Neutral Citation Number: [2022] EWCA Civ 1686

Case No: CA-2022-001184

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER
Mr Justice Fordham
[2022] EWHC 1286 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Between :

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

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- -

Professor Conor Gearty KC (Hon) (instructed by **R. James Hutcheon Solicitors**) for the **Appellants**
Russell Fortt (instructed by **Metropolitan Police Service**) for the **Respondent**
Richard O'Brien and **Tom Tabori** (instructed by the Treasury Solicitor) for the **Interested Party/Second Respondent**

Hearing date: 30 November 2022

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the question of whether a provision of the Police Pensions Regulations 1987 (SI 1987/257, as amended) (the "PPR87") is compatible with the Appellants' Article 12 Convention right as scheduled to the Human Rights Act 1998. The provision in question provides that the widow or civil partner of a deceased member of the pension scheme shall receive a pension for life, unless they remarry, form a new civil partnership or cohabit with a new partner in which case it shall cease to be payable.

Background

2. The provision is contained in the Police Pensions Regulations 1987 ("PPR87"). The PPR87 were made by the Home Secretary, pursuant to powers in sections contained in the Police Pensions Act 1976. The PPR87 contain the scheme rules for the Police Pension Scheme (the "PPS").

3. The PPS applies in relation to "Scheme Members" who at the relevant time, were (and may still be) serving members of the police force ("Active Scheme Members"). On their retirement, a Scheme Member ceases to be an Active Scheme Member and an entitlement to a pension arises in accordance with the PPS rules. The maximum pension payable to a Scheme Member on retirement is two-thirds of final salary after 30 years' service and the compulsory retirement age has been increased from 55 to 60, or 65 in the case of ranks above inspector. The level of contribution to the PPS payable by an Active Scheme Member was set at 11% of pensionable salary.

4. Pension entitlements also arise under the PPS rules in a variety of other situations including pensions for widows and other eligible beneficiaries, referred to as "Survivors' Pension Benefits" ("SPBs"). SPBs are payable at the rate of 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 1976. "Pre" and "post" retirement are a reference to whether the police officer married whilst still an Active Scheme Member or not.

5. The PPS closed to new members in April 2006. A new police pension scheme, the "NPPS" was established by the Police Pension Scheme Regulations 2006 (SI 2006/3415). They came into force on 1 February 2007 with effect from 5 April 2006 for the purpose of membership. A police officer who began their service after 5 April 2006 was entitled to join the NPPS and not the PPS. Furthermore, police officers who were Active Scheme Members of the PPS on and after February 2007 were entitled to transfer to the NPPS.

6. Under the NPPS amongst other things: the maximum pension was a half of final salary after 35 years of service, payable from the age of 55; the contribution rate was initially 9.5% rising to 11-12.75% of pensionable salary between 2006 and 2015; and SPBs were payable to pre-retirement and post-retirement spouses, civil partners or partners for life.

7. A further new scheme was established by means of the Police Pension Regulations 2015 (SI 2015/445 (as amended)) which were made pursuant to powers in the Public Service Pensions Act 2013. They came into force on 1 April 2015 (the "2015

Scheme"). 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 revaluation rate (by CPI + 1.25%) of each year's accrued pension. SPBs are payable to widows, widowers, civil partners and cohabitees for life.

8. From 1 April 2022, the PPS and the NPPS closed to future accrual of benefits and all Active Scheme Members were transferred to the 2015 Scheme.

Regulation C9

9. Regulation C9 is entitled: "Termination of widow's or civil partner's pension on remarriage or other event." The regulation contains seven sub-clauses or regulations. It is agreed, however, that for the purposes of this appeal, it is only necessary to focus upon regulation C9(3). The same approach was adopted before the judge, Fordham J. Regulation C9(3) where relevant, provides as follows:

> "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."

10. SPBs were originally payable only to widows. However, the Police (Pensions and Injury Benefit) (Amendment) Regulations 1992 ("AR92") were made on 30 September 1992 and came into force on 1 November 1992. By virtue of AR92, SPBs became payable to widowers. That change took effect through an amendment of the definition of "widow", in Schedule A: regulation 12 AR92. As the judge described it at [11]: a widower's benefit was a proportionate pension, referable only to service postdating the scheme change; and women's contributions were raised by 2%, to the same rate as men's with effect from 1 September 1992 (AR92 regulation 10). Previously, women police officers had paid a lower contribution rate reflecting the inferior nature of their pension benefits.

11. The PPR 87 were amended to include references to civil partners (both in relation to entitlement and cessation of payment of an SPB) by virtue of the Police Pensions (Amendment) Regulations 2006 ("AR06"). They were made by the Home Secretary on 14 March 2006 and came into force on 5 April 2006. They made 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. The PPR 87 have not been amended to entitle cohabiting partners to receive SPBs, however.

12. A further change to Regulation C9 came about as a result of "death in line of duty" payments. They were extracted from the PPR 87 and set out in one place by the Police (Injury Benefit) Regulations 2006 (SI 2006/932) and came into force on 20 April 2006. Regulation 13 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".

13. Lastly, as from 18 January 2016, Regulation C9 was amended to include Regulation C9(5) and (6). Those provisions provide that if the Active Scheme Member's death was in the "line of duty" the pension payable to the widow/widower/civil partner shall continue even if they remarry, enter into a further civil partnership or cohabit after 1 April 2015. See The Police Pensions and Police (Injury Benefit) (Amendment) Regulations 2015 (SI 2015/2057).

The Parties

14. The Appellants are all "Survivors". Ms Green, the First Appellant, was married to a police officer who died in service. She now has a partner. She says that they do not necessarily want to marry but would like to live together; however, they are prevented from doing so because of the financial impact it would have. She is in receipt of a widow's pension of around £1,000 per month.

15. Ms Jennings, the Second Appellant, was also married to a police officer who died in service. She is a Scheme Member of the PPS in her own right. In her evidence she stated that Regulation C9 prevented her from progressing with her life and that she found the fact that she cannot share her life with anyone "restrictive, controlling, demeaning, archaic and very depressing". Further, she has met someone and at some stage they will want to think about moving in with each other but that would not be possible or feasible as a result of Regulation C9. She is in receipt of a widow's pension of approximately £1,000 per month.

16. Both the Third Appellant, Mr Sneller, and his first wife were serving police officers. He is in receipt of his own police pension of approximately £1,700 per month and a widower's pension of around £1,100 per month. He has a partner who moved in with him after these proceedings were commenced. He informed the PPS and his widower's pension was stopped as from December 2020. He has since married his partner.

17. I have only set out the bare bones of what the judge described as the Survivors' "lived experience". He sought to encapsulate their evidence at [33] – [35] of the judgment

and reference should be made to those paragraphs for a fuller picture of their experience.

18. The Appellants were represented before us by Professor Gearty KC (Hon) who took on the role of advocate only hours before the hearing before us, Mr Edwards having been taken ill. We are very grateful to him for his clear and helpful submissions.

19. The First Respondent, the Commissioner of Police for the Metropolis, is the administrator of the PPS. The Commissioner takes a neutral stance on the appeal as he did before Fordham J. He was represented before us by Mr Fortt. Mr Fortt explained that if the court were to grant a declaration of incompatibility in relation to Article 12, it would be necessary to amend Regulation C9 to delete references to cessation of benefits on re-marriage. He also stated that even if such an amendment were necessary, as there is no appeal in relation to cohabitation, the Commissioner would not reinstate Mr Sneller's pension payments backdated to the date on which they ceased because the cessation arose as a result of cohabitation rather than re-marriage. That is something which is not for us to consider.

20. The Second Respondent, the Interested Party, is the Secretary of State for the Home Department. If Regulation C9 were amended to remove references to cessation of benefits on re-marriage, the Secretary of State would be liable to fund the PPS indirectly (through police forces) in order to enable it to make pension payments both prospectively and retrospectively to those Survivors whose pensions have been terminated as a result of the application of Regulation C9 in its present form. The Secretary of State, who was represented before us by Mr O'Brien and Mr Tabori, denies that there is any incompatibility with the Survivors' Article 12 rights.

The Proceedings

21. Fordham J heard the Survivors' case for judicial review in relation to: the proposed decisions by the Commissioner as administrator of the PPS, applying Regulation C9, to cease to pay Ms Green and Ms Jennings a pension in the event of their re-marriage or cohabitation with a new partner, the threat of which was described as "ongoing"; and in relation to Mr Sneller, in respect of the decision to cease to pay his pension as from 21 December 2020, when he and his second wife began to cohabit.

22. Ms Green and Ms Jennings claimed violations of their Article 12 right to marry and Article 8 right to respect of private and family life Convention rights both on their own terms and read in conjunction with their respective Article 14 prohibition of discrimination Convention rights. They also claimed violations of their contingent rights under Article 1 of the First Protocol Right to Property, read in conjunction with their respective Article 14 rights by way of prohibition of discrimination. Mr Sneller claimed violation of his Article 8 and Article 12 rights both separately and together with Article 14. He also claimed that the Commissioner had breached his rights under Article 1 of the First Protocol ("A1P1") read with Article 14. He also claimed "just satisfaction" damages pursuant to section 8 of the Human Rights Act 1998.

Fordham J's Decision

23. Fordham J decided that Regulation C9 does not infringe the Claimants' Article 8, 12 or 14 rights (the latter as read with A1P1). In particular, he held that: he did not

consider that an Article 12 breach arose on the facts; 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 does not inhibit the right to marry in a way which is "disproportionate" or "arbitrary" or "unjust": [93]. The citation for his closely reasoned judgment is [2022] EWHC 1286 (Admin).

24. As the Appellants criticise the judge's approach in relation to Article 12, partly upon the basis that his thinking was affected by the relevant tests to be applied in relation to Articles 8 and 14, it is necessary to consider the whole of the judgment in some detail. It is important, however, to bear in mind when doing so that, although this appeal is now confined to whether the judge erred in law in his approach to Article 12, the scope of the hearing below was much wider. It included the alleged effects not only of marriage and re-marriage but also of cohabitation which is no longer relevant.

The judgment in detail

- *Background and Concepts*

25. The judge noted that it was common ground that Regulation C9 had an identifiable rationale in 1987 but was subsequently recognised as outdated: [8]. He also recorded that it was acknowledged by Peter Spreadbury, Deputy Director for Police Workforce and Professionalism at the Home Office, in a witness statement filed in the proceedings, that by 2003, it was considered that an officer's surviving spouse or partner's pension should be paid for life rather than ceasing on remarriage or on the commencement of a new relationship because social changes were such that partners now tended to be financially interdependent.

26. The judge also noted that the principle of non-retrospective changes to scheme benefits loomed large. He coined two terms: "Complete Prospectivity" and "Basic Prospectivity". He used "Complete Prospectivity" to mean a pension enhancement applicable only in respect of Active Scheme Members at the date of the rule change and which takes effect only in relation to service after the date of the change. By "Basic Prospectivity" he meant a pension enhancement applicable only to Active Scheme Members at the date of the rule change but which relates to service both before and after the change. In both cases, he noted that the core principle was that the benefit change applied to "paying members" whose contributions could be altered to make sure that they not only benefitted from any change but that it was also paid for: [15].

27. He also stated that although there had been reforms to public sector pensions in the mid-2000s, including changes in eligibility for SPBs to reflect changes in social patterns of behaviour, including the removal of rules ending pensions on remarriage, the new rules did not generally have retrospective effect: [16]. He also noted that, nevertheless, the entitlement to SPBs had been amended, as from July 2014, in relation to police pensions in Northern Ireland so that all survivors of Scheme Members of the Royal Ulster Constabulary retain their SPBs for life: [21].

28. Further, the judge identified what he described as two particular impacts of Regulation C9(3). The first he described as "Deprivation" being the direct loss of income because the Survivor is no longer paid a pension. The second, he described as "Inhibition" by which he meant the way in which the prospect of Deprivation can detrimentally affect those Survivors in receipt of a pension in relation to the way in which they live their lives and their approach to private life and relationships: [29]. Deprivation, he said, applies to Mr Sneller and Inhibition to Ms Green and to Ms Jennings. Those terms were not limited to the effect of marriage or re-marriage.

29. As I have already mentioned: in fact, Mr Sneller's widower's pension ceased to be payable as a result of cohabitation, rather than re-marriage, although he went on to marry his partner; and neither Ms Green nor Ms Jennings has a present intention to marry.

- *The Case law and approach*

30. The Appellants do not dispute the judge's analysis of the authorities in relation to Article 12 at [37] – [43] of his judgment. Professor Gearty contends, however, that when the judge came to apply the relevant principles, his reasoning was infected by his consideration of Articles 8 and 14 and that as a result, he misapplied the test for Article 12. It is important, therefore, to have in mind those principles and the judge's analysis of them, together with the overall structure of his judgment.

- *Basic Four Stage Disciplines*

31. The judge began by setting out what he described as two "Four Stage Disciplines" at [36]. For these purposes, it is only necessary to refer to the first which he describes as the "Basic Four-Stage Proportionality Discipline", a description which he says comes from *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 51 at [66] citing an Article 8 case, *(Quila*) and is as follows:

> "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 judge referred to this discipline in his analysis of Article 12 at [94].

- *Article 12 authorities and analysis*

32. The judge then turned to the Article 12 authorities. As these authorities are central to this appeal, I will set out the judge's approach to them in some detail. The judge began with *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 187, a case in which three couples had sought permission to marry from the Home Secretary. Section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 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 permission. Information required of a "permission to marry" applicant and an application fee of £295 and Immigration Directorate Instructions ("IDIs") identifying general immigration status criteria for refusing permission to marry were prescribed by Regulation.

33. The House of Lords concluded that the scheme was incompatible with Article 12 as a result of the criteria in the IDIs and that the level of fee could itself, constitute a breach of Article 12. As a result of his analysis of the case, the judge set out the following propositions at [38]:

> ". . . (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)."

34. The judge then turned to *O'Donoghue v United Kingdom* (2011) 53 EHRR 1 in which the European Court of Human Rights in Strasbourg dealt with questions about the Article 12 compatibility of three versions of the scheme considered in the *Baiai* case. He noted that the Court had endorsed *Baiai* and had concluded that all three versions of the scheme were inconsistent with Article 12 because "the schemes, as designed, went beyond the Article 12-permissible purpose of identifying and preventing marriages of convenience . . .". He went on at [39] as follows:

> "39. . . 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); . . . the imposition of the fee acting as "a powerful disincentive" to marriage (§§90-91)."

35. Next, he noted that in the cases of *Hamer v United Kingdom* (1979) 24 DR 5 (EComHR, 13 December 1979) and *Draper v United Kingdom* (1980) 24 DR 72 (EComHR 10.7.80) 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. The European Commission of Human Rights ruled that it constituted an "injury" to the substance of "that right": [40].

36. In *F v Switzerland* (1987) 10 EHRR 411, on granting a divorce the Swiss Civil Court had imposed a three-year prohibition on the applicant's remarriage. The applicant was co-habiting with a new partner whom he wished to marry. The judge stated that the Court had articulated two principles, the first of which was that where proceedings originated in an individual application, the court had to confine its attention to the issues raised by the actual case before it. The second was what the judge described as a "core proposition based on the previous case-law", as follows:

> "***Article 12 secures 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 or to such an extent that the very essence of the right is impaired***"."

The judge went on also at [41] as follows:

> ". . . 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 judge's analysis of the case was also at [41], in the following terms:

> ". . . The judgment was 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 affect 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."

37. The judge then turned to *Goodwin v United Kingdom* (2002) 35 EHRR 18, in which the applicant was a post-operative male to female transsexual who was registered at birth as a male. Although the applicant lived in society as a woman her birth certificate recorded the fact that she had been born male. For legal purposes, therefore, she remained male. The birth certificate was the basis for a raft of arrangements including marriage. The Strasbourg Court found violations of Articles 8 and 12. The judge noted that: "[C]entral 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" and that the Court endorsed the core propositions in *F v Switzerland*. He went on at [42]:

> "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)."

He also noted that like *F v Switzerland*, *Goodwin* was "an example of a national measure with an outdated social rationale."

38. Lastly, at [43], the judge analysed *R & F v United Kingdom* App No. 35748/05 (28 November 2006). That was a case in which the applicants were married. One partner had been born biologically male and had undergone gender reassignment surgery five years into the marriage. Those who had acquired a new gender were entitled to apply for a Full Gender Recognition Certificate, the statutory condition being that the applicant was not married. The argument was that the couple's Article 12 rights were violated because they would have to bring their marriage to an end in order to seek to obtain a Full Gender Recognition Certificate. The Strasbourg Court rejected the claim as "manifestly ill-founded". The judge noted at [43]:

> ". . . 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 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)."

- *Article 14 authorities and analysis*

39. Having considered the concept of "victim" status (section 7(1) and (7) Human Rights Act 1998 and Article 34) at [44], the judge turned to the key authorities in relation to

Article 14. Although these cases are not relevant to Article 12, it is important to set them out in outline in the light of the fact that it is said that the Article 14 analysis (as well as that of Article 8) ensnared the judge and affected his approach. The judge engaged in an in-depth analysis of:

i) *In re Brewster* (above), a Supreme Court authority about SPBs in a new contributory public service pension scheme where regulations which made unmarried cohabitees eligible for a pension but required the active member to complete a cohabitee nomination form was found to be contrary to Article 14 at [46];

ii) *Harvey v Haringey London Borough Council* [2018] EWHC 2871 (Admin) [2019] ICR 1059 which was about SPBs in an old contributory public service pension scheme where an eligibility regulation which excluded unmarried cohabiting partners whereas a new scheme provided for such individuals, was found not to violate Article 14 read with A1P1 on the grounds of comparability and because there was objective justification for the differences in treatment at [47] and [48];

iii) *Carter v Chief Constable of Essex Police* [2020] EWHC 77 QB, [2020] ICR 1156 which was concerned with SPBs in the PPS where widows who had married a Scheme Member after that member's retirement were ineligible for an SPB as a result of conscious policy-making and thereafter, were included but were only entitled to a proportionate pension. The regulation was found not to violate Article 14 (read with A1P1) at [51] and [52];

iv) *Lennon v Department for Social Development* [2020] NICA 15 which was about cessation of particular welfare benefits on cohabitation, marriage or civil partnership. A widowed parent's allowance was suspended if the surviving spouse cohabited with a new partner and would be terminated on marriage or civil partnership. The Article 14 claim failed on numerous bases including because, as the judge described it at [53], "there was objective justification for the different treatment. This was a long-standing policy . . . 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 their earlier need would generally be expected to be dissipated.";

and

v) *In re Eccles* [2021] NIQB 111 which is about SPBs in the Northern Ireland equivalent of the PPS where an ineligibility regulation which provided SPBs for widows, widowers and civil partners but not unmarried cohabitees was found not to violate Article 14 read with A1P1. Subsequent schemes did do so, however. The judge stated at [54] that the claim failed because the onus of justifying the differential treatment was discharged. As to the need to reflect social change, he noted that the Government had moved with the times by creating new schemes and had acted in accordance with long-standing policy 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"".

- *Contours of the challenge and justification for the purposes of Article 12*

40. The judge then turned to the structure of the Appellants' arguments and noted that they involved submissions in relation to the various standards of justification needed and the fact that those standards could not be met. He considered the arguments in relation to justification in respect of each of Articles 8, 12 and 14 separately. Article 12 was addressed at [56] under the separate heading of "Need for justification: the Article 12 argument".

41. The judge recorded his understanding of Mr Edwards' arguments, including his submission that the exercise "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 distinct 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")."

- *Absence of justification*

42. Before setting out the seven factors or themes relied upon by the Appellants to support their case that Regulation C9 could not be justified, the judge stated that: ". . . 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. . . .": [59]. He went on to record that 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 arose. As a result, he dealt with those themes together at [60] – [66].

- *Justification*

43. It was in that context that the judge moved on to consider whether the Home Secretary could 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." The judge noted amongst other things at [68]:

> ". . . 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. . . . "

The judge's reference to a "composite question" is a reference back to [56] of his judgment, at which he had stated that 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" to marry which involves asking whether the effect on the substance of the right to marry is "arbitrary or disproportionate" or "arbitrary or unjust" 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 judge's conclusions*

44. The judge concluded that he was unable to accept that Regulation C9 lacks objective justification by reference to any of the Convention rights relied on and in particular, that the Home Secretary had "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). . ." [69].

45. The judge set out twelve key features for his conclusion in relation to justification at [70] – [81]. In summary, they were as follows:

i) 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 (which was accepted by the Claimants/Appellants): [70];

ii) The pension scheme benefits under the PPS are referable to the scheme member's prior service and active scheme membership within a contribution-based scheme, to which they paid their assessed contributions. Such schemes have rules and parameters, benefits and trigger circumstances, set out with clarity within the design of the scheme: [71];

iii) In considering justification the focus is on the retention of the rules in the PPS: [72];

iv) 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: [73];

v) Cessation is an aspect of eligibility to receive SPBs. It is part of the integrity of the scheme rules, with their deliberate design, costing and contributions. Further, it was the subject of conscious policy decision-making, through a new scheme which active scheme members were given the right to choose to join: [74];

vi) 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 (the NPPS) which addressed the issue of SPBs which are payable for life: [75];

vii) That conscious policy decision-making introduced SPBs which are payable for life by means of the NPPS in 2006 which gave the Appellants' former spouses

the opportunity to join that new scheme and achieve those benefits if they wished to acquire that package of benefits: [76];

viii) There would be significant economic implications, estimated by the Government Actuary's Department at £198 million, of disapplying Regulation C9. The same would be true of other public service pension schemes: civil service; teachers; NHS; local government and firefighters: [77];

ix) 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. They are not fairly comparable to the fee in *Baiai* and *O'Donoghue* which a needy irregular migrant could not afford to pay: [78];

x) There is a coherent basis for treating deaths in the line of duty as different: [79];

xi) There is a need for fixed and predictable rules in the context of a contributory pension scheme: [80];

and

xii) The policy nature of the decision – with its conscious and contemporaneous decision-making – and the economic and social nature of the policy choice, are significant. The law gives the Home Secretary, not the Court, the statutory function of designing and amending the PPR87 and the discretionary power to make appropriate 'retrospective' regulations. The Home Secretary is afforded a latitude as to the making of policy choices and the Court does not have a substitutionary jurisdiction: [81].

46. The judge concluded at [82] that by reference to his twelve key features, the onus of justifying Regulation C9 and its retention had been discharged, viewed in terms of its impact and implications in relation to each of the rights relied upon, including the right to marry.

47. Nevertheless, he went on to address what he considered to be the correct legal analysis in relation to each right and added, that "[E]ach Convention right brings its own legal 'flowchart'": [83].

- *The Article 12 analysis*

48. His reasoning in relation Article 12 is set out at [92] and [93]. As the paragraphs are densely reasoned and the Appellants take issue with much of that reasoning, it is appropriate to set out those paragraphs in full:

> "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)."

The judge went on to explain what he considered the appropriate test to be for the purposes of Article 12:

> "94. . . . 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."

Permission to appeal and Article 12

49. The judge gave permission to appeal on two grounds. The Appellants are only pursuing the first of those grounds before us which is as follows:

> "The Court erred in law and reached an impermissible conclusion . . . in finding (para 93) that regulation C9 'is not a measure which "impairs" or "injures" the "essence" or "substance" of the exercise of the [Article 12] right to marry or which "substantially interferes with" or "unreasonably inhibits" it."

50. Before proceeding any further, it is helpful to have the terms of Article 12 directly in mind. It provides as follows:

> "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."

The Appellants' case on appeal

51. Although I mentioned that the Appellants accept that the judge's analysis of the law in relation to Article 12 is correct, in his oral submissions, Professor Gearty added one caveat in relation to *F v Switzerland*. In relation to that case, the judge noted that the "prohibition affected the very essence of the right to marry and was disproportionate to the legitimate aim pursued": [41]. Professor Gearty's preferred interpretation is that the prohibition affected the very essence of the right to marry and therefore was disproportionate to the legitimate aim (emphasis added).

52. This nuance, he says, is consistent with his submission that Article 12 contains a strong and positive right which differs from Articles 8 and 14 and requires a highly

particular analysis. That analysis, he says, requires one to focus on the "essence" of the right itself. If the national law damages or impairs that "essence", Professor Gearty submits that no amount of proportionality could save it. He says, therefore, that the traditional approach to proportionality does not apply to the effect of the relevant national laws for the purposes of Article 12.

53. He accepts, nevertheless, that the concept of the "essence" of the right captures the factual matrix of the national law. It does so, however, in a different way from the traditional approach to proportionality. Everything must flow from the essence of the right. Professor Gearty says, therefore, that although the proper consideration of Article 12 includes a value judgment as to whether the essence of the right has been impaired and may embrace aspects which could be deployed in relation to a proportionality test, the correct test is different. The very strength of the right requires an elevation of the burden of justification. To put the matter another way, he says that the State is put on its guard and the use of the concept of "essence" means that the State has to be clear that the national law in question is justified.

54. Professor Gearty submits, therefore, that the judge did not follow his own analysis and failed to apply the correct test. He says that this arose because the judge conflated the approach to proportionality for the purposes of Articles 8 and 14 with the test which should be applied in relation to Article 12. Had the correct test been applied, it is said that the judge would, inevitably have concluded that Regulation C9 was in breach of Article 12.

55. The Appellants' argument centred on the "essence" of the Article 12 right is based, in some part, upon an article written by Koen Lenaerts, President of the Court of Justice of the European Union in the German Law Journal in 2019 in which the President expresses his own opinions. We were taken to the article very briefly but did not hear detailed submissions upon it or upon the very numerous cases referred to in the footnotes to it, the vast majority of which were not before us. In the circumstances, I will not mention it further.

56. In addition, in their written argument, Professor Gearty and Mr Edwards had set out a number of particular criticisms of the judge's approach which they say, illustrate their general point that the judge conflated the relevant Convention rights into a single test of justification. Despite the fact that Professor Gearty did not pursue these in oral argument, I will set them out in summary:

    i) None of the cases on justification considered by the judge except *Lennon*, are concerned with parties whose right to marry was affected. On the contrary, in general, they are concerned with claimants seeking to have pension rights available to married couples extended to them. It is submitted, therefore, that it is unsurprising that those cases are cautious about extending pension entitlements and afford substantial weight to the judgment of the primary decision maker in fields such as economic and social policy;

    ii) The judge's reasons for why the fact that the absence of a current rationale for Regulation C9 should not lead to its being found to lack justification are based on cases concerning Article 14;

iii) The judge was wrong to assume that the claim in this case is like that in *Harvey*: [72]. It is said that this case is about a penalty on marriage not on cohabitation and, therefore, attracts the rigorous attention of the right to marry in Article 12 in a way that cohabitation does not;

iv) It is acknowledged that pension schemes can, in exceptional circumstances, encompass changes that are outwith the usual approach based on prospectivity. The Article 12 right brings the Appellants' cases into just such a category;

v) The "conscious policy decision-making" [75] that is said to add protection to Regulation C9 may have been true of many aspects of the policy discussions but there is no evidence that Article 12 was ever added to the mix in that discussion;

vi) The judge's conclusion that the creation of the NPPS "gave the [Claimants'] former spouses the opportunity to join the NPPS and achieve those benefits if they wished to acquire that package of benefits" [76] is irrelevant. The assumption that partners operated together in a cohesive way might well work for mainstream Article 14 cases but it does not do so where Article 12 is thrown into the mix;

vii) The "bright-line rules" [80] and need to respect policy choices "in a socio-economic context, involving Government latitude" [81] which influenced the judge's reasoning are relevant only to the Article 14 discussion, with no allowance being made for the different requirements of Article 12;

viii) The passing references made by the judge to the terminology of Article 12 towards the end of his judgment take their colour entirely from his analysis of Article 14, with the Article 12 tests being shoehorned into place to fit with the Article 14 reasoning: [78] and [92] – [94];

ix) *Lennon* may be the one direct authority, but as already observed, the right to marry was not argued in that case and welfare cessation is not the same as pension-deprivation [93]; and

x) At [94] the judge failed to formulate and then apply the relevant test under Article 12. The paragraph is far too general and imprecise and in generalising, the judge allowed Article 14 considerations to come into play. For example, while "broad social policy" [94] is relevant to Article 12 it is not the driver that it might well be in Article 14 cases.

"Governing the exercise of the right of marriage"

57. Before turning to the heart of the appeal, I should mention that Mr O'Brien, on behalf of the Secretary of State, encouraged us to proceed on the basis that as the judge held at [93], Regulation C9 is not a provision "governing the exercise of the right of marriage", Article 12 does not apply to it and accordingly, there was no need to examine the nature of the test for Article 12 at all. We should look no further.

58. It is true that the judge did come to that conclusion. He did not treat the "governing the exercise" of the right to marry point as definitive, however. It was one of the raft

of factors which he took into consideration at [93] when determining the "composite question" which had been posed. It seems to me, therefore, that it would be inappropriate to single it out.

59. This is all the more so in the light of the fact that although Professor Gearty referred to the judge's analysis of *R & F* in support of the submission that a provision with an indirect effect on marriage may also come within the ambit of Article 12, *R&F* itself was not before the court, nor was any other authority in relation to the scope of the phrase "governing the exercise" of the right to marry. Not surprisingly, therefore, we did not hear any detailed submissions on this issue. Accordingly, it seems to me that consideration of the precise ambit of that phrase must be left to another occasion and we should proceed to consider the wider issue of whether the judge applied the correct test under Article 12.

Did the judge apply the correct test in relation to Article 12?

60. In the light of Professor Gearty's submissions, it seems to me that there are two aspects to the question of whether the judge applied the correct test in relation to Article 12. The first is whether the judge conflated the tests for the purposes of Articles 8, 12 and 14 in the sense of having been influenced by the approach in relation to Articles 8 and 14 to an impermissible extent. The second is more complex. It is whether, having analysed the authorities, the judge failed to use the Appellants' approach of evaluating whether the "essence" of Article 12 has been damaged and therefore erroneously applied a broader test of proportionality.

Were the tests conflated?

61. The first aspect can be addressed quite shortly. I agree with Mr O'Brien, on behalf of the Secretary of State, that the judge did not conflate the relevant tests for the purposes of Articles 8, 12 and 14. Nor having been influenced by the authorities in relation to Article 14, did he apply a composite and single test of justification to all of the Convention rights including Article 12.

62. It is apparent from the judge's analysis of *Baiai* at [38], that he was fully aware that Article 12 cannot be qualified on grounds simply because they could be relied upon under Article 8. It was also clear that the judge was aware that Article 12 is subject only to national laws governing its exercise. Furthermore, he recorded that those national laws cannot by rules of substance or procedure "impair the essence of the right to marry", "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 the exercise of that right", but that national laws may have a permissible objective.

63. It is also clear from his analysis of *O'Donoghue* at [39] and the second key principle which he elucidated from *F v Switzerland* at [41] that ". . . limitations . . . introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired." The judge considered that the latter case was noteworthy, amongst other things, because it "illustrated a lack of proportionality where the means was found not to be appropriate for achieving the legitimate aim."

64. The judge also recorded the Appellants' arguments in relation to justification in the context of Article 12 separately from those in relation to the other articles, at [56]. As I have already mentioned, he also went on to state at [59] that "each of the three justification tests arises by a distinct route" and that "there are dangers in eliding [these]".

65. Further, the judge concluded at [69] that he was unable to accept that Regulation C9 lacks objective justification by reference to any of the Convention rights invoked and that it is objectively justified and proportionate as to any Article 8 or Article 12 interference. Given the close proximity between this conclusion and the judge's recognition at [68] "that an Article 12 breach can be said to involve a 'composite question'", it is difficult to see that the judge can have forgotten the question which he was required to answer.

66. In any event, the judge makes further reference to the fact that each Convention right brings its "legal flowchart" at [83] and then considers each relevant article in turn. In relation to Article 12, at [92] and [94], he repeats his reference to the "composite question" which had been submitted by Mr Edwards and accepted by Mr O'Brien.

67. It is quite clear, therefore, that having distilled the principles which apply to Article 12, the judge remained clear throughout that they were different from those which apply to Articles 8 and 14 and that he applied those same principles when reaching his conclusions at [93] and when analysing the relevant test at [94].

Did the judge, in fact, apply the wrong test?

68. As I have already mentioned, in his oral submissions, Professor Gearty placed emphasis upon the second aspect of the question to which I now turn. Did the judge apply the wrong test by failing to use Professor Gearty's approach of evaluating whether the "essence" of Article 12 has been damaged and applied a broader test of proportionality instead?

69. This brings me on to the reference to the "composite question" in both [92] and [94]. The judge concluded that "for the purposes of Article 12 it may be sufficient to ask a "composite question" 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".

70. As I have already mentioned, this formulation was not in dispute before the judge nor is it before us. Accordingly, I proceed on that basis. I should add, however, that it is not clear to me that framing the task to be undertaken in this way adds anything to the jurisprudence in relation to Article 12 which was distilled by the judge. I should make clear that by proceeding on this agreed basis, I do not intend to add a further dimension to that jurisprudence.

71. It is not in dispute that Article 12 is a strong right which does not contain the kind of proviso which applies, for example, to Article 8. Accordingly, when considering Article 12, the court does not apply tests of "necessity" or "pressing social need". It must, nevertheless, determine whether, regard being had to the State's margin of appreciation, the alleged interference with Article 12 was arbitrary or

disproportionate. Any restrictions under national law must be imposed for a legitimate purpose and must not go beyond a reasonable limit to attain that purpose: *O'Donoghue.* They must not restrict or reduce the right to such an extent that the very essence of the right is impaired: *F v Switzerland*.

72. This was the approach adopted by the House of Lords in the *Baiai* case. As Lord Bingham explained in *Baiai*:

> "12. Ms Carss-Frisk QC helpfully advanced the Secretary of State's case in a series of propositions which it is convenient to consider in turn. She submitted, first, that the right to marry protected by article 12 is not an absolute right. She relied in particular on the closing phrase of article 12 ("according to the national laws governing the exercise of this right"), on the Strasbourg and domestic case law and on the analogy drawn in some of the cases between article 12 and article 8.
>
> 13. If by "absolute" is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights (1948) and anticipates article 23(2) of the International Covenant on Civil and Political Rights (1966). In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.
>
> 14. The Strasbourg case law reveals a restrictive approach towards national laws. Thus it has been accepted that national laws may lay down rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity and the prevention of bigamy are examples (*Hamer v United Kingdom* (1979) 24 DR 72, para 62; *Draper v United Kingdom* (1980) 24 DR 72, para 49; *F v Switzerland* (1987) 10 EHRR 411, para 32; *Sanders v France* (1996) 87 B-DR 160, 163; *Klip and Krüger v Netherlands* (1997) 91 A-DR 66, 71). But from early days the right to marry has been described as "fundamental", it has been made clear that the scope afforded to national law is not unlimited and it has been emphasised that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right (*Hamer*, above, paras 60, 62; *Draper*, above, paras 47-

> 49; *F v Switzerland*, above, para 32; *Sanders v France,* above, 162-163; *Klip and Krüger*, above, 71; *R and F v United Kingdom*, Appn no 35748/05 unreported, 28 November 2006, p 14). In practice the Strasbourg authorities have been firm in upholding the right to marry, finding in favour of applicants denied the exercise of that right because they were serving prisoners (*Hamer*, above; *Draper*, above) or because of a mandatory delay imposed before entering into a fourth marriage (*F v Switzerland*, above), or because one applicant was the father-in-law of the other and they could only exercise their right if they obtained a private Act of Parliament (*B v United Kingdom* (2005) 42 EHRR 195).
>
> . . .
>
> 16. The Strasbourg jurisprudence requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right.
>
> . . .
>
> 24. The Secretary of State's fourth proposition was that the assessment of whether the section 19 scheme satisfies the requirement of proportionality essentially involves consideration of whether it strikes a fair balance between the protection of individual rights and the general interests of the community. It has of course been held that the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is inherent in the whole of the Convention: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69. But I do not think the problem in the present case is aptly analysed in terms of striking a fair balance. Article 12 gives those within the jurisdiction a right to marry. That right is subject to national laws governing its exercise, but the section 19 scheme, taken as a whole, does not fall within the category of national regulatory laws which the closing phrase of article 12 permits, as is clear from the decided cases cited above. Thus, the section 19 scheme, insofar as it restricts the right to marry, can be justified only to the extent that it operates to prevent marriages of convenience which, because they are not genuine marriages, do not earn the protection of the right. If the section 19 scheme restricts the right to marry to a greater extent than that, it is disproportionate."

73. It seems to me that the judge took exactly this approach. He took into account the fact that Article 12 contains a strong right, considered Regulation C9 in context and exercised an evaluative judgment in order to determine whether the "essence" of the right had been 'impaired', 'injured' or 'substantially interfered with' and determined whether Regulation C9 was proportionate to achieve a legitimate objective. This can

be seen both from his approach at [93] and his complex distillation of the appropriate approach in [94]. This is entirely consistent with Professor Gearty's approach.

74. Furthermore, Professor Gearty accepts that context is relevant and that an evaluative judgment is necessary. It seems to me that that is inevitably the case. As Lord Bingham explained in *Baiai*, the Article 12 right is not absolute. It is necessary to consider whether the national law, whether substantive or procedural, is necessary to achieve a legitimate objective or is disproportionate. That is the case whether one is considering a national law which restricts marriage to certain age groups, for example, a scheme of the kind in *Baiai,* or a provision like Regulation C9, assuming that it governs the exercise of the right of marriage in the first place.

75. In fact, Professor Gearty accepted that the majority of the factors set out by the judge at [70] - [81] (other than those which do not apply to Article 12 and the conclusion that cessation of a pension benefit was not a penalty) were all part of the relevant context. He submitted, however, that they should not be allowed to dominate and that none of them was decisive. He also accepted that the Basic Four Stage Discipline to which the judge referred at [36] and [94], is relevant.

76. In relation to the question of whether the cessation of a pension benefit is a penalty, I agree with the judge. The cessation of the benefit is not a penalty or levy on marriage. The situation is entirely different from the fee in the *Baiai* case, for example. That related directly to the ability to marry and also required a payment to be made. The cessation under Regulation C9 is inherent in the nature of the pension benefit itself. It was always defeasible.

77. It seems to me, therefore, that as Mr O'Brien pointed out, this is not a situation in which it is alleged that an irrelevant factor was taken into account. Nor is it a situation in which the judge failed to ask the right question or to address himself to the relevant issues when determining that question. Professor Gearty's complaints appear to come down to a matter of the weight to be placed upon the factors which he accepts are relevant.

78. The necessary evaluative judgment was a matter for the judge. The appellate court does not second guess a judge and carry out the evaluation afresh unless "the decision is wrong because of an identifiable flaw in the reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" per Lord Carnwath in *In R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR at [64]. As Lewison LJ concluded at [66] in *R (Z) v Hackney LBC [2019] EWCA Civ 1099;* [2019] PTSR 2272 in relation to an assessment of proportionality:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality."

Those observations were endorsed by the Supreme Court on appeal: [2020] UKSC 40; [2020] 1 WLR 4327 per Lord Sales at [74] and Lady Arden at [118] – [120]).

79. It seems to me, in any event, that the cumulative effect of the factors which Professor Gearty accepts may be taken into account is such that even if a heightened level of justification is required for the purposes of Article 12, it would be met.

80. As the judge points out at [93], Regulation C9 is not a measure which is targeted at marriage per se. It applies more broadly to cohabitation. It is no purpose of Regulation C9 to discourage people from marrying. It must be seen in context, which includes the fact that: SPBs are part of a bundle of rights which were referable to the police officer's pensionable service and the contributions he or she made to the PPS; the integrity of the PPS was designed, costed and contributed to on that basis; the Survivors' police officer spouses had an opportunity to transfer to the NPPS which would have provided SPBs for life but chose not to do so and the outdated social rationale was addressed in that way, and: the retention of Regulation C9 was consistent with the policy of Prospectivity.

81. It seems to me, therefore, that there is no basis for concluding that the judge applied an incorrect test in relation to Article 12 or that his approach to the necessary evaluative judgment was flawed.

82. Accordingly, whilst not underestimating the unfortunate potential effects of Regulation C9 upon the Appellants, I would dismiss the appeal for all of the reasons set out above.

Lord Justice Peter Jackson:

83. I agree.

Lord Justice Bean:

84. I also agree.