Neutral Citation Number: [2019] EWCA Civ 1271

Case No: C3/2018/0111 AND C3/2018/0111(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT.
UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge E. Mitchell
CAF25652015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE LEGGATT
and
LORD JUSTICE BAKER

- -

Between:

JANE LANGFORD	**Appellant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Respondent**

- -
- -

Chris Buttler and Raj Desai (instructed by Candey) for the Appellant
Tim Buley QC (instructed by the Government Legal Department) for the Respondent

Hearing date: 19 June 2019

- -

Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is the appeal of Mrs Jane Langford from the decision of 26 October 2016 of the Upper Tribunal (Administrative Appeals Chamber) (Upper Tribunal Judge E. Mitchell) ("the UT") dismissing her appeal from the decision of 19 February 2014 of the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) (Tribunal Judge Mark, Mr P. Powell and Mr P.F. McDougall) ("the FTT"). The FTT had dismissed Mrs Langford's appeal from the decision of the Respondent Secretary of State for Defence ("the Minister") disallowing her claim for benefit under the Armed Forces (Compensation Scheme) Order 2011 ("the Order") following the death in service of her long-standing partner, Air Commodore Christopher Green.

2. The Order, made by the Minister, pursuant to powers conferred by the Armed Forces (Pensions and Compensation) Act 2002, contained a revised benefits scheme ("the Scheme") for dependents of members or former members whose death was caused (wholly or partly) by their service.

3. Mrs Langford's claim was disallowed because, notwithstanding her long relationship with the Air Commodore, she remained married to her estranged husband. In the proceedings Mrs Langford claims that the decision was unlawfully discriminatory against her.

(B) Background Facts

4. The facts of the case are not contentious. Air Commodore Green was a serving officer in the Royal Air Force when he died suddenly and unexpectedly on 17 May 2011. He and Mrs Langford had lived together for 15 years (from 2 November 2006) in a relationship akin to marriage. However, Mrs. Langford remained married to her husband, Mr Alan Langford, from whom she had been estranged for some 17 years. She had no financial support from her husband; she had claimed none and had no expectation of any. Late in the Air Commodore's life he and Mrs. Langford declared publicly their intention to marry and made some early investigations into securing Mrs Langford's divorce from her husband.

5. The unchallenged evidence of Mrs Langford is that both she and the Air Commodore believed that she would be entitled in any event, irrespective of her marital status, to survivors' benefits (and to a pension) upon his death. Mrs Langford had become a member of the Armed Forces Pension Society. However, the flaw in their belief was that the Scheme and the Armed Forces Pension Scheme ("AFPS"), while providing for benefits for the surviving partners of deceased members who are not married to a deceased member, clearly exclude from benefit partners who remain married to, or in civil partnership with, another person.

6. In the present proceedings, Mrs Langford claims that this exclusionary rule discriminates against her unlawfully, contrary to Article 14 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), read in conjunction with Article 1 of Protocol 1 ("A1P1") to that Convention.

(C) The Scheme

7. The relevant provisions of the Scheme are to be found in Articles 29 and 30 of, and in paragraphs 1 to 3 of Schedule 1 to, the Order as follows:

> "**29 Description of benefits—death**
>
> (1) Benefits payable for the death of a member or a former member ("the deceased") are—
>
> (a) a survivor's guaranteed income payment payable until death to a surviving spouse, civil partner or surviving adult dependant;
>
> (b) a bereavement grant payable to a surviving spouse, civil partner[,] … surviving adult dependant[, or eligible child];
>
> (c) a child's payment payable to or in respect of an eligible child.
> …
>
> **30 Meaning of "surviving adult dependant**"
>
> A person is a surviving adult dependant in relation to a deceased member or former member if, at the time of the deceased's death—
>
> (a) the person and the deceased were cohabiting as partners in a substantial and exclusive relationship;
>
> (b) the deceased leaves no surviving spouse or civil partner;
>
> (c) the person and the deceased were not prevented from marrying or forming a civil partnership; and
>
> (d) either the person was financially dependent on the deceased or they were financially interdependent.
>
> **SCHEDULE 1 MEANING OF "SUBSTANTIAL AND EXCLUSIVE RELATIONSHIP"**
>
> **Part 1 Substantial Relationship**
>
> 1. In deciding whether a relationship of a deceased member ("the deceased") and the claimant is a substantial relationship, the Secretary of State is to have regard to—
>
> (a) any evidence which the claimant considers demonstrates that the relationship is substantial; and
>
> (b) must in particular have regard to the examples of the evidence specified in paragraph 2 which could, either

alone or together, indicate that the relationship is substantial.

2. The evidence referred to in paragraph 1(b) is—

(a) evidence of regular financial support of the claimant by the deceased;

(b) evidence of a valid will or life insurance policy, valid at the time of the deceased's death, in which—

(i) the deceased nominates the claimant as principle beneficiary or co-beneficiary with children; or

(ii) the claimant nominates the deceased as the principal beneficiary;

(c) evidence indicating that the deceased and the claimant were purchasing accommodation as joint owners or evidence of joint ownership of other valuable property, such as a car or land;

(d) evidence of a joint savings plan or joint investments of a substantial nature;

(e) evidence that the deceased and the claimant operated a joint account for which they were co-signatories;

(f) evidence of joint financial arrangements such as joint repayment of a loan or payment of each other's debts;

(g) evidence that the deceased or the claimant had given the other a power of attorney;

(h) evidence that the names of both the deceased and the claimant appeared on a lease or rental agreement, if they lived in rented accommodation;

(i) evidence that the deceased and the claimant shared responsibility for children;

(j) evidence of the length of the relationship.

3. A relationship is not an exclusive relationship if—

(a) one or both of the parties to the relationship is married to, or is the civil partner of, someone other than the other party to the relationship; or …

(b) one or both of the parties is a party to another relationship which is, or could be considered to be, a substantial and exclusive relationship having regard to the provisions of this Schedule.

8. It will be seen from those provisions that Mrs Langford's claim is excluded by Article 30(a) (as defined in Sch. 1 para. 3) and (c).

9. As Mr Buttler, for Mrs. Langford, pointed out the Explanatory Memorandum on the Scheme as presented to Parliament said this on the subject of the ECHR (in paragraph 6):

> "6. European Convention on Human Rights
>
> 6.1 As this Instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required."

(D) ECHR Provisions

10. Article 14 of the ECHR provides that the enjoyment of rights and freedoms in the ECHR

> "…shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

11. A1P1 states:

> "44. 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."

12. There is no dispute that a survivor's benefit under a scheme such as this falls within the ambit of A1P1 (and thus within the aim of Article 14) and that Mrs Langford as a person in a substantial and exclusive relationship with a scheme member, but with an estranged spouse, (subject to a small qualification) has a relevant "status" for the purposes of Article 14.

13. For Mrs Langford, it is argued that she is in an analogous position to the surviving partner of a substantial and exclusive (but unmarried) relationship with a Scheme member who does *not* have a continuing marriage to an estranged spouse. She, like such a person or a surviving spouse of a Scheme member, was in substantial and exclusive relationships and was financially dependent (wholly or partly) upon the member. For the Minister, the nature of the discrimination and the argument about it are put this way in the skeleton argument (paragraph 6):

> "6. …

(i) Whether there is different treatment between the Appellant, as an unmarried partner of someone covered by the AFCS, and her chosen comparator, a married partner, on grounds of the status of being an unmarried partner? There is no differential treatment between married and unmarried partners, and certainly none that is in reference to their status as such. The rule that is challenged in these proceedings is that an unmarried partner must not by married to anyone (a third party) other than the AFCS member. Married persons are by definition subject to that very same rule, since a person who is married to a third party can never, for that reason, marry the AFCS member. Since the exclusionary rule applies equally to the Appellant and her comparator, there is no differential treatment and no discrimination."

14. For Mrs Langford it is submitted that the discrimination that she identifies is disproportionate and thus unjustified because,

> "6. …(a) it is unnecessary for the purposes of establishing that the non-formalised relationship was substantial and exclusive; (b) replicating a formality of marriage is inconsistent with the scheme's overarching objective of enfranchising those who fail to comply with such legal formalities; and (c) it would be disproportionately harsh to withhold benefits from those who have lost a breadwinner for want of compliance with a technicality."

15. For the Minister, it is argued that any discrimination that there is derives from a "weak" analogy sought to be drawn by Mrs Langford. Further, it was legitimate/necessary to mirror the limits inherent in the status of marriage, to achieve consistency of treatment between married and unmarried persons and to ensure the Scheme was affordable and administratively workable. On this basis, if justification is necessary, it is submitted, the exclusion cannot be said to be "manifestly without reasonable foundation".

(E) The Proceedings

16. Before addressing further the arguments before us, it is necessary to say a little about the history of these proceedings and of parallel proceedings in which Mrs Langford claimed entitlement to a pension under the Armed Forces Pension Scheme ("AFPS"). This exercise needs to be rather longer than might otherwise be the case because it is necessary to say something of the background to an application to this court by the Minister to adduce fresh evidence upon the appeal. After hearing argument, we refused this application at the outset of the appeal hearing and said that we would give our reasons for so doing in our judgments on the substantive appeal.

17. The AFPS contains a similar exclusionary rule as the Scheme with which we are concerned. The AFPS also excludes from benefit persons in Mrs Langford's position and for the same reason. Mrs Langford challenged her exclusion from the AFPS. Her challenges were rejected by the Services Personnel and Veterans Agency, the administrators of the AFPS, and by the High Court on appeal. The judgment of the High Court was given by Mr Timothy Fancourt QC (as he then was, now Fancourt J), sitting as a Deputy Judge of that court: [2015] EWHC 875 (Ch). While accepting that Mrs Langford had a relevant status analogous to those entitled to benefit under the Scheme, Mr Fancourt dismissed the claim on the basis that the identified differentiation was justified because the surviving partner of an AFPS member married to someone else could be expected, "in the majority of cases", to have some claim on the estranged spouse for financial support if needed: see Loc. Cit. paragraph 22.

18. In the present proceedings, in her Article 14/A1P1 claim, Mrs. Langford relied upon the same status and comparator as before Mr Fancourt. The Minister successfully argued in the UT that her expectation of benefits did not amount to a "possession" for the purpose of A1P1: see paragraph 32 of the decision. (That point has not been taken by the Minister on the appeal to this court.) If wrong about that, the Minister also relied upon the reasoning of Mr Fancourt in the AFPS case. The UT accepted that argument: paragraphs 36-39 of the decision. It appears that no wider evidence as to the purpose of, or the reasoning behind, the exclusionary rule was presented to the High Court in the AFPS case or to either tribunal in the present proceedings.

19. The UT's decision was sent to the parties on 9 November 2016. As the UT's decision on Mrs Langford's application for permission to appeal records, on the last day of the period for applying for permission, she notified the UT of her wish to appeal on the basis of the decision of the Supreme Court in *In re Brewster* [2017] UKSC 8 and she sought time to obtain legal advice. The UT was satisfied that she had acted sufficiently promptly, following the handing down of the Supreme Court's judgment in that case, and granted an extension of time in which to apply for permission to appeal. The UT, however, refused permission. The application was renewed to this court and was granted by Newey LJ by his order of 24 October 2018 (sealed on 29 October 2018).

20. It followed that if (on the appeal) the Minister wished to contend that the UT's decision should be affirmed upon grounds different from, or additional to, those given by the UT, a Respondent's Notice had to be filed within 14 days after notification was given to him of the grant of permission to appeal: CPR 52.13(2), (4) and (5). No such notice was filed then or subsequently.

21. The skeleton argument for Mrs Langford was filed on or about 17 December 2018. The Minister's skeleton argument was due to be filed on 7 January 2019. There followed from 20 December 2018 onwards a series of requests by the Government Legal Department for extensions of time for the filing of that argument. Somewhat generously, as it appears to me, those requests were consented to by Mrs Langford's solicitors. Ultimately, however, it appears that Mr Buley QC (who has acted for the Minister throughout) unfortunately suffered a serious injury and further extensions were understandably readily agreed, initially to 4 April 2019 and finally until 18 April 2019. At no stage throughout this process, however, was there any indication given that an application would be made to adduce fresh evidence. Indeed, in the Minister's

statement of 16 February 2018, resisting the grant of permission to appeal, he had rejected a criticism made on Mrs Langford's behalf that he had not filed evidence as to the purpose of the exclusionary rule, contending that such evidence was unnecessary: see paragraph 6 of the statement.

22. Mr Buley's skeleton argument dated 17 April 2019 was eventually filed along with an Application Notice of 18 April 2019 to adduce in evidence the witness statement of Ms Beryl Preston, the Assistant Head of Armed Forces Compensation and Insurance at the Ministry of Defence, together with an extensive documentary exhibit, running to 243 pages in total. The evidence, in summary, recited the background to the changes introduced from 1998 onwards, directed to equating unmarried partners with spouses for benefits purposes. Little, if anything, was produced that assisted with the contemporaneous reason for the exclusionary rule with which we are now concerned, and much of the witness statement itself was argumentative in character.

23. In support of the application it was now argued for the first time that the decision in *Brewster* gave rise to a need to adduce new evidence, although it was conceded for the Minister that, "The natural place for the Respondent to have adduced evidence was before Mr Fancourt". For my part, I agreed with that concession. It seemed to me that if the Minister had wished to provide this background history to the AFPS and to the Scheme, as part of a case in justification for this exclusionary rule, he should have done so long before 18 April 2019. The real arguments were ones upon which the proposed evidence had little bearing, and *Brewster*, while assisting in the legal analysis in this case did not seriously prompt a need for new evidence, if that need was not there before. In any event, the *Brewster* case had been in the forefront of the grounds of appeal of 15 January 2018 upon which Mrs Langford sought and obtained permission to appeal from Newey LJ. As I have said, at that stage the Minister protested strongly that evidence as to the purpose of the exclusionary rule was not required.

24. Further, it was entirely clear to me from the new skeleton argument that the Minister did indeed wish now to uphold the UT decision on grounds additional to those advanced in that tribunal, which had relied entirely upon the short reasons taken from Mr Fancourt's judgment in Mrs Langford's AFPS claim. On this basis, a Respondent's Notice should have been filed on a date in November 2018, i.e. some 5 months before this new evidential material was provided with the April 2019 application.

25. Given the marginal assistance provided by the proposed fresh evidence, over and above matters of argument, it seemed to me wrong to permit appeal materials to be expanded so significantly by way of evidence, on a second appeal, in a case which hitherto had turned on relatively narrow issues of law. Further, no sufficiently good reason had been advanced for the failure by the Minister to comply with the Civil Procedure Rules as to Respondents' Notices. The rules are to be complied with by Government litigants in exactly the same way as they are to be complied with by other litigants. The relaxed way in which the Minister and/or her advisers approached the procedural requirements in this case is not acceptable on the part of any litigant, whoever he or she may be.

26. These were my reasons for the decision to refuse to permit the new evidence to be adduced.

(F) The Grounds of Appeal

27. Although expressed in five separate grounds, the substance of the appeal is to be found in grounds 1 to 3, as follows:

> "1. Upper Tribunal Judge Mitchell failed properly to identify the aim of the impugned exclusionary rule in article 30 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (which disentitles adult dependants who have not divorced an ex-partner from the benefits of the compensation scheme) in assessing its compatibility with Article 14 (read with Article 1 of the First Protocol) of the European Convention on Human Rights **('Ground 1')**.
>
> 2. The learned UT Judge failed in form or substance to apply the required four-stage domestic proportionality test as required by Supreme Court authority, including *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* [2017] UKSC 8, [2017] 1 WLR 519 **('Ground 2')**.
>
> 3. The learned UT Judge erred in applying the Court of Appeal's analysis of the proportionality of a previous compensation scheme in *Radcliffe v Secretary of State for Defence* [2009] EWCA Civ 39 **('Ground 3')**."

Ground 4 then states shortly the alleged breach of Article 14, read with A1P1.

28. While we refused the application to adduce new evidence, we granted permission to the Minister to be treated as if she had filed out of time a Respondent's Notice in terms of sub-paragraphs (i) to (iii) of paragraph 55 of the skeleton argument of 17 April 2019 (as amended to correct an important typographical error identified by Baker LJ during argument), as follows:

> "55. …
>
> (i) As explained above, the general intention was to ensure that, where members were prepared to meet the cost, unmarried partners would be able to claim under the AFCS (or other schemes modernised in that way) where they were in a relationship akin to marriage.
>
> (ii) As such, the introduction of an exclusionary rule, by which unmarried partners would be prevented from claiming where they were married to another person, is fundamentally in harmony with this aim. That is because, for reasons given, claimants are automatically excluded from making a claim as married partners if already married to another person other than the scheme member, by simple operation of the rules governing the validity of marriages. So to disallow a

claim by an unmarried person in circumstances where they are still married to other persons, far from being discriminatory, is fundamentally in harmony with the intention of allowing claims by persons in a relationship akin to marriage.

(iii) Beyond this, the exclusionary rule is a bright line, workable rule which does not rely overly on the exercise of discretion by officials and creates legitimate limits on the overall costs of the scheme."

(G) The Arguments and my Conclusions

29. As I have noted above, the "prompt" for Mrs Langford's appeal was the Supreme Court's decision in *Brewster*.

30. In that case the claimant's partner was a member of the Northern Irish local government pension scheme. Under the scheme rules, as amended, benefits were payable to a deceased member's surviving spouse, civil partner or "nominated cohabiting partner". One of the requirements in the latter case was for the member and the partner to have signed a declaration that they had been living together, as if man and wife or civil partners, for a continuous period of at least two years and that the nominated partner had been financially dependent on the member or that they were financially interdependent. The claimant's partner, the scheme member, died after they had lived together for 10 years. However, the claimant's entitlement to benefits was rejected by the administrator because no nomination form had been lodged by the deceased member.

31. The claimant contested the administrator's decision in judicial review proceedings in reliance upon an alleged breach of Article 14 when read together with A1P1. There was no dispute that the potential benefits were possessions or that the claimant had the requisite status and was in an analogous position to a surviving spouse or civil partner. All other criteria being satisfied, except for the absence of the nomination form, the administrators sought to justify the requirement as achieving parity with similar schemes in England and Wales and as achieving administrative and actuarial advantages of a "bright line" rule. It was also said that administrative costs would be increased if the clear rule were abandoned. No other evidence in support of the rule was advanced.

32. The case provides a number of helpful "steers" to assist in resolution of cases of this type. However, the principal decision that is material for present purposes is this. The Supreme Court decided that, even testing the supposed justification of the nomination requirement by whether or not it was manifestly without reasonable foundation, it could not stand as it failed the proportionality test arising under the ECHR because there was no rational connection between the objective of extending survivors' pensions to unmarried couples and the requirement to provide a formal nomination of the partner to be benefited.

33. There are a number of passages in the single judgment of the Supreme Court in *Brewster* (given by Lord Kerr of Tonaghmore, with whom the other members of the

court agreed) which are of significance for this case. The conclusion expressed at the end of the judgment, at paragraph 67, was this:

> "67. For the reasons earlier given, I consider that the objective of the particular provisions in the 2009 Regulations which are involved here must have been to remove the difference in treatment between a long-standing cohabitant and a married or civil partner of a scheme member. To suggest that, in furtherance of that objective, a requirement that the surviving cohabitant must be nominated by the scheme member justified the limitation of the claimant's article 14 right is, at least, highly questionable. Be that as it may, I consider that there is no rational connection between the objective and the imposition of the nomination requirement and that this also fails to meet the third and fourth standards in Lord Reed JSC's formulation."[1]

34. Mr Buttler for Mrs Langford argued that the requirement that a person in a substantial and exclusive relationship with a scheme member and either financially dependent on, or interdependent with, that member cannot rationally be excluded from benefit, simply by reason of having failed to secure the formality of divorce from a moribund marriage. Mr Buley QC for the Minister, on the other hand, argued that the object of the Scheme was to equate married and unmarried partners and that to permit Mrs Langford's claim would be to introduce a discrimination against *married* partners who share the same inability as Mrs Langford to marry a third party.

35. In my judgment, Mr Buttler is clearly correct on this part of the argument. The aim of the Scheme is to secure benefits to married and unmarried partners of Scheme members alike. What has to be avoided is unjustified discrimination in securing such benefits. Upon the Scheme member's death, if Mrs Langford's argument is correct, the surviving spouse and a qualified person in her position would become entitled to benefit on equal terms. There would be no discrimination, in relation to benefits, against the spouse either before or after the member's death. Before the death each would have potential claims; after the death, each would have actual claims, but the claimant in Mrs Langford's position still remains unable to re-marry. It is "no skin off the nose" of the surviving spouse that his/her co-claimant remains married. Each would be entitled to benefit under the Scheme on the same footing; the marital status of the surviving partner of the scheme member would be irrelevant to entitlement. The surviving spouse can now remarry but Mrs Langford cannot, but for Scheme purposes, one may ask "So what?"

36. To my mind, the aim of this Scheme is to put those in stable and exclusive relationships with Scheme members, whether married to Scheme members or not, into the same position for benefit purposes. Indeed, such is the Minister's case. Spouses qualify automatically by their status; "surviving adult dependents" have to satisfy the Minister that the relationship was substantial and exclusive, with particular regard to the various matters set out in Schedule 1 to the Order. The exclusion of partners of deceased Scheme members, who are still married to third parties, is one method or means of identifying the target group of *dependent* beneficiaries: it is not an aim of

[1] As to "Lord Reed JSC's formulation": see paragraph 43 of this judgment below.

the Scheme itself. As Lord Kerr said in *Brewster*, one must not confuse the aim with the means employed to achieve it. At paragraphs 34 and 35 of the judgment, Lord Kerr said:

> "34. It surely must be the case that the Regulations were geared to eliminate unwarranted differences of treatment between married or civil partner survivors on the one hand and, on the other hand, those unmarried long-term partners who were in a stable relationship with the scheme member before death. Given DENI's acceptance that the provision of a survivor benefit engages A1P1 and that the claimant has the requisite status to rely on article 14, unwarranted (ie unjustified) difference of treatment (ie discrimination) would bring it into breach of its Convention obligations if such unequal treatment was not eradicated. In my view, DENI simply cannot be heard to say that elimination of unjustified difference of treatment between, on the one hand, the survivor of a scheme member who establishes that they were in a stable long-term relationship with that member and, on the other, a married or civil partner of a scheme member was not the aim of the inclusion of unmarried partners within the survivors' entitlement. This must have been its objective and, expressed in that way, it is no more than a rephrasing of the judge's formulation of the aim.
>
> 35. The error of DENI's submission on this point and, with respect, Higgins LJ's characterisation of the aim of the Regulations on this aspect is to confuse the aim with the means employed to achieve it. Permitting some cohabitants in certain defined circumstances to obtain the same pension provision as married or civil partner survivors is the way in which unjustified discrimination is avoided. It is not an end in itself. The essential question, therefore, is whether imposing a nomination requirement in fact conduces to unwarranted difference of treatment or to its removal."

37. The exclusionary rule here is one means of seeking to achieve benefits for the desired group. The Schedule 1 criteria define far more closely the hallmarks of a relevant relationship. Equally, as Mr Buttler recognised, the formal existence of a marriage may be relevant in the Minister's consideration in any individual case as bearing upon exclusivity or financial dependence. However, he submitted that with a marriage that is as long moribund as that of Mr and Mrs Langford, it might perhaps be thought to be of marginal relevance to the decision.

38. Mr Buttler argued that the exclusionary rule here discriminates between Mrs Langford (and other persons in her position) on the one hand and partners of Scheme members who are not married to the Scheme member or to any other person on the other hand. It seems to me that this is indeed the relevant discrimination for Article 14/A1P1 purposes.

39. In adopting the reasoning of Mr Fancourt in the earlier litigation, in the Tribunals in these present proceedings there was no contest to Mrs Langford's "status" in this sense. Equally, even under the "deemed" Respondent's Notice that the court permitted the Minister to advance, in terms of paragraph 55 of Mr Buley's skeleton argument, the status issue does not resurface. However, in oral submissions, Mr Buley argued that, even accepting that Mrs Langford has a relevant "status", it derived from "personal characteristics" which were relatively weak in nature when compared, for example, with race or gender in discrimination cases.[2]

40. Mr Buley relied upon a passage in the speech of Lord Walker of Gestingthorpe (with whom the rest of the Appeal Committee agreed) in the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at 318H – 319D, paragraph 5, as follows:

> "5. …Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

Thus, Mr Buley argued, the Minister's task in justifying any discrimination in the present case becomes less onerous, because Mrs Langford's status is to be seen as being on the "outer edge of Lord Walker's concentric circles" in the passage just quoted.

41. I am reluctant to put out of mind Mr Buley's point here simply on the basis that it is one (of several) that ought to have featured in a Respondent's Notice, which I am

[2] This is the "small qualification" on the "status" point to which I referred in paragraph 12 above.

clear it should. However, I think that the point can be generally subsumed in my consideration of whether the discrimination is justified and proportionate.

42. In this regard, Mr Buley argued that this was a case in which the exclusionary rule arises in the context of social and welfare policy regarding the payment of benefits from public funds which will only fail if it is "manifestly without reasonable foundation" ("MWRF", an acronym which Lord Carnwath said, in his judgment in *R (DA & others) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, 3321 at paragraph 110, was "hard to escape").

43. In *Brewster*, Lord Kerr in the single judgment of the Supreme Court said that he worked on the basis that the test to apply was whether the discrimination was MWRF [2017] 1 WLR at 537D, paragraph 55. At this point of the judgment, Lord Kerr said:

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

In his conclusion on the test for proportionality, Lord Kerr summed up the matter thus (paragraphs 66):

> "66. The test for the proportionality of interference with a Convention right or, as in this case, the claimed justification for a difference in treatment, is now well settled: see the judgments of Lord Wilson JSC in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [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 …"

Here, then, while working on the basis of the test being one of MWRF, Lord Kerr returned to the fourfold test stated by Lord Sumption and Lord Reed in *Bank Mellat v HM Treasury (No. 2)* [2012] 1 AC 700 at paragraphs 20 and 74.

44. *Brewster* does not appear to have been cited in *DA & others.* However, it is very necessary to note what the Supreme Court said in *DA* about the applicability of the MWRF test. The leading judgment was given by Lord Wilson of Culworth (with whom the rest of the majority in the seven judge court agreed).

45. Lord Wilson appeared to have regrets about the development of the test. At paragraphs 55 to 57 of his judgment, he said this:

> "55. This court has been proceeding down two different paths in its search for the proper test by which to assess the justification under article 14 for an economic measure introduced by the democratically empowered arms of the state. In retrospect this duality has been unhelpful. I regret having contributed to it.
>
> 56. The considerations which have informed the mapping of both paths is best explained by two citations. First, from the judgment of Lord Hope of Craighead in *In re G (Adoption: Unmarried Couple)* [2009] AC 173, para 48:
>
>> "Cases about discrimination in an area of social policy … will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."
>
> Second, from the judgment of Lord Reed JSC in the first benefit cap case [2015] 1 WLR 1449:
>
>> "92. Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.

> "93. That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions."

> 57. Lord Reed JSC then completed para 93 by adding "Unless manifestly without reasonable foundation, their assessment should be respected."

46. Having noted that dichotomy in judicial view at the highest level, Lord Wilson continued at paragraphs 58 and 59 as follows:

> "58. The appropriateness of an inquiry into whether the adverse effects of certain measures are manifestly without reasonable foundation is firmly rooted in the jurisprudence of the ECtHR. In *James v United Kingdom* (1986) 8 EHRR 123, in which it rejected the challenge to the legislation in England and Wales for leasehold enfranchisement, that court, in plenary session, held at para 46 that it should respect the judgment of the national legislature as to what was in the public interest unless it was manifestly without reasonable foundation. And in *Stec v United Kingdom* (2006) 43 EHRR 47, para 52, which it repeated word for word in *Carson v United Kingdom* 51 EHRR 13, para 61 the Grand Chamber, addressing complaints of discrimination arising out of the rules for entitlement to social security benefits, held that it should respect the national legislature's determination of where the public interest lay when devising economic or social measures unless it was manifestly without reasonable foundation. It explained that this more benign approach to the establishment of justification for the adverse effects of a rule flowed from the margin of appreciation which was wide in this area of decision-making.
>
> 59. I now accept that the weight of authority in our court mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are manifestly without reasonable foundation."

47. Lord Wilson then described what he saw as "[t]he possible mapping of a different path" in Lord Mance's judgment in *Re Recovery of Medical Costs etc. (Wales) Bill* [2015] AC 1016 in which, as Lord Wilson noted, Lord Mance referred to the "four stages of a conventional enquiry into justification".

48. Lord Wilson then said at paragraph 61 of *DA*:

> "61. …In para 52 he held that the first three stages (which require the establishment of a legitimate aim of the measure, of a rational connection of the measure to the aim and of an

> inability to achieve it less intrusively) could be addressed by whether the contentions in support of the measure were manifestly without reasonable foundation; but that the fourth stage (which requires the establishment of a fair balance between all the interests in play) fell for decision by the court, although it might pay significant respect to the balance favoured by those responsible for the measure."

However, Lord Wilson went on to note the court's decision in *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, the "bedroom tax case", and said (at paragraph 63):

> "63. Almost two years later the court delivered its judgments in the bedroom tax case [2016] 1 WLR 4550, cited in para 30 above. Two of the three conjoined appeals concerned claims that the effect of rules for the computation of housing benefit was to discriminate against disabled people in the enjoyment of their rights under article 8 and/or A1P1. Giving the main judgment, Lord Toulson JSC recorded in para 28 the primary contention of the claimants in the first appeal as having been that the Court of Appeal had erred in asking whether the treatment of which they complained was manifestly without reasonable foundation. In paras 29–38 he then at length set out reasons in support of his conclusion, in which all the other members of the court concurred, that the Court of Appeal had not erred when, in assessing justification for the effect of the rules on the claimants, it had asked itself that single question."

49. Lord Wilson then concluded his judgment on this aspect of the law in this way (at paragraphs 65]:

> "65. …I reached too quickly for the observations of Lord Mance JSC in the Wales case. For by then there was—and there still remains—clear authority both in the Humphreys case [2012] 1 WLR 1545 and in the bedroom tax case [2016] 1 WLR 4550 for the proposition that, at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

50. Lord Wilson then helpfully said how the MWRF test is to be applied in practice. At paragraph 66 of the judgment, he said this:

> "66. How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having

> countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

In my judgment, this paragraph gives lower courts (including us on this appeal) a clear practical guide as to how one should approach the MWRF test in any individual case.

51. In a judgment with which Lord Reed and Lord Hughes agreed, Lord Carnwath said, at paragraph 110:

> "(iii) Test for justification
>
> 110. The argument that a less demanding test should be applied than "manifestly without reasonable foundation" (or its hard-to-escape acronym "MWRF") was most fully articulated by Mr Wise for DA. For the reasons given by Lord Wilson JSC (issue 7) I agree with him that this argument must be rejected, and that the application of the MWRF should be regarded as beyond "future doubt"."

52. In opening the present appeal before us, Mr Buttler submitted that all that the MWRF test meant was that that criterion had to be applied to each of the four stages of the conventional justification/proportionality test. In reply, Mr Buttler suggested as a "way out" from the application of the MWRF test to discrimination challenges in welfare benefits cases was to be found in paragraph 118 of Lord Carnwath's judgment (referring to the dissenting judgment of Lord Kerr in that case). In that paragraph Lord Carnwath said:

> "118. Lord Kerr JSC goes further and would hold, in agreement with Mr Wise's submission, that the MWRF test should not be applied to the final stage of the proportionality analysis. Although he does not in terms explain how he feels able to disregard the authority of *MA* [2016] 1 WLR 4550, he emphasises that the technique applied to that question by the national court is to be distinguished from that applied in Strasbourg at the supra-national level. However, the fact that the Strasbourg court uses the MWRF test when applying the margin of appreciation and that the same margin of appreciation does not necessarily apply at the national level does not entail that domestic courts cannot also use the MWRF test. It is being used as a means of allowing the political branches of the constitution an appropriately generous measure of leeway when assessing the proportionality of measures

> concerning economic and social policy. The seven-Justice decision in MA surely settled the point for the foreseeable future."

Mr Buttler said that paragraph 118 did not indicate that the "four stage" test, as applied in *Brewster*, was wrong. With respect to Mr Buttler, I do not think that this can be right; it seems to me that Lord Carnwath was there *emphasising* his disagreement with Lord Kerr's dissenting judgment in the *DA* case and re-stating his agreement with Lord Wilson on the point. In *Brewster*, by contrast, Lord Kerr had merely assumed (without deciding) that the MWRF test applied and approached the case on that basis.

53. Mr Buttler also invited us to adopt the approach taken by my Lord, Leggatt LJ in *R (SC and others) v Secretary of State for Work and Pensions and others* [2019] EWCA Civ 615 (16 April 2019) at paragraph 89, where my Lord said this:

> "89. Although it is not immediately obvious how the "manifestly without reasonable foundation" test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to a legitimate aim. This would accord with the statement of the European Court in *Blecic v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters "unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued" (emphasis added). It also reflects how the Supreme Court applied the test in the recent case of *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, at paras 38-39 (Baroness Hale) and para 83 (Lord Hodge)."

This judgment was delivered a few weeks before the Supreme Court's judgments in *DA*.

54. In my judgment, while accommodating fully what Leggatt LJ said in the *SC* case, one can satisfactorily address the issue of justification of the discrimination in this present case by adopting the approach offered by Lord Wilson in paragraph 66 of his judgment which I have quoted above. I will assume that the MWRF test is indeed to be applied in this case, in the manner that Lord Wilson indicated.[3]

55. Mr Buttler said that the rule in this case hardly involved the application of a high policy judgment of the executive, but rather a means of defining the cohort of beneficiaries and the degrees of their dependency on the Scheme member. As he pointed out, in *Brewster*, Lord Kerr had said this at paragraph 59:

[3] I note in passing, however, this Scheme and the AFPS scheme are schemes perhaps not so much related to "welfare benefits and social policy" but schemes, akin to occupational pension schemes, designed to benefit the dependent relatives of employees of a particular state employer, rather than the population as a whole – c.f. the benefits cap and the "bedroom tax" considered in *DA* and in *MA* respectively.

> "59. …No independent evaluation of the need for this particular procedure was undertaken. It was not present to the mind of the decision-maker that a wider discretion was available because the status of those affected was not "an inherent or immutable personal characteristic". For all these reasons, while this is a factor that should not be left out of account, it does not weigh heavily in the assessment as to whether the discrimination is "justifiable and proportionate to its objective"."

56. However, using the MWRF test and applying Lord Wilson's approach, we must look at the reasons put forward on behalf of the Minister for the difference in treatment and start from the basis that unless it is shown that it is without reasonable foundation then justification is established. However, we are to examine "proactively" whether the foundation is reasonable; if we are not persuaded that it is reasonable, it will be "fanciful" to conclude that it is nonetheless not "manifestly" unreasonable.

57. Of course, the reasons for the particular exclusionary rule have not been supplied from contemporary sources. The closest material that we were shown was in a Defence Council Instruction of 23 January 2004 reporting upon the government's decision to extend benefits to unmarried partners of pension scheme members and plans for implementation of the decision. The introduction in the first paragraph said this:

> "Change of Policy
>
> Introduction
>
> 1. This instruction informs you of a change of policy announced by the Government on 15 Sep 03 and effective from that date, whereby attributable benefits equivalent to those available under the Armed Forces Pension Scheme (AFPS) or Reserve Forces (Attributable Benefits Etc) Regulations (RFAB) may be paid to unmarried partners where there is a substantial relationship. The purpose of this instruction is to announce details of the scheme changes ahead of a further DCI, which will provide more detailed guidance relating to the partnership nomination scheme (see para 11)."

(The nomination scheme mentioned in the final sentence seems to be a nomination requirement of the character which was found to be unjustified in *Brewster*.)

58. In paragraph 7 of the Instruction, eligibility was dealt with. There were to be three criteria: (a) Death attributable to service; (b) Substantial/Established Relationship – to be assessed by a wide range of factors, not dissimilar to those set out in paragraph 2 of Schedule 1 to the Order); and (c) Exclusive and Free to Marry. This last element was explained in this way:

> "*Exclusive and Free to Marry* – The word "exclusive" is intended to mirror the requirements in UK law that a person who is already married cannot enter into marriage with another person. Just as a person cannot be married to two people at the

> same time, so a scheme member and/or unmarried partner cannot be in two exclusive relationships at the same time. There would be no entitlement where either partner was in a marriage that had not been legally dissolved (is where there was a legal spouse on either side). Free to marry means that either partner is legally able to marry an individual in law (or would have been able to if you and your partner had not been the same sex). ANNEX B details those relationships which are too close to allow a marriage, or therefore an unmarried partnership. A claim would equally fail where there was a second unmarried relationship that could lay equal claim to satisfying the criteria."

59. In my judgment, this extract from the Instruction provides a statement of the exclusionary rule rather than a justification for it. It simply does not address the reason or need for the difference in treatment of the two classes in issue in this case.

60. Mr Buley advanced what he said were the three legitimate aims at which the rule in issue was directed. First, it was said that the aim of the revised scheme was to achieve parity of treatment between married and unmarried partners of scheme members. Secondly, the rule was to prevent double recovery by the partner in the event that the partner's spouse was also a member of this or some other similar public service scheme. Thirdly, the rule avoided an increase of cost in the scheme and administrative inconvenience.

61. I would note that the second and third points are being raised after the event and there is no evidence to indicate that they played any part in the formulation of the rule in the first place. Certainly, they do not appear to have been advanced against Mrs Langford's claim under the AFPS or in these proceedings below. Thus, they weigh less heavily in the assessment of the reasonableness of the rule: see per Lord Kerr at paragraphs 38 to 41 and 59 in *Brewster*. However, I will look at each of the three points in turn. None of which, in my view, give rise to reasonable foundation for the rule on the evidence in this case.

62. As for point 1, it does not seem that parity between partners who are married to scheme members and those who are not is achieved by imposing a discrimination between different classes of those partners who are not married to scheme members. An exclusionary rule which prevents unmarried partners of scheme members from claiming under the scheme if they are married to another person cannot be justified on the ground that it makes them subject to the same rules as married partners because married partners are not subject to such a rule. Mr Buley argued that they do not need to be, as it is impossible for the spouse of a scheme member to be married to another person, simply by operation of the law governing the validity of marriages. As a matter of law, an individual could not be the lawful spouse of a scheme member if he or she was already married to someone else. Parity with that requirement for unmarried partners, however, is achieved by imposing an equivalent requirement of exclusivity, whereby a person is not eligible to claim as the unmarried partner of a scheme member if he or she are in another relationship that is similar in nature with somebody else. It is not achieved by preventing unmarried partners from claiming unless they comply with requirements which are simply preconditions of a lawful marriage. The latter approach impairs rather than promotes equality of treatment. As

Mr Buttler pointed out, taken to its logical conclusion it would prevent partners from claiming unless they satisfy all the conditions of a lawful marriage – which would require them to have gone through a marriage ceremony and actually be married to the scheme member.

63. Accordingly, I would accept that it is a legitimate aim of the scheme to achieve parity of treatment between married and unmarried partners of scheme members. But such parity is in reality achieved, not by imposing restrictions based on a partner's marital status, but by requiring the demonstration of a substantial, exclusive and financially dependent relationship in practice.

64. Turning to point 2, one can see that there might in theory be potential for "double recovery" if the partner remained married to another Scheme member or to a member of another public service scheme. However, we have no evidence of the likely numbers involved (which might be thought to be small) and, in all events, I find it impossible to accept that the scheme has to be protected by such a broad exclusionary rule when such protection could be provided by a rule requiring evidence from a claimant that any relevant spouse is not a member of such a scheme. In other words, the rule seems to be, as Mr Buttler argued, "a sledgehammer to crack a nut".

65. Finally, there is point 3 (cost and administrative convenience). On the similar argument raised in *Brewster*, Lord Kerr said this (at paragraph 42):

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

66. The same applies here. No evidence about these points were made available to the Tribunals and it was too late to adduce the (with respect) sketchy material on the subject that was proposed by the application that we refused. Further, as Mr Buttler argued, there was no statement in the contemporary materials available to suggest that the rule was introduced as a cost savings measure. It is clear that if Mrs Langford and her like are excluded the costs to the Scheme would be less, but that is not a reason why the rule was introduced and it is a difficult one to justify *ex post facto* absent significant evidential input. There is nothing by which to judge the potential additional administrative costs.

67. For these reasons, on "proactive" examination (as Lord Wilson enjoined), I do not find that the foundation for the clear discrimination in this case is reasonable, and in such circumstances, it appears to me to be indeed "fanciful" to find that Mrs Langford's claim should fail because the discrimination, although unreasonable, is not "manifestly" so.

68. In the result, the discrimination is, in my judgment, unlawful and cannot be justified or proportionate in Mrs Langford's case. We have been dealing with her case and her case alone. I would not exclude the possibility that, in other cases (perhaps in relation to other public service schemes) it might be possible, on material adduced at the proper stage of the proceedings, for an exclusionary rule of this character to be justified and proportionate. I do not say that it would be possible; I simply do not rule out the possibility. The exercise was not undertaken properly in this case.

(H) Outcome

69. I would, therefore, allow the appeal.

Lord Justice Leggatt:

70. I agree.

Lord Justice Baker:

71. I also agree.