Regulation C9 necessarily makes recipients of SPBs accountable to scrutiny as to their private lives and relationships, including the incidence and continuity with which they and any partner spend their days and nights together. In the absence of demonstrable

proportionality of the interference, the Claimants would all be "victims" of an Article 8 breach. The Home Secretary has, however, discharged the onus of demonstrating that the interference with respect for private and family life is justified as proportionate, applying the applicable Basic Four-Stage Discipline (§36 above). In conscious and contemporaneous policy decision-making, the Home Secretary has identified the legitimate objectives of retaining the integrity of clear scheme rules with their design, costing and contribution, and of not revising those rules to enhance pension benefits referable to those whose Active Scheme Membership has ended, declining to depart from an important and coherent policy principle of Basic Prospectivity. The decision not to disapply Regulation C9 'retrospectively' is rationally linked to these legitimate objectives. In terms of alternative measures, the Home Secretary addressed the issues of an outdated social rationale and the issues of scheme integrity and Prospectivity by designing a "new scheme", after consultation. Retrospectively amending the PPS would be less burdensome for the Claimants (and others) but would be ineffective to achieve the legitimate objectives. The retention of Regulation C9 strikes a fair balance because the serious impacts and implications for the Claimants (and others) are outweighed by the importance of the objectives pursued, and in the light of the economic implications of disapplication of Regulation C9 (and its inevitable logic for other pension schemes). A fair balance has been struck, by retaining the scheme rules which were in place while the Scheme Members to whose service the SPBs are referable were Active Scheme Members making contributions, a conclusion reinforced by the fact that a new scheme was created which included SPBs Payable For Life which as Active Scheme Members in 2006 they were entitled to choose to join. In all the circumstances, the Article 8 claim fails.

The Article 14 analysis: survivors of those who Died other than in the Line of Duty

85. In my judgment, the correct analysis in relation to this way of putting the Article 14 claim is as follows. The Basic Four-Stage Article 14 Discipline (§36 above) yields the following answers. As is common ground, the circumstances fall within the "ambit" of A1P1 (Brewster §§44-45). Although contested by Mr O'Brien, there is here a relevant "other status". The "status" is 'being married or a civil partner of a person who died other than in the Line of Duty'. The difference in treatment (applicability of Cessation of PPS SPBs) is "based" on this "identifiable characteristic" (SC §37(1)) which is not "defined solely by the difference in treatment complained of" and would not need – but in fact has – a "social or legal significance for other purposes or in other contexts" (SC §§69, 71). There is a social significance to being married or a civil partner of a person who Died in the Line of Duty, as well as a legal significance under PIBR06 (§7 above), and there must equally be a social (and legal) significance from being on the other side of that same line. This is just as much a "status" as is 'being in a cohabiting relationship other than marriage or civil partnership at the time of a partner's death' (Brewster §46); or 'children living in households containing more than two children' (SC §§70-71). As to 'comparability', recipients of SPBs who were married or a civil partner of a PPS Scheme Member who died other than in the Line of Duty are in "analogous, or relevantly similar, situations" (SC §37(2)) to recipients of SPBs who were married or a civil partner of a PPS Scheme Member who Died in the Line of Duty. Since the latter group benefit from a 'retrospective' disapplication of Regulation C9 (§18 above), the analysis in Harvey (design, costing and contribution) relied on as precluding comparability (§48(1) above) cannot apply. The focus is on justification for the difference in treatment: of those whose PPS Scheme Member spouse or civil partners

did (SPBs Payable For Life) – or did not (Cessation) – Die in the Line of Duty. Applying the Basic Four-Stage Proportionality Discipline (§36 above), the Home Secretary can discharge the onus of justifying the differential treatment as proportionate. That is because of the coherent differentiation (§79 above), in the context of conscious policy decision-making (including a new scheme with all SPBs Payable For Life, which Active Scheme Members could join) (§§75-76 above), in a socio-economic context (§81 above) having significant economic implications (§77 above).

86. I did not accept Mr O'Brien's comparability 'knock-out point' on this part of the case: that Mr Spreadbury's evidence described PPS recipients of SPBs whose partners Died in the Line of Duty as being, in the event, an 'empty set'. That is because: the conscious contemporaneous policy decision-making approached the issue on the basis that it is a real distinction with a real justification; there was an express change to PPR87 which I am not persuaded was 'beating the air'; there was a similar position for firefighters; and issues relating to the size of the sub-group better belong to the question of justification.

The Article 14 analysis II: those who cohabit or enter marriages/civil partnerships

87. In my judgment, the correct analysis in relation to this way of putting the Article 14 claim is as follows. The Basic Four-Stage Article 14 Discipline (§36 above) yields the following answers. Again, the circumstances fall within the "ambit" of A1P1. As accepted by Mr O'Brien, there is here a relevant "other status". The "status" is 'becoming married or a civil partner or a cohabitee with another person'. The difference in treatment (applicability of Cessation of PPS SPBs) is, again, "based" on this "identifiable characteristic" which is not "defined solely by the difference in treatment complained of" and would not need – but in fact has – a "social or legal significance for other purposes or in other contexts" (SC §§69, 71). There is a social significance to 'becoming married or a civil partner or a cohabitee with another person' and there may in some contexts be a legal significance (see Lennon). It is when the recipient of SPBs 'becomes married or a civil partner or a cohabitee with another person' – as Mr Sneller did – that Cessation occurs. That gives rise to the conundrum that those facing Inhibition who have not yet 'become married or a civil partner or a cohabitee with another person' – because of Inhibition and the threat of Deprivation – do not currently have the "status". I accept Mr Edwards' approach: that the answer lies in their intentions and wishes (including more freely to 'move in' together, albeit not currently to get married) and in the "victim" test which allows (given the clear "risk" that they face for acting in the way they wish to act). One possible answer is that Article 8 proportionality steps in to address this issue, given the interference with private and family life. If necessary, I would have reframed the "status" as those 'wishing to become married or a civil partner or a cohabitee with another person'. In fact, Mr O'Brien did not take his stand on "status" on this part of the case, and there may have been further authorities relevant had he done so.

88. On the contested question of 'comparability', recipients of SPBs who 'become married or a civil partner or a cohabitee with another person' are, in my judgment, in "analogous, or relevantly similar, situations" to recipients of SPBs who do not. Or, as Mr Edwards put it, they are in in "analogous, or relevantly similar, situations" to recipients of SPBs who are in a stable relationship with another person but do not wish to become married or a civil partner or a cohabitee. The analysis in Harvey (§48(1) above) would support the conclusion that there is no 'comparability', because of the obvious difference: the scheme design, costing and contribution means SPBs were 'paid

for by the Active Scheme Member' for one group and not for the other. On this issue, I have the advantage of the discussion in Carter, where the Court found comparability (Carter §58), declining to adopt the Harvey approach that "a costed benefit … paid for by contributions" defeats comparability (Carter §§61-64), and preferring to "decide the matter on the basis of justification" (§64). I also have the advantage of the discussion in Eccles, where the Northern Ireland Court found comparability (Eccles §§34, 37) and did not follow Harvey on this issue (Eccles §§41-42), it being appropriate to focus on justification (§§43, 48). I take the same view.

89. On the question of justification for the difference in treatment: of those recipients of SPBs who 'become married or a civil partner or a cohabitee with another person' and those who do not. It is here, in my judgment, that the Harvey analysis comes to the fore. Applying the Basic Four-Stage Proportionality Discipline (§36 above), the Home Secretary can discharge the onus of justifying the differential treatment as proportionate. That is because of the coherent differentiation, in the context of conscious policy decision-making, where a scheme rule (involving a type of enhanced pension benefit) subsists despite its socially obsolete historic rationale, because the non-introduction of SPBs Payable For Life, in a scheme referable to the officer's service and contributory Active Scheme Membership, has held to the integrity of the scheme rules (designed, costed and contributed to), has declined to depart from the coherent policy principle of Basic Prospectivity, addressing the issues through a "new scheme", which Active Scheme Members were given the choice to join. All of this in a socio-economic context having significant economic implications.

90. Three reference points convey the substance. (1) First, I can draw and adopt the substance of the key points encapsulated earlier from Harvey (§48(2) above), in particular: that the core justification is the design-in, costing-in and contribution-towards pension benefits, viewed in the context of the established general Basic Prospectivity principle; that maintaining Regulation C9 in the PPS suitably and proportionately achieves the legitimate objectives – which a 'retrospective' rule change enhancing benefits would undermine – of avoiding unexpected pension liabilities, with their implications for the public purse, and unfairness in terms of the rules under which Active Scheme Members contributed; and that, balancing the severity of the effects on the rights of those to whom it applies against the importance of the objective to whose achievement it contributes, the impacts are not disproportionate. (2) Secondly, I can read-across the substance of the pithy encapsulation in Harvey (§17 above): the approach to creating the NPPS with SPBs Payable For Life was justified by reference to important legitimate aims which included (i) the establishment of a new scheme which implemented desired benefit structures at a stable and affordable cost (ii) managing and reflecting inter-generational fairness through the provision of benefits only to those who would pay for them through contributions and (iii) adopting a scheme which could readily be administered, and which protected existing active members; and that it applied bright-line rules to create a suitably funded overall package of benefits and costs. (3) Thirdly, I can read-across the substance of key points encapsulated earlier from Eccles (§54 above), including: that the NPPS provided SPBs Payable For Life through a scheme where these were properly costed, planned and paid for; that this constitutes a reasonable and permissible foundation for the differential treatment; that the Scheme Members (Kevin Green, David Jennings and Sharon Sneller) had not joined the NPPS but remained within the PPS with its additional benefits but under which SPBs were not Payable For Life (moreover they were married to the Claimants at that

time); that it is unfair when a scheme member avails of a benefit for which they had neither bargained nor paid, and when other scheme members (or the taxpayer) have to subsidise that unanticipated and unfunded benefit; that the difference in treatment is justified, being rationally connected to and a proportionate means of achieving the objectives of avoiding that unfairness and avoiding a 'windfall' as well as serving to ensure relative predictability and certainty and allow for the maintenance of separate and more up-to-date schemes; that the NPPS struck a proper balance of benefits and liabilities which will assist in the recruitment and retention of employees, whilst still being affordable for employers and the taxpayers who ultimately fund the scheme, as well as being fair as between members; that the objectives of adhering to Basic Prospectivity include that changes were implemented at a stable and affordable cost, whilst also providing an attractive package of benefits; that significant further costs would be incurred for public service pension schemes, GAD estimates having been provided; and that bright-line rules were permissible.

91. What about 'manifestly without reasonable foundation'? Mr Edwards accepted that this was a case concerned with a general measure of economic or social strategy but submitted (§48 above) that there was a feature of this case justifying a closer Article 14 scrutiny, in the "nuanced" and "flexible" approach to 'manifestly without reasonable foundation' (SC §§142, 158-159). That feature was the disproportionately prejudicial effect of Regulation C9 Cessation on "more women than men" giving rise to "indirect discrimination" (cf. SC §§46, 49). In my judgment, this argument could not materially assist him. The 'manifestly without reasonable foundation' formulation is an indication of the intensity of the review (SC §151). Put another way, it is a means of affording latitude when assessing proportionality (Carter §68). It does not mean immunity from intervention, as Brewster demonstrates. But a low intensity of review is generally appropriate, to respect and afford substantial weight to a social and economic policy judgment of the executive in the field of pensions (SC §§158, 161). It is well recognised that where differential treatment is on the ground of certain inherent or immutable personal characteristics, that warrants a heightened intensity of view and a reduced latitude. As explained in SC: the "status" of "sex" is expressly identified in Article 14 (SC §44); the claim may be indirect sex discrimination (§49); that is a "suspect" ground attracting a "strict standard of review" requiring "very weighty reasons" (§§71, 100-101); these are among the factors (§§115(1)(2), 129(1), 158) which can heighten the Article 14 scrutiny of justification, within the "nuanced" and "flexible" approach (§§139, 146), as part of an "overall assessment" (§§99, 116, 130). This explains the interrelationship, and lexicon, of familiar principles. This co-existence of indirect sex discrimination and social and economic policy latitude is, as Mr O'Brien pointed out, illustrated in a case like R (The Motherhood Plan) v HM Treasury [2021] EWCA Civ 1703 [2022] PTSR 494 at §126. No sex-based discrimination claim or feature was said to arise in Brewster (§§56-59), nor in Harvey (§§194, 197-198, 102), and nor in Eccles (§62). The Claimants advance (and have pleaded) no claim of Article 14 discrimination based on "sex". That position was confirmed in pre-hearing exchanges. They rely not on "sex" (an express ground in Article 14). They rely instead on "other status", identifying two alternatives, as the "ground" for the differential treatment. Neither of those involves sex or is a "suspect" class. But even if the circumstances put forward as to differential impact on women were to qualify – or even remove – the 'manifestly without reasonable foundation' formula this remains a social and economic policy judgment of the executive in the field of pensions and the adjusted standard would not

in my judgment yield a different result. Equivalent conclusions were reached in Harvey at §215; and in Eccles at §62.

The Article 12 analysis

92. In my judgment, the correct Article 12 analysis is as follows. The caselaw indicates that a paradigm breach of Article 12 (the right to marry) will involve: (1) a national law (or administrative action: right (Hamer §73; Draper §63) "governing the exercise" of the right to marry (Baiai §13); (2) a claimant with a crystallised intention to marry (O'Donoghue §§85-86); (3) where the national law (or administrative action) in practical terms prevents the marriage. But the cases show that the claimant may have been a "victim" even though they did in fact marry (O'Donoghue), that a crystallised intention to marry is not always an identified feature (Goodwin), and that the impugned national law may not directly be regulating marriage (R & F). As to "victim" status, it may make sense in some cases to focus on the legal merits (cf. Siliadin §63), since a law or action which "impairs the essence" of a claimant's right to marry would render them the "victim" of a breach. Ultimately, there may be a single 'composite' question, encapsulated in various ways (all seen in Baiai: §38 above), by asking whether, having regard to all the circumstances and features of the case, the exercise of the right to marry has its 'essence' or 'substance' 'impaired' or 'injured' by – or is 'substantially interfered with' or 'unreasonably inhibited' by – the impugned national law or administrative action. Within that 'composite' question, the Court is looking to see whether the interference is 'disproportionate', 'arbitrary' or 'unjust'.

93. It is necessary to focus on the concrete facts of the Claimants' cases (F v Switzerland §31). Ms Green and Ms Jennings do not have a present crystallised intention to marry their current partners, and their immediate complaint is that Regulation C9 Inhibits them from 'cohabiting'. Mr Sneller's crystallised intention to marry came after Cessation had already been triggered by cohabitation. These complications would be eliminated in the case ("the Further Scenario") of an SPBs recipient with a crystallised present intention to marry, who does not believe in cohabitation outside marriage, Inhibited by the financial implications of Deprivation. But I do not consider that an Article 12 breach arises in any of these situations. In my judgment, Regulation C9 (Cessation) is not a measure which 'impairs' or 'injures' the 'essence' or 'substance' of the exercise of the right to marry or which 'substantially interferes with' or 'unreasonably inhibits' it; it does not interfere with the right to marry in a way which is 'disproportionate', or 'arbitrary', or 'unjust'. Regulation C9 (Cessation) is a measure of national law but it is not a law "governing the exercise" of the right to marry. Nor is it a measure targeted at marriage: it applies, more broadly, to cohabitation as well. It is a provision similar in nature to the welfare benefits cessation provision in Lennon. It is no "purpose" of Regulation C9 to "discourage people" from marrying or entering civil partnerships or cohabiting (cf. SC §§31-32). Cessation is not in its nature a "penalty" or a "levy" on marriage etc; and nor does it place those affected into poverty (§78 above). Regulation C9 has to be seen in its context and setting, remembering: that SPBs are benefits referable to an officer's service and contributory Active Scheme Membership (§71 above); that the retention of Regulation C9 maintains, in the context of the coherent policy of Basic Prospectivity, the integrity of scheme rules which were designed, costed and contributed to (§73 above); that the outdated social rationale was addressed, again in the context of that coherent policy, through a "new scheme" which

was designed and consulted upon, and which the relevant Scheme Members were given the opportunity to join (§§75-76 above).

94. This is what I made of the arguments on the prominent contentious aspects of the Article 12 analysis. Mr Edwards submitted (§56 above) that Article 12 proportionality is recognisably distinct, which he submitted meant: that it does not involve the Basic Four-Stage Proportionality Discipline (§36 above); that it does not involve the latitude afforded to interferences with qualified rights such as Article 8; that it does not turn on considerations of "broad social policy" (citing Baiai §25); and that it asks whether the factors weighing against the measure outweigh the factors relied upon by the State. In my judgment, the legally correct position is as follows. Article 12 does not include a provision corresponding to Article 8(2) (Baiai §§13, 15, 46 and O'Donoghue §84). That means it cannot be taken that a 'justification' which would satisfy Article 8(2), for an interference with private or family life, would justify as proportionate a restriction on the right to marry. Specifically, it means that an 'objective' which could constitute a "legitimate objective" for Article 8(2) – for the purposes of justifying as proportionate an interference with private or family life – would stand as a permissible "legitimate objective" whose pursuit is capable of justifying a restriction on the right to marry. Further, the assessment of proportionality viewed against an Article 12 "legitimate objective" is an assessment from which "considerations of broad social policy" may be absent. All of this is exemplified by Baiai (§38 above). There, the permissible "legitimate objective" – which national laws governing the exercise of the right to marry could pursue – was the identification and prevention of marriage of convenience (Baiai §§20-22). Analysing the scheme against that objective did not involve issues of "broad social policy" (§25). But that does not mean that issues of "broad social policy" are invariably irrelevant in an Article 12 case. Whether a 17-year-old should be permitted to marry could engage "broad social policy". If Article 12 is engaged in a case such as the present – which would mean it could be engaged in a case like Lennon – it follows that "considerations of broad social policy" can be relevant in an Article 12 case. Conversely, if "broad social policy" measures fall outside Article 12, then Lennon and the present case would fall outside Article 12. So far as concerns the Basic Four-Stage Proportionality Discipline (§36 above), Article 12 does not lose sight of these basic contours of proportionality. It would be very odd if it did: a principled discipline would be lost. In Baiai itself it was necessary to consider whether there was a "legitimate objective". That, albeit in the specific context of Article 12 and its nature, is classic proportionality stage (1). In Baiai the claim succeeded because of a mismatch between the criteria in the IDIs and the legitimate objective (§§23-24, 31). That engages the same considerations as classically found at proportionality stages (2) (rational connection) and (3) (less intrusive measure). And in both Baiai and O'Donoghue the fee held to operate incompatibly with Article 12 was unaffordable for an applicant in needy circumstances. That engages the same considerations as are found as proportionality stage (4) (fair balance, having regard to severity of effects). A crude test of 'whether the factors weighing against the measure outweigh the factors relied upon by the State' would not necessarily mean greater rigour than the stages of the conventional proportionality discipline. In the end, it may well be sufficient for the purposes of Article 12 compatibility to ask a "composite" question – as it is in the present case – in which disproportionality, arbitrariness and injustice are part and parcel of the idea of whether the exercise of the right to marry has its 'essence' or 'substance' 'impaired' or 'injured' by – or is 'substantially interfered with' or 'unreasonably inhibited' by – the impugned national law or administrative action.

Conclusion

95. These cases bring into sharp focus the effects of Regulation C9 (Cessation) on the lives, freedom and pursuit of happiness of the Claimants and others like them. Zooming in on those effects they are, in my judgment, properly to be characterised as serious and severe. A case like this calls for a thorough examination, and one in which the human realities are never eclipsed by dry legalism. As part of that examination, the questions of human rights compatibility require the Court to 'zoom out'. The Court has to look at the 'bigger picture': what is happening in the retention of Regulation C9 and why, by reference to the factual and legal context, and the wider implications on all sides. Furthermore, the Court is enjoined to approach the issues by reference to objective standards which serve to remind the judicial review Judge that they are not the policy-maker and pension scheme rule-maker. In my judgment, for the reasons which I have given, there is no human rights violation in this case and the claim must fail.

Consequential matters

96. Having circulated this judgment in confidential draft, I am able to deal here with the only contested consequential matter. There was agreement as to the costs position, in light of the judgment: the Claimants are to pay 90% of the Home Secretary's costs (and the full costs of an application made by the Home Secretary in November 2020). What was contested was the Claimants' application for permission to appeal. I decided to grant permission to appeal on two grounds: that I have erred in law and reached an impermissible conclusion: (1) in finding (§93 above) that Regulation C9 "is not a measure which 'impairs' or 'injures' the 'essence' or 'substance' of the exercise of the right to marry or which 'substantially interferes with' or 'unreasonably inhibits' it; and (2) in finding (§82 above) that the Home Secretary has discharged the onus of justifying Regulation C9 and its retention in the context of (a) Article 8 and (b) Article 14. I am granting permission to appeal because my confidence in the correctness of the reasoned analysis in this judgment does not extend to regarding as unrealistic (or fanciful) the prospect of the Court of Appeal finding that my conclusions were wrong. If the Claimants and their representatives wish to pursue these matters at higher judicial altitude, they have the permission of this Court to do so.