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Equality between married/civil and cohabiting partners to a survivor's pension

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In the United Kingdom, unmarried cohabiting relationships are still not provided formal legal recognition. Cohabiting partners are provided certain legal rights through a patchwork of legislation. *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* [2017] UKSC 8 is a case involving a cohabiting partner's entitlement to a survivor's pension under the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 (SI2009/32) (hereafter 'the 2009 Regulations'). In *Brewster*, the appellant, B, had lived together with M for about ten years. M had worked for nearly 15 years with Translink, which provides Northern Ireland's public transport services, and was a member of the Local Government Pension Scheme (LGPS) of Northern Ireland. M died unexpectedly in December 2009, intestate and with no children. The pension scheme is administered by the first respondent, Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC), pursuant to the said Regulations. The second respondent is the Department of the Environment for Northern Ireland (DENI) who made and is responsible for the 2009 Regulations.

Under the 2009 Regulations, particularly Regs 24 and 25, a surviving cohabiting partner is eligible for a survivor's pension if he or she is a 'nominated cohabiting partner'. To qualify as a 'nominated cohabiting partner', there are at least two conditions that have to be satisfied. Firstly, there must be a nomination by the deceased scheme member in favour of the surviving partner. Secondly, the substantive conditions for a qualifying cohabiting relationship set out in Reg 25(3) have to be met. They include the parties' living together as husband and wife, or as civil partners, for at least two years at the time of nomination (Reg 25(4)) as well as for at least two years before the time of death (Reg 25(6)). In addition, the surviving partner must be financially dependent on the deceased member or they are financially interdependent (Reg 25(3)(d)). In other words, mere nomination of a cohabiting partner by the deceased member is insufficient; there must be evidence of the combined effect of Regs 25(3), (4) and (6) in order for the nomination to be effective.

NILGOSC decided not to award a survivor's pension to B because M had not made the required nomination in B's favour prior to his death. B then applied for judicial review of NILGOSC's decision on the grounds that the imposition of the nomination requirement on a cohabiting partner tantamount to unlawful discrimination contrary to Art 14, read together with Art 1 of Protocol 1. It discriminates on the basis of her status as an unmarried partner of the deceased member. The issue therefore is whether the

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nomination requirement applicable to cohabiting partners but not married/civil partners under the 2009 Regulations provides for a difference in treatment which is discriminatory and contrary B's rights under the European Convention of Human Rights (ECHR).

At first instance (*Brewster, Re Judicial Review* [2013] Pens LR 165), Treacy J held that the imposition of the nomination requirement on cohabiting partners who satisfy the substantive conditions under Reg 25 of the 2009 Regulations is a breach of Art 14 and Art 1 of Protocol 1. NILGOSC and DENI successfully appealed against Treacy J's decision (*Brewster v Northern Ireland Local Government Officers' Superannuation Committee & Anor* [2014] Pens LR 103). By a 2-1 majority, the Court of Appeal held that the nomination requirement was not unjustified or disproportionate, nor was it 'manifestly without reasonable justification'. Upon B's appeal to the Supreme Court, Lord Kerr, with whom Lady Hale, Lord Wilson, Lord Reed and Lord Dyson agreed, allowed the appeal.

In the appeal, the parties agree that the nomination requirement does provide a difference in treatment between married/civil and cohabiting partners. The more contentious point is whether that differential treatment is objectively and reasonably justifiable which, in turn, raises a couple of related points. The first is the policy objective of the nomination requirement. In order to answer that question, there was much discussion about 'commitment'. Using a marriage-like definition of cohabiting relationships can be problematic as it reinforces the normative and symbolic significance of marriage (Rowthorn, 2002). A particular (marital) conception of commitment is then imposed on cohabiting partners in order to determine their entitlement to certain rights. Yet, perceptions of commitment amongst married/civil and cohabiting partners may not differ significantly (Lewis, 2001). Others argue that modern marriage is becoming more like cohabiting relationships as marriage is increasingly flexible and contingent upon spouses continuing to derive satisfaction from it (Cherlin, 2004). This arguably makes marital commitment more fragile than before.

B argues that the nomination requirement is in fact redundant as it neither adds to nor substantiates the existence of a committed relationship since that evidential function is being performed separately by the substantive conditions in Reg 25(3). The respondents, however, state that the nomination requirement is reasonable and justifiable as it serves the evidential purpose of establishing both the cohabiting couple's commitment to their relationship as well as the deceased partner's clear intentions to benefit the surviving partner. This is due to the ease and informal manner in which cohabiting relationships can be formed, coupled with an absence of a public declaration of commitment as with married/civil partners. The respondents therefore argue that the nomination requirement serves as a substitute 'formality' for cohabiting relationships. However, as Lord Kerr states (para. [36]), if the purpose of extending the 2009 Regulations to cohabiting partners was to eliminate the differential treatment of married/civil and cohabiting partners as well as to distinguish between transient and long-term (and therefore committed) cohabiting relationships, the substantive conditions in Reg25(3) serve to filter out those who qualify.

Consequently, restricting the nomination requirement on cohabiting partners who meet the Reg 25(3) conditions will *prima facie* be differential treatment that requires justification.

Differential treatment does not necessarily mean there is discrimination contrary to Art 14. That depends on whether the differential treatment is objectively justifiable which in turn links with the second point, i.e., the proportionality of the measure and the scope of the margin of appreciation given to the state. The Supreme Court accepted the test for proportionality of interference with an ECHR right adopted in earlier cases such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39. The court also accepted that, where a decision relates to socio-economic policy and the differential treatment is based on a ‘non-suspect’ ground (e.g., marital status) rather than ‘suspect’ grounds (e.g., sex or race), the state generally has a wide margin of appreciation. The question though is the exact extent of that margin of appreciation. Cases like *Stec v UK* (2006) 43 EHRR 47 suggest that the court would generally respect a wide margin of appreciation in the policy decision-making of the legislature unless it is ‘manifestly without reasonable foundation’. As per the dissenting judgments of Lord Reed and Lord Sumption in *R (Tigere) v Secretary of State for Business Innovation and Skills* [2015] UKSC 57, there may even be justification for setting bright-line rules – such as, the nomination requirement – where it is necessary to avoid, e.g., arbitrariness and administrative difficulties. The Supreme Court proceeded to deal with the issue of proportionality through a more contextual approach which included reflecting on and ascertaining the reasons/factors that informed the decision-making process. While Lord Kerr conceded that the state has a generally wide margin of appreciation, justification for interference based on socio-economic policy reasons alone may not be sufficient to escape scrutiny by the court. That may especially be the case when those reasons were not at the forefront of the decision-making process and will therefore be subject to closer scrutiny by the courts.

To some extent, the decision of the Supreme Court may be unsurprising. The LGPS for Northern Ireland, England and Wales, and Scotland had initially imposed a nomination requirement on cohabiting partners. However, the regulations in England and Wales, and Scotland were subsequently revised in 2013 and 2014 respectively, which included the removal of the nomination requirement. The 2009 Regulations did not follow suit. That meant that the 2009 Regulations were out of line with the operation of the English and Scottish LGPS regulations; the reasons relied upon by the respondents for retaining the nomination requirement for cohabiting partners would be more vulnerable to attack and be subject to greater scrutiny. It would not be sufficient therefore to rely on broad constructions of the state’s margin of appreciation in order to justify the continued differential treatment of married/civil and cohabiting partners through the nomination requirement.

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