



Neutral Citation Number: [2020] EWCA Civ 1199

Case No: C1/2019/2914

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**IRWIN LJ AND WHIPPLE J**  
**[2019] EWHC 2552 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/09/2020

**Before :**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal, Civil Division)**

and

**LADY JUSTICE ROSE DBE**

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**Between:**

**THE QUEEN**  
**on the application of**  
**(1) JULIE DELVE**  
**(2) KAREN GLYNN**

**Appellants**

**- and -**

**THE SECRETARY OF STATE FOR**  
**WORK AND PENSIONS**

**Respondent**

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**Michael Mansfield QC, Henrietta Hill QC, Adam Straw and Keina Yoshida** (instructed by  
**Birnberg Peirce Solicitors**) for the **Appellants**  
**Sir James Eadie QC and Julian Milford QC** (instructed by **The Treasury Solicitor**) for the  
**Respondent**

Hearing dates : 21 and 22 July 2020  
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**Approved Judgment**

**Sir Terence Etherton MR, Lord Justice Underhill and Lady Justice Rose:**

**1. Introduction**

1. The Appellants in these proceedings challenge the changes brought about by a series of Pensions Acts between 1995 and 2014 which equalised the state pension age for women with that of men by raising the state pension age for women from 60 to 65 and then raised the age at which both men and women can claim their state pension. The Pensions Act 1995 raised the state pension age for women on an incremental basis starting with those reaching age 60 in 2010. A woman born before 6 April 1950 would still receive her state pension at age 60 but a woman born after that date would only receive her pension on a specified date when she was aged between 60 and 65, depending on her date of birth. The Pensions Acts 2007, 2011 and 2014 then accelerated the move to age 65 as the state pension age for women and raised the state pension age for some men and women to 66, 67 or 68 depending on their date of birth.
2. The Appellants are two women born in the 1950s and now have a state pension age of 66. Their challenge to the legislation at base is that although one of the aims of the Pensions Act 1995 was to end the discrimination based on gender that had previously allowed women to claim their pension five years earlier than men, this equalisation has run ahead of actual improvements in the economic position of women in their age group. They say that they were in no better position in terms of opportunities for stable, well-paid work than women born earlier than them who have not been caught by the legislation and have continued to receive their pensions at age 60. The Appellants say further that women born in the 1950s were not treated equally with men during their working lives and they therefore arrive at their early 60s in a poorer financial position than men of that age, making it harder for many of them to manage without a state pension. The Appellants argue that the legislation does not therefore end discrimination but in fact gives rise to direct age discrimination contrary to Article 14 of the European Convention on Human Rights ('ECHR') in conjunction with Article 1 of the First Protocol ('A1P1'), indirect sex discrimination contrary to EU law and indirect discrimination contrary to Article 14 on grounds of sex or of sex and age combined. They also claim that the Respondent failed in her duty to notify them far enough in advance of the fact that they would not, as they expected, start receiving their pension at age 60. Finally, they argue that they should have been granted the declaratory relief they sought, even though it is now many years since the legislation that they challenge came into force.
3. The Appellants' judicial review claim was dismissed by the Divisional Court (Irwin LJ and Whipple J) in a judgment handed down on 3 October 2019 and reported at [2019] EWHC 2552 (Admin). Permission to appeal was granted by Dingemans LJ on 17 January 2020.
4. In the appeal Michael Mansfield QC appeared for the Appellants with Henrietta Hill QC, Adam Straw and Keina Yoshida. Sir James Eadie QC and Julian Milford QC appeared for the Respondent ('the SSWP').

## **2. The state pension**

5. The state pension was introduced in 1909 as a means tested pension for men and women over the age of 70, reduced to age 65 for both men and women in 1925. The Old Age and Widows' Pensions Act 1940 provided for a differential in the pension age for men and women when the age was lowered to 60 for women but remained at 65 for men. The modern national insurance scheme was established in 1946 to provide a range of welfare benefits including pensions and to fund the National Health Service. Individuals and employers pay national insurance contributions into a fund and benefits are paid out of that fund on a 'pay as you go' basis, this year's contributions funding this year's benefits. In some years, contributions to the national insurance fund have not been sufficient to cover payments out and in that event the fund is supplemented by a grant from the Consolidated Fund. A person's eligibility for state pension depends on the contributions made by him or her between the ages of 16 and their state pension age. Since 1959 the rate of contribution has been linked to earnings. A welfare benefit known as pension credit was introduced in October 2003 to replace income support for pensioners and is paid to those with modest incomes. Pension credit is based on financial need and a claimant is entitled to the benefit whether or not they have paid national insurance contributions.
6. Expenditure on state pensions is one of the largest components of government spending, amounting to £95.5 billion in 2017/2018 expressed in 2018/2019 price terms. Together with pension credit, benefit expenditure on pensions in 2017/18 represented 5.8 per cent of gross domestic product and 67 per cent of total benefit expenditure.
7. A detailed account of the changes brought about by the Pensions Acts between 1995 and 2014 was given in the judgment of the Divisional Court and the relevant statutory provisions are set out in an Appendix to that judgment. The details of the changes are not relevant to the issues raised in this appeal so we need provide only a summary here. One of the triggers for a reconsideration of the different pension ages of men and women was the decision of the European Court of Justice ("CJEU") in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1991] 1 QB 344. In that case the CJEU held that it was contrary to what is now Article 157 TFEU to impose an age condition which differed according to gender for the purpose of entitlement to a pension under a private occupational pension scheme, even if the difference between the pensionable age for men and that for women was based on that provided for by the national statutory scheme.
8. The Pensions Act 1995 equalised the state pension age by increasing the age for women to 65. The relevant provisions are contained in section 126 of, and Part 1 of Schedule 4 to, that Act. Women born before 6 April 1950 retained the entitlement to state pension at age 60 and women born after 5 April 1955 reached state pension age at 65. The pension age for women born between those two dates was increased incrementally, moving up by a number of months from age 60 to 65 for each successive monthly cohort of women so that the pension age was close to 60 for a woman born shortly after 6 April 1950 and close to 65 for those born shortly before 5 April 1955.
9. The Pensions Act 2007 increased the equalised state pension age for men and women born between 5 April 1960 and 6 April 1968 to age 66; for people born between 5

April 1969 and 6 April 1977 to age 67; and for people born after 5 April 1978 to age 68. People born between April 1959 and April 1960 had a pension age of between 65 and 66, those born between April 1968 and April 1969 had a pension age between 66 and 67, and those born between April 1977 and April 1978 had a pension age between 67 and 68.

10. The Pensions Act 2011 brought forward the increase in state pension age from 65 to 66 by 6 years so that it applied to earlier cohorts of men and women, and the Pensions Act 2014 then brought forward the increase in state pension age to 67. No one who had had their state pension age increased as a result of the 2011 Act faced a further rise and no individual affected by the 2014 Act had their state pension age increased by more than a year compared to the timetable set in 2007. The Pensions Act 2014 also introduced a requirement for the government to review the state pension age regularly in the future. The current position arrived at after the Pensions Act 2014 is therefore as follows:

<b>Date of birth</b>	<b>State pension age</b>
Man before 6 December 1953	65
Woman before 6 April 1950	60
Woman between 6 April 1950 and 5 December 1953	Between the ages of 60 and 65, increasing incrementally by month of birth
Man or woman between 6 December 1953 and 5 October 1954	Between the ages of 65 and 66, increasing incrementally by month of birth
Man or woman between 6 October 1954 and 5 April 1960	66
Man or woman between 6 April 1960 and 5 March 1961	Between the ages of 66 and 67, increasing incrementally by month of birth
Man or woman between 6 March 1961 and 5 April 1977	67
Man or woman between 6 April 1977 and 5 April 1978	Between the ages of 67 and 68, increasing incrementally by month of birth
Man or woman 6 April 1978 and later	68

### **3. The proceedings so far**

11. The Appellants lodged their judicial review claim on 30 July 2018. Their application for permission described the decision to be reviewed as “the provisions and

application of the Pensions Acts 1995, 2007 and 2011, which equalised state pension age, and which apply transitional provisions to women born in the 1950s; and the failure to give sufficient notice for those changes.” As regards the date of the decision being reviewed, they stated on the form that “The most recent of a series of decisions refusing to review or revisit the legislation was communicated on 8 Feb 2018.” Permission to apply for judicial review was refused on the papers by Sir Ross Cranston in an order dated 20 September 2018. He gave as the first reason for refusing permission that the application was “well and truly out of time” and that there was no case for an extension of time. Following an oral hearing of the Appellants’ renewed application for permission, however, Lang J granted an extension of time to 30 July 2018 for filing the claim, if the extension of time was required.

12. The Appellants and the SSWP both lodged evidence before the Divisional Court and before us. The main witness statement for the SSWP was that of Mr Duncan Gilchrist who is employed as Deputy Director for Fuller Working Lives and State Pension Policy. His statement covers the early history of the current state pension regime and the reasons for the changes made in the Pensions Acts. He also analyses the social and economic situation of women in the Appellants’ age group, looking at the factors that could affect the fairness of the treatment of women born in the 1950s compared to other age cohorts.
13. The second witness statement for the SSWP was from Ms Wendy Fox who is employed as the Head of Customers, Intelligence and Digital within the DWP’s Operational Excellence Directorate. She describes the steps which the DWP has taken to publicise the changes to the state pension age including notifying the individuals affected by the changes.
14. For the Appellants, a witness statement was provided by Ms Marcia Willis Stewart QC (Hon), the solicitor with conduct of the case on their behalf. She presents information from various sources aimed at showing that women born in the 1950s are more likely than men in that age group to have lower incomes during their working lives and to be in greater need of their state pension once they reach the age of 60.
15. Both the Appellants also provided witness statements. Julie Delve was born on 21 May 1958. She worked full time from 1975 to 2012 with a two year sabbatical. Under the Pensions Act 1995 she would have had a state pension age of 65. This was then increased to 66 by the Pensions Act 2011. She will therefore reach state pension age on 21 May 2024. She was not affected by the 2007 and 2014 Acts. Karen Glynn was born on 23 September 1956. Under the Pensions Act 1995 she would have had a state pension age of 65 and this was increased to 66 by the 2011 Act. She will reach state pension age on 23 September 2022. She is also unaffected by the 2007 and 2014 Acts.
16. In their judgment, the Divisional Court set out the background to each successive Pensions Act, quoting extensively from the Green and White Papers, reports and Command papers published by the Government over the years, describing the establishment of the Pensions Commission in December 2002 and its reports published in 2004 and 2005 and the consultation exercises undertaken by Government before each of the Pensions Acts was introduced into Parliament. They then addressed each of the claims made by the Appellants.

17. The first claim was that the legislation unlawfully discriminated against the Appellants on grounds of age, contrary to EU law. The Appellants relied on both a general EU principle of non-discrimination and on the Equality Directive, Council Directive 2000/78/EC of 27 November 2000. The Court dismissed this claim on the grounds that the general principle did not apply because the payment of state pension did not come within the ambit of EU law concerning age discrimination and further that state pensions were excluded from the scope of the Equality Directive by Article 3(3) of that Directive: [37] and [41]. The Appellants do not appeal against that decision.
18. The Divisional Court then turned to the claim of age discrimination contrary to Article 14 ECHR in conjunction with A1P1. The Court rejected this claim on two bases. First, they accepted the SSWP's submission that the Appellants could not rely on a comparator group comprising women born before 6 April 1950 who were unaffected by the changes. This was because the case law of the European Court of Human Rights ('ECtHR') showed, they held, that two cohorts are not comparable for the purposes of Article 14 where they are legitimately subject to different legislative regimes: [52]. Secondly, they held that the legislation was justified because the evidence established that it was not manifestly without reasonable foundation ('MWRF'): [53 - 54]. Both those decisions are challenged in Ground 1 of the appeal before us.
19. Turning to sex discrimination under EU law, the Divisional Court rejected the claim based on Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ('the Social Security Directive'). They held that the claim was precluded by the derogation in Article 7(1)(a) which permits Member States to exclude the determination of pensionable age from its scope: [64]. As regards the claim of sex discrimination contrary to the ECHR, the Divisional Court accepted the SSWP's argument that there could be no direct discrimination on the grounds of gender, or age combined with gender, in circumstances where the legislation simply removed the advantage that had previously existed in favour of women: [70]. The Divisional Court decided there was no indirect discrimination contrary to the Convention because of the absence of a causal link between the measures and the disadvantages accruing to women or to women in this age group: [73]. In any event, again, the Divisional Court held that the legislation was plainly not MWRF. The Divisional Court's rejection of the claim based on sex discrimination or combined sex and age discrimination is the subject of Ground 2 of the Appellants' appeal although there is no appeal against the rejection of the direct discrimination claim under EU law.
20. The Divisional Court then considered the claim based on lack of adequate notice. The Court held that the claim failed as a matter of law because no promise or representation had been made by the Government beyond a promise that Parliament would not change the state pension age without prior consultation. There had been widespread consultation with interested bodies before each of the Pensions Acts: [118]. Further, a failure to give notice could not lead to the abrogation of the relevant statute so that even if the court were able to impose obligations of notice arising from common law fairness, no breach could require or empower the court to suspend the operation of primary legislation: [119]. As to the factual basis of the claim, having

regard to all the material before them the Court said it was not possible to conclude that the steps taken to inform those affected by the changes were inadequate or unreasonable: [123]. The Court's dismissal of the claim based on lack of notification forms Ground 3 of the Appellants' appeal.

21. Finally the Divisional Court dealt briefly with delay. They recorded that the chief substantive changes to the state pension age for the cohort of women represented by the Appellants were made by the Pensions Act 1995. They said: "A delay of more than 20 years before the relevant legal challenge would in our view be fatal in any event." That decision forms the basis of Ground 4 of the Appellants' appeal.
22. In the paragraph concluding their judgment, the Divisional Court said:

"We are saddened by the stories we read in the evidence lodged by the Claimants. But our role as judges in this case is limited. There is no basis for concluding that the policy choices reflected in this legislation were not open to government. We are satisfied that they were. In any event they were approved by Parliament. The wider issues raised by the Claimants, about whether these choices were right or wrong or good or bad, are not for us; they are for members of the public and their elected representatives."

#### **4. GROUND 1: age discrimination contrary to Article 14 ECHR**

23. Article 14 ECHR provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

24. A1P1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. The basic principles of discrimination contrary to Article 14 were considered by the ECtHR in *Carson v United Kingdom* (Appn 42184/05) (2010) 51 EHRR 13 ('*Carson*'). In that case, non-UK residents entitled to a state pension challenged a difference in treatment whereby the state pension was increased in line with inflation

for UK-resident claimants but not for them. The ECtHR summarised the effect of the case law on discrimination: (footnotes omitted)

“61. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14. Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”.”

26. The ECtHR observed that where a complaint relates to alleged discrimination in a welfare or pensions system, the court is concerned with the compatibility of the system with Article 14 and not with the individual facts and circumstances of the applicants. Submissions about the extreme financial hardship that might result from the failure to uprate pensions were not relevant because a court was not in a position to assess the effect of the system on the many thousands who were in the same position as the claimants. The court’s role was to determine the issue of principle, namely whether the legislation as such unlawfully discriminated between people in an analogous situation: [62]. The ECtHR said that, although there is no obligation on a state to create a welfare or pension scheme, if a state does so, that legislation generates a proprietary interest falling within the ambit of A1P1 for persons satisfying its requirements. The claim therefore fell within the scope of A1P1 so that Article 14 was engaged. The ECtHR went on to reject the claim on the ground that the claimants were not in an analogous position to pensioners resident in the United Kingdom. The fact that the claimants had paid national insurance contributions when they worked in the United Kingdom was not sufficient to put them in a relevantly similar situation to pensioners resident in the UK. Such a contention, the ECtHR said: [84]

“misconceives the relationship between National Insurance contributions and the state pension. Unlike private pension schemes, where premiums are paid into a specific fund and where those premiums are directly linked to the expected



benefit returns, National Insurance contributions have no exclusive link to retirement pensions. Instead, they form a source of part of the revenue which pays for a whole range of social security benefits, including incapacity benefits, maternity allowances, widow's benefits, bereavement benefits and the National Health Service. Where necessary, the National Insurance Fund can be topped-up with money derived from the ordinary taxation of those resident in the United Kingdom, including pensioners. The variety of funding methods of welfare benefits and the interlocking nature of the benefits and taxation systems have already been recognised by the Court. This complex and interlocking system makes it impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who receive uprating and those, like the applicants, who do not."

27. Turning to the application of those principles to the Appellants' submissions before us, the Pensions Acts create three different cohorts of women:

- i) women born before 6 April 1950 who attain pensionable age at the age of 60 ('pre-1950s women');
- ii) women born between 6 April 1950 and 5 October 1954 who attain pensionable age when they are aged between 60 and 66; and
- iii) women born after 5 October 1954 but before 6 April 1960 who attain pensionable age at 66.

28. The Appellants fall within the third group. They assert that they suffer from a clear difference in treatment compared with the other two groups, namely that they do not receive their pension until the age of 66. It is common ground that age is an 'other status' for the purposes of Article 14. It is also accepted by the SSWP that the legislation removing the Appellants' entitlement to the state pension falls within A1P1 and hence within the scope of Article 14. The two areas of contention on Ground 1 are whether women born before 6 April 1950 are a valid comparator group for the purposes of Article 14 and whether the difference in treatment has been justified.

*(a) Age discrimination under Article 14: is there a valid comparator group?*

29. Sir James argued before us that the Appellants cannot rely on pre-1950s women as a comparator group because the difference in treatment between the two groups is a consequence of bringing into effect changes to the legislative regime. Where a difference in treatment arises because one group falls on the wrong side of a line drawn by legislation to determine those to whom the legislation will apply, Article 14 is not engaged by comparing them with a group which falls on the more favourable side. This principle was established, Sir James submits, in two ECtHR cases *Zammit and Cassar v Malta* (Appn 1046/12) (2017) EHRR 17 ('*Zammit*') and *Minter v United Kingdom* (Appn 62964/14) (2017) 65 EHRR SE6 ('*Minter*').

30. In *Zammit* the claimant challenged an ordinance which set rent controls for leases of commercial property. The restrictions in the ordinance did not apply to property owners who began leasing their properties after 1995. The ECtHR rejected the claim under Article 14 based on a difference in treatment of landlords who leased their property before 1995 compared with those who leased their property after that date, holding that the claim was manifestly ill-founded:

“69. In any event, the legal restrictions and impositions complained of apply to every owner whose property was rented under a contract of lease prior to 1995 and the applicants (or their predecessor in title, were he still alive) would not have been subjected to such restrictions and impositions in respect of contracts entered into after 1995. Thus, it would appear that there is no distinguishing criterion based on the personal status of the property owner, nor on any other ground which the applicants failed to mention.

70. Furthermore, no discrimination is disclosed as a result of a particular date being chosen for the commencement of a new legislative regime and differential treatment arising out of a legislative change is not discriminatory where it has a reasonable and objective justification in the interests of the good administration of justice. The Court notes that the 1995 amendments, which sought in effect to improve the situation of land owners in order to reach a balance between all the competing interests, by abolishing the regime which is in fact being challenged by the applicants before this Court, do not appear arbitrary or unreasonable in any way.”

31. In *Minter* a prisoner who had been sentenced to an extended sentence with an indefinite notification period under the law in force at the time of his conviction complained that he had been treated differently from a prisoner convicted following changes to the legislative sentencing regime. Again the ECtHR rejected the complaint as manifestly ill-founded:

“67. In *Massey* (14399/02) 8 April 2003 the applicant also invoked art. 14 in conjunction with art. 8, complaining that sex offenders convicted of more recent offences than his were not subject to the requirements of the Sex Offenders Act 1997 because they had completed their sentences on the commencement date of the legislation. However, the Court considered that no discrimination was disclosed by legislative measures being prospective only or by a particular date being chosen for the commencement of a new legislative regime. The Court has subsequently confirmed this position (for a recent example, see [*Zammit*]). In this regard, it has noted that the use of a cut-off date creating a difference in treatment is an inevitable consequence of introducing new systems which replace previous and outdated schemes. However, the choice of such a cut-off date when introducing new regimes falls

within the wide margin of appreciation afforded to a State when reforming its policies.”

32. The ECtHR in *Minter* described its decision in *Zammit* as reaffirming “that no discrimination was disclosed by the selection of a particular date for the commencement of a new legislative regime”.
33. The SSWP accepts that there is an additional factor here in that the comparator group of pre-1950s women is defined not only by the fact that they fall on the more favourable side of the cut-off date for the application of the Pensions Act 1995 but by their date of birth. Sir James argues, however, that *Ackermann and Fuhrmann v Germany* (Appn 71477/01) (2006) 42 EHRR SE1 (*Ackermann*) extends the principle to cover precisely this case. In *Ackermann* the applicant sought exemption from the obligation to pay the German equivalent of national insurance contributions. One of the many grounds he relied on was recorded by the ECtHR as a complaint that “he was discriminated against when compared to the older generation who currently profited from higher pensions than those which he himself would receive on reaching pension age” (see p 2 of the report). The ECtHR declared that the whole claim was inadmissible because it was manifestly ill-founded. They dismissed the claim based on Article 14 with the following brief analysis: (p 7)

“In so far as the applicants further complained about discrimination on grounds of age, alleging that earlier generations of pensioners received considerably higher pensions than they themselves would on reaching pension age, the Court notes that the applicants have not established that their own situation is comparable to that of earlier pensioners. In this respect, it has to be taken into account that the State must be in a position to adapt the pension system to the change of socio-economic circumstances. Accordingly, the applicant cannot claim equal treatment “in time”.”

34. The Divisional Court accepted Sir James’ submission at [52]:

“The analysis suggested in *Ackermann*, a case close to this one on its facts, is that Article 14 is not even engaged, because the situation of the complainant younger pensioners is “not comparable” to that of the older pensioners. We infer from the judgment in that case that the two cohorts were not comparable precisely because they comprised people of different ages who were legitimately subject to different legislative regimes. On that analysis, no question of justification arises: States are at liberty to alter the age at which the state pension becomes payable, and a person cannot claim equal treatment “in time”.”

35. Sir James submitted to us that the setting of a commencement date does not create a comparator group comprising those not affected by the legislation. The Appellants cannot, he argues, recast a timing complaint of the kind that the ECtHR rejected in *Zammit* and *Minter* as a complaint about age discrimination. If that was right, then the same principle must apply even where, as here, a series of dates is incorporated to bring about the tapered introduction of the new regime rather than a cliff edge

between those whose entitlement arose before the new regime came into effect and those whose entitlement arose after that date.

36. Although we see the force in Sir James' submissions in reliance on this line of authority, we consider that the ECtHR's judgment in *Ackermann* provides too slender a basis for a firm conclusion that the Appellants here are precluded from relying on the pre-1950s women as a comparator group to found their age discrimination claim. There is in this legislation something that the ECtHR noted was absent in *Zammit*, namely a "distinguishing criterion based on the personal status" of the claimant because the cut-off date adopted by the legislation distinguishes on the basis of age and not simply on the implementation date of the measure. We accept Ms Hill's submission that the reasoning in the judgment in *Ackermann* is sparse. The nature of the measure which Mr Ackermann said led to him receiving a lower pension than previous generations is not at all clear. The ECtHR's reference to the need for the State to "be in a position to adapt the pension system to the change of socio-economic circumstances" seems to be a factor more relevant at the justification stage than at the stage of identifying a comparator group. The present state of the jurisprudence of the Strasbourg Court has not, in our judgment, reached the point that any comparator group is invalid because it is a group that remains unaffected by prospective legislation, in circumstances where that group is defined not merely by reference to the date when the legislation comes into effect but by reference to a protected characteristic.
37. The Appellants submitted that the Divisional Court's conclusion on this aspect of the claim was inconsistent with this Court's decision in *Lord Chancellor v McCloud and others* [2018] EWCA Civ 2844, [2020] 1 All ER 304. That was a case in which transitional provisions bringing into effect a new judicial pension scheme in a way which differentiated between scheme members according to their date of birth were held to be unlawful age discrimination contrary to the Equality Act 2010. Ms Hill submitted that it would be inconsistent to hold that a pension scheme based on date of birth can be unlawful age discrimination within the meaning of the Equality Act but not within the meaning of Article 14. We have not derived assistance from *McCloud* for a number of reasons. First, the respondent in that case accepted at every stage of the proceedings that there had been direct age discrimination between the claimants and the older judges who stayed in the more favourable scheme until retirement. The case was argued solely on the question of justification. Secondly, the scheme at issue there was an occupational pension scheme amounting to 'pay' for the purposes of Article 157 TFEU. The legal and factual issues raised were very different from those raised by a state social security pension scheme established in primary legislation.
38. We would not dismiss this part of the claim on the basis of the *Ackermann* decision alone.

*(b) Age discrimination under Article 14: justification*

39. The Appellants accept that the correct test for justification in this context is whether the measures under challenge are MWRP. The way to apply that test was discussed recently by McCombe LJ in *Langford v Defence Secretary* [2019] EWCA Civ 1271, [2020] 1 WLR 537 in a judgment with which Leggatt and Baker LJ agreed. McCombe LJ referred to the clear guidance given to lower courts by Lord Wilson JSC

in *DA v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 ('DA'). Lord Wilson said at [66] of *DA*:

“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.”

40. McCombe LJ then said at [56] of *Langford*:

“... using the MWRF test and applying Lord Wilson JSC’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.”

41. Sir James rightly reminded us of the limited role that an appellate court should play when reviewing the decision of the lower court on the issue of proportionality under the ECHR. The appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong: see *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, [64].

42. In our judgment there is no basis for impugning the Divisional Court’s conclusion that the legislation equalising and then raising the state pension age was justified. The Divisional Court were right to approach the issue on the basis that this legislation operates in a field of macro-economic policy where the decision-making power of Parliament is very great: [53]. The Appellants’ complaint is that the line between women who retained the state pension age of 60 and those whose state pension age was increased should have been drawn at a later birth date so that it affected only women who had better opportunities during their working life to pay national insurance contributions or make other provision for their retirement. However, as Lord Bingham of Cornhill said in *R (Animal Defenders International) v Secretary of*

*State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 when explaining why great weight must be accorded to the judgement of Parliament in the framing of legislative boundaries:

“A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.”

43. The background to the decision to increase state pension age is described in detail in Mr Gilchrist’s witness statement and explained fully in [10] onwards of the Divisional Court’s judgment. The urgency of reform coupled with a recognition of the difficulties that women still experienced in building up adequate pension entitlement were fully appreciated by the Government when promoting the legislation.
44. In December 1991 the Government published the Green Paper ‘*Options for Equality in State Pension Age*’ (Cm 1723) seeking the public’s views on a number of options for achieving equalisation of the state pension age. The Green Paper highlighted four key factors. The first was the increase in pensioners’ net average income in real terms between 1979 and 1988, in particular the increase in the number of pensioners with occupational pensions. The second factor was the increase in the projected number of pensioners to a peak of 14.4 million in 2034 combined with a decrease in the number of people of working age potentially contributing to the national insurance fund. This ratio is referred to as the old age dependency ratio or ‘OAD’. In 1990 there were 3.4 people of working age for every pensioner but this was projected to fall to 2.6 workers for every pensioner by 2050. The third factor was the increase in life expectancy for both men and women and the fourth was the projected increase in state pension costs both in real terms and as a percentage of GDP. The 1991 Green Paper summarised the main policy drivers behind the proposals to equalise the state pension age as follows:

“Whatever solutions are adopted, the Government is clear that it would not be right to continue with unequal pension ages for men and women. There have been immense social and economic changes since these ages were set at their present levels over half a century ago. These changes include the greater willingness of women of all ages and marital status to work, and the spread of part time working. At the same time pensioners generally have been living longer, and have gradually become better off through the development of occupational pensions. To have differing pension ages now is increasingly out of line with developments in the equal treatment of men and women in the employment field, including in occupational pension scheme.”

45. Mr Gilchrist’s evidence is that the 1991 Green Paper received over 4000 responses. The subsequent White Paper ‘*Equality in State Pension Age*’ (Cm 2420) published in 1993 explained why the Government thought it was right to equalise the pension age at 65 reflecting the increasing rates of female employment supported by the introduction of sex discrimination legislation, increasing life expectancy, the

international trend towards increasing and equalising state pension ages together with the need for Britain to maintain international competitiveness and the changes to occupational pension schemes both in terms of their greater availability and the equalisation of the pension age under such schemes. The White Paper also explained why the Government was not adopting the various options that had been canvassed in the Green Paper, including equalising at a lower age than 65 or having a flexible state pension age or allowing the full state pension to be drawn at any time once a certain number of contributions had been paid. This last option was rejected because those who had gaps in their employment record would be disadvantaged by having to wait longer to access their pension and women were more likely to have such gaps than men. The White Paper also made it clear that the Government recognised that the change would need to be phased in gradually so that people had enough time to plan.

46. In 2002 the Government published a Command Paper called '*Simplicity, security and choice: working and saving for retirement*' (Cm 5677). This Command Paper did not propose an increase in state pension age despite increasing life expectancy. It focused instead on increasing employment rates for people over 50 and providing incentives for people to defer claiming their state pension. The Pensions Commission was established in 2002 and produced its first report in October 2004 '*Pensions: challenges and choices*'. The report noted that without an increase in state pension age, expenditure on pensions would continue to grow as a proportion of GDP. A further report in November 2005 highlighted the need for fundamental policy changes and a longer term pensions settlement. Mr Gilchrist describes the DWP's engagement with interested groups such as Age Concern, the Confederation of British Industry, Help the Aged and the National Association of Pension Funds.
47. The White Paper published in May 2006 (Cm 6841) noted the pressing need for pension reform because of the demographic and social changes which had led to an increase in life expectancy for men from 11 years at age 65 in 1950 to 20 years at age 65 in 2006. This and the fact that the 'baby boomer' generation would be reaching retirement, substantially increasing the ratio of pensioners to workers, were described as factors that called for radical reform of both private and state pension schemes.
48. The consultation exercise leading up to the Pensions Act 2011 raised a number of issues including whether the lengthy lead-in periods adopted in the 1995 and 2007 Acts (that is the number of years between the enactment of the legislation and the date at which the first person whose pension age was affected by the changes would actually reach that pension age) was right, observing that it had not been based on any empirical evidence of the amount of time that people needed to adjust their retirement plans. It also asked the question what evidence the Government should consider to ensure that no group was disproportionately affected by changes to the state pension age and the timing of the increase to 66. The White Paper published in 2010 (Cm 7956) noted that:

“The State Pension age has not kept pace with increases in life expectancy since 1926. If it had, it would now need to be at least 75. Consequently we are receiving State Pension for longer than ever before. In 1980, a man received a State Pension for 24 per cent of his adult life, on average. Today, a man will receive it for 32 per cent of his adult life, on average. For women, the proportion of adult life spent in receipt of a

State Pension has increased from 36 per cent in 1980 to 42 per cent today, on average.”

49. Despite those factors, the Government did respond to concerns about the increases in state pension age. Mr Gilchrist describes the points urged on Government at different stages, for example the evidence received by the House of Commons from Age UK when the Bill which became the Pensions Act 2011 was in its Committee stage. Age UK criticised the equalisation timetable:

“We have concerns about the speeding up of increases to the State Pension Age. The proposals in the Bill will not allow those affected enough time to plan for a delayed State Pension of up to 2 years. 4.9 million people will have to wait longer than expected to qualify for their State Pensions - 2.3 million men and 2.6 million women. Around 330,000 women in Britain born between December 1953 and October 1954 will have their State Pension Age increased by 18 months or longer. 33,000 women born between 6 March and 5 April 1954 will see their State Pension Age increased by two years. These 33,000 women stand to lose on average around £10,000 each from the proposals.

We believe that equalisation should not be speeded up and any increases to the State Pension Age beyond 65 must not start until 2020 at the earliest.”

50. The Government had to balance those legitimate concerns against projections published by the Office of National Statistics in October 2011 which revised cohort life expectancy projections and indicated that life expectancy had reached its highest level on record for both men and women and was projected to continue to increase. Mr Gilchrist’s evidence is that although the Government maintained the acceleration of the timetable outlined in the Bill, an amendment to the Bill was introduced which phased in the transition from 65 to 66 more slowly so that the state pension age reached 66 in October 2020 rather than April 2020. This meant that the maximum deferment faced by any woman as a result of the Pensions Act 2011 was 18 months rather than two years. Mr Gilchrist notes that the implementation of that amendment cost £1.1 billion at 2011/12 prices and was estimated to benefit 245,000 women most affected by the changes.
51. For the Appellants, Mr Mansfield described to us the very difficult financial position in which the Appellants now find themselves. Ms Glynn’s evidence is that she worked for eight years full time at the start of her working life in the 1970s and returned to part time work in 1989 after taking a break to look after her children. She then worked two days a week whilst caring for her husband and then her parents who had serious health issues. She is now a widow with two grown children. She has a number of health problems which have been exacerbated by having to continue to work and she has restricted mobility. She has only minimal occupational pension entitlement. She describes the effect of having to work two days a week and having very little money:



“10. I have to continue working despite being in poor health as I could not live without my salary. Even with my salary, I have to budget very carefully and have very little money left over at the end of the month. I struggle to afford gifts for my grandchildren’s birthdays and never buy any luxury items. I have to think very carefully. I just buy items on a necessity basis such as basic foods. I cannot afford to go on holiday. I have stopped entertaining my friends as I can no longer afford to do so. I wish I could spend more quality time with my family whilst I am still able to.”

52. Ms Delve’s evidence is that she is now dependent on her husband’s pension because her small occupational pension does not cover her living expenses. She has continued to work and may have to do so until she is 66. She says that the pension changes have robbed her and her husband of precious time together doing things that they planned to do once she retired.
53. Mr Mansfield submitted that the experience of the Appellants is typical of the problems that this cohort of women face now that they cannot claim the state pension from age 60. It is not uncommon for women born in the 1950s to have contracted various ailments and health problems by the time they reach their early 60s, because of the environment they lived in during their early years. He said further that it is common for women in this age group to be living in straitened circumstances particularly if they are now single, with part time jobs at best and working for low pay. It is also very common for them to be caring for elderly and infirm parents. He argued that the lack of state pension means that they have to resort to makeshift measures to make ends meet, selling their houses, using up their savings and cutting back on any non-essential spending so that they are not in a position to enjoy their retirement years. The amount of money that women have lost as a result of their state pension being deferred can be substantial, up to about £50,000 over the whole six years for which they have forgone their pension entitlement. He described the effect on the women as catastrophic as they find themselves unexpectedly living in poverty and subject to the psychological stress that that brings with it.
54. The Appellants argue that the prevalence of their own experience is confirmed in the concluding observations of the eighth periodic report on the United Kingdom dated 14 March 2019 produced by CEDAW, the Committee on the Elimination of Discrimination against Women. The report makes many wide ranging recommendations as to ways in which the position of women in the UK can be improved through legislative or policy changes. The Committee expressed its concern that the withdrawal of the state pension from women aged 60 to 65 “is contributing to poverty, homelessness and financial hardships among the affected women”. The Committee does not recommend the repeal of the equalisation legislation but that the UK take effective measures to ensure that the increase does not have a discriminatory impact on women born in the 1950s.
55. Despite that evidence and despite the sympathy that we, like the members of the Divisional Court, feel for the Appellants and other women in their position, we are satisfied that this is not a case where the court can interfere with the decisions taken through the Parliamentary process. In the light of the extensive evidence presented by the SSWP, we agree with the Divisional Court’s assessment that it is impossible to

say that the Government's decision to strike the balance where it did between the need to put state pension provision on a sustainable footing and the recognition of the hardship that could result for those affected by the changes was MWRF.

56. We also agree with the Divisional Court's conclusion that the Appellants' contention that the Government could have implemented these changes in a less intrusive way is unsustainable. The Appellants argue that the cut-off date for withdrawing the state pension should have been set using more recent dates of birth so that it only affected a younger cohort of women who had better opportunities during their working lives to build up savings for a more comfortable retirement. That would, they argue, have been a more proportionate response to the problems facing the Government than setting the cut-off date where it has affected women who were still socially disadvantaged.
57. That submission, in our view, does not give sufficient weight to the evidence about the urgency with which reform was needed in the light of the increases in life expectancy and the falling OAD. The need for more rapid reform has been borne out by subsequent statistics provided by Mr Gilchrist. In 1951 a woman aged 65 could have a cohort life expectancy of 80.5 years whereas in 2019 a 65 year old woman could expect to live to 88. Women retiring today can still expect to receive a state pension for over 22 years on average, that is two years longer than men. Ms Willis Stewart points out that this does not mean that women receive more state pension than men because DWP figures in August 2018 for the mean weekly amount of state pension for men was £158.87 and for women £131.27. Though they may have shorter life expectancy, men will still receive much more state pension than women even taking into account that women live for two years longer. That does not, however, undermine the point that the SSWP makes that longer life expectancy for women places a strain on public finances, even if they would have received a lower pension over the years 60 – 65 than a man would receive.
58. The Appellants' submission also fails to take into account the evidence provided by Mr Gilchrist that the legislation increasing the state pension age included other elements in a package of measures designed to mitigate the hardship caused by the absence of a state pension in the years 60 – 66. It would be wrong to look at the changes to state pension age in isolation. There have been measures to support longer working by removing the mandatory retirement age and extending the right to request flexible working. Alongside the equalisation of the state pension age in the Pensions Act 1995, there were measures designed to improve the position of those with caring responsibilities and of low earners by treating some welfare benefits such as family credit as pensionable income for the purposes of an individual's national insurance contribution record. The effect of these measures has been, Mr Gilchrist explains, that once they reach state pension age a much higher percentage of women receive the full basic state pension than was previously the case. As for the period between age 60 and 66, Mr Gilchrist points out in his witness statement that increases in the state pension age are matched by increases in the maximum age at which people can still qualify to receive working age benefits such as disability living allowance, attendance allowance and the widow's pension. Mr Gilchrist points out that the concept of a flexible state pension age was one of the options considered in the 1991 Green Paper and rejected. We agree with the SSWP that this Court cannot now revisit that choice.

59. Finally on this ground, the Appellants say that the Divisional Court asked themselves the wrong question by asking whether the Government has explained why the legislation was brought in whereas Lord Wilson in *DA* says that the correct question was whether Government has explained the disproportionate effect on women in this age group. The difficulty with applying the distinction drawn by Lord Wilson to the present case is that this is primary legislation and not a Government measure. The sponsoring department may be able to describe the pre-legislative stages of Green Papers, White Papers and consultation documents as Mr Gilchrist had done here. That does not explain why Parliament chose to enact the legislation and, as Lord Hope pointed out in *Wilson v First County Trust (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [166], it is no part of the court's function to assess whether Parliament had sufficient reason to enact legislation. We do not accept that the Divisional Court asked the wrong question at [53] and [54] of the judgment. They had already described in earlier paragraphs the factors that made an equalisation of the state pension age urgent. They also described the discussion in the 1991 Green Paper of the different options for equalising the state pension age and the need for it to be phased in.
60. Ground 1 of the appeal is therefore dismissed.

## **5. GROUND 2: Indirect sex discrimination or sex/age discrimination**

61. Ground 2 asserts that the Pensions Acts lead to indirect sex discrimination or discrimination on the basis of sex and age combined. This challenge is mounted under both EU and Convention law.

### *(a) Indirect sex or sex/age discrimination under EU law*

62. The Appellants rely on Article 4 of the Social Security Directive which provides:

“The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

...

— the calculation of benefits, including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.”

63. The SSWP relies on the exclusion in Article 7(1)(a) of the Social Security Directive. Article 7 sets out five exclusions, most of which are directed at provisions which are likely to favour women:

“1. The Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

...

(2) Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.”

64. The Appellants submit that Article 7 only permits Member States to maintain in place temporarily legislation which sets different state pension ages for men and women. It allows a derogation for discrimination between the sexes in setting unequal state pension ages but, they contend, does not go further in permitting an equalisation measure that indirectly discriminates against a particular cohort of women who are disadvantaged as compared to men of the same age.
65. We do not accept that that is a correct interpretation of Article 7(1)(a). It is true that, as a derogation, Article 7 must be construed narrowly but as the Divisional Court said at [64], the language of the provision does not support such a limitation. It would also lead to an absurd position whereby any move towards equalising pensionable age would fall within the scope of the Directive, despite the clear intention expressed in Article 7(2) that Member States should periodically consider whether the removal of excluded measures can be justified. We agree with the Divisional Court that there is no sense or utility in such a construction of Article 7.
66. The Appellants argue that their submissions on the narrow scope of Article 7(1)(a) are supported by the judgment of the CJEU in Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585, [2006] 2 CMLR 49, a reference for a preliminary ruling from the United Kingdom. In that case the claimant who was born a man, underwent gender reassignment surgery and applied for a pension at the age of 60. The application was refused by the Respondent on the ground that the claimant had not reached the male retirement age of 65. The UK Government submitted before the CJEU that the facts giving rise to the dispute stemmed from the choice made by the national legislature to prescribe different pensionable ages for men and women. That right was expressly granted to Member States under Article 7(1)(a). It was irrelevant that the distinction made by the state pension scheme on the basis of gender affected the rights of transgender people.
67. The CJEU rejected that argument. The Court defined the unequal treatment at issue as based on Ms Richards’ inability to have her new gender recognised with a view to the application of the pensions legislation. The comparator group was women whose gender was not the result of gender reassignment surgery since they could receive a retirement pension at the age of 60. Ms Richards was not able to fulfil one of the conditions of eligibility for that pension and because that inability arose from her gender reassignment, the unequal treatment to which she was subject must be regarded as discrimination precluded by the Directive. It was in that context that the CJEU went on to say:

“34 Furthermore, discrimination contrary to Article 4(1) of Directive 79/7 falls within the scope of the derogation provided for by Article 7(1)(a) of that directive only if it is necessary in order to achieve the objectives which the directive is intended to pursue by allowing Member States to retain a different

pensionable age for men and for women (Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, paragraph 13).

35 Although the preamble to Directive 79/7 does not state the reasons for the derogations which it lays down, it can be inferred from the nature of the exceptions contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages include the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a) of the same directive (*Equal Opportunities Commission* at [15]).

36 According to settled case-law, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 must be interpreted strictly (see Case 152/84 *Marshall* [1986] ECR 723, paragraph 36; Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38; and Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 8).

37 Consequently, that provision must be interpreted as relating only to the determination of different pensionable ages for men and for women. However, the action in the main proceedings does not concern such a measure.”

68. Although the CJEU did in those paragraphs describe the derogation as applying to legislation which retained different pensionable ages for men and for women, the CJEU was not limiting the application of Article 7(1)(a) to such legislation. The distinction which the Court was drawing in that case was a distinction between discrimination arising from the differential pension age and discrimination arising as between cisgender women and trans women. The Court was not concerned with the application of Article 7 to legislation intended to equalise the state pension age. This was also made clear in the Opinion of Advocate General Jacobs who said that Article 7 was irrelevant because it covered legislation concerned with determining the different pensionable ages of men and women and did not cover legislation concerned with the separate question of determining the sex of the person concerned: see [51] of his Opinion. The reference by the CJEU at [35] to the purpose of the derogation being to enable Member States progressively to adapt their pension systems “without disrupting the complex financial equilibrium of those systems” shows that the construction for which the Appellants contend cannot be right. The need for the derogation arises as much from legislation which makes a progressive adaptation towards equalisation as it does from the temporary retention of the differential pension ages.
69. We therefore hold that the Divisional Court were right to dismiss the claim for indirect sex discrimination under the Social Security Directive on the grounds that the

derogation in Article 7(1)(a) applies. In the light of that conclusion, we do not need to consider further the application of Article 4 of the Social Security Directive.

*(b) Indirect sex or sex/age discrimination under Article 14*

70. The claim for direct sex discrimination was rejected by the Divisional Court because the legislation removed an advantage previously enjoyed by women and did not treat women less favourably than men. There is no appeal against that aspect of the Divisional Court's decision.

71. Turning to indirect discrimination, the principles governing this area of the law were reviewed by Baroness Hale DPSC in *Essop and others v Home Office (UK Border Agency)*, *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] 1 WLR 1343 ('*Essop*'). The first claim considered in that appeal concerned black and minority ethnic civil servants over the age of 35 who challenged the requirement that all candidates for promotion to certain civil service grades should sit and pass a Core Skills Assessment test. A report commissioned by the Home Office showed that BME candidates and older candidates had lower pass rates than white and younger candidates. No one knew why the proportion of BME or older candidates failing was significantly higher. The question for the Supreme Court was whether the claimants were required to prove the reason for the lower pass rate before they could establish their claim to indirect discrimination or whether it was sufficient to show that statistically the pass rate was lower. At [25], Lady Hale said that direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the measure and the particular disadvantage suffered by the group and the individual. The reason for this, Lady Hale said, was that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment but aims to achieve a level playing field where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet and which cannot be shown to be justified. She described one feature of indirect discrimination in the following terms:

“26. A third salient feature is that the reasons why one group may find it harder to comply with the [measure] than others are many and various... They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between “women’s jobs” and “men’s jobs” or the practice of starting at the bottom of an incremental pay scale. ... These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the [measure] and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem.”

72. Turning to the present challenge, the relevant comparator group relied on by the Appellants for their claim of indirect discrimination is men between the ages of 60 to

66. Like women between those ages, such men do not receive a pension and also suffered an increase in their pension age from 65 to 66. Although the legislation determining the state pension age therefore appears to affect men and women in that age group equally, the Appellants say that it affects women more disadvantageously than it affects men. This is because men in that age group are better able to bear that lack of support than women in the same age group.
73. The Divisional Court held that the Appellants faced difficulties on each element of the indirect sex discrimination test. They noted that the legislation raising the state pension age for women did not apply indiscriminately to all because it applies only to women born after 1 April 1950. It was not the kind of apparently neutral measure which Lady Hale was describing in *Essop*.
74. That is undoubtedly true but it is not, in our judgment, a complete answer to the Appellants' case, as Ms Hill indicated when she agreed in response to our questions during the hearing that the Appellants' complaint would be the same even if the pension age for women had never been lower than that for men. The nub of the complaint so far as indirect sex discrimination is concerned is not the way in which equalisation was introduced but the fact that as a result of the legislation, the state pension age is now the same for men and women, whether that age is 65, 66 or older. In that sense, the Appellants submit, both the equalisation and the subsequent increases are measures that apply equally to men and women.
75. The Divisional Court went on to analyse the nature of the disadvantage suffered by women as compared with men of the same age and concluded that the removal of the earlier pension age for women did not satisfy the need for a causal link between the measure and the disadvantages affecting these women: [73]
- “Secondly, we have considered the removal of the historic direct discrimination embodied in the different SPAs for men and women, where that discrimination was justified (and the Claimants argue is still justified) by disadvantages accruing to women, or to women of this generation. Can the removal of discriminatory mitigation of those disadvantages satisfy the need for a ‘causal link’ between the measure and the disadvantages affecting these women? We are not persuaded that can be so. The disadvantages existed and to the extent that they persist, exist anyway. They are rooted in traditions and cultural norms which meant that women did not have the same work expectations or opportunities as men of the same age; whatever the pension age for women and whether or not equal with men, women would be subject to those disadvantages. The differential in the state pension age may have provided a form of mitigation for that pre-existing inequality but its removal does not amount to discrimination, because it does not cause the disadvantages or exacerbate them; they are there anyway.”
76. The Appellants submit that the Divisional Court were wrong to reject the claim on that basis. They argue that the disadvantage women suffer falls within the definition of indirect discrimination given by the ECtHR in *JD and A v United Kingdom* (Appn 32949/17) [2020] HLR 5 (*‘JD and A’*). The discrimination complained of in that case

arose from the application of what has been colloquially referred to as the “bedroom tax”. The claimants’ housing benefit was reduced because they each occupied a house which had one more bedroom than they needed according to criteria set out in the Housing Benefit Regulations 2006. The ECtHR said:

“85. The court has also held that a policy measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. Thus, indirect discrimination prohibited under art. 14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, such as gender or disability, attaching to this situation. In line with the general principles relating to the prohibition of discrimination, this is only the case, however, if such policy or measure has no “objective and reasonable” justification.”

77. The Appellants rely on the broad wording of that paragraph to argue that because a higher proportion of women in their age group need the state pension to pay for their basic living costs, they suffer a particularly prejudicial impact when compared to men from the lack of the state pension between the ages of 60 to 65. Ms Willis Stewart cites statistics which show that being under the state pension age reduces the average individual income by £50 per week. She also sets out information showing that the average weekly income for those in employment aged over 60 is considerably lower for women than for men, in part because more of them work part time. This means that the drop in income resulting from being below pension age is a far higher proportion of the total pay for women than it is for men. Further, a significantly higher proportion of women between 60 and 64 are not in work compared with men in that age group. These factors establish, the Appellants say, that the fact that the state pension age is the same for women and men puts a significantly greater number of older women than men at a disadvantage.
78. Ms Willis Stewart describes research into the reasons for these disparities between men and women born in the 1950s. These include the fact that women carry out an average of 60 per cent more unpaid work than men; 86 per cent of single parents are women and single parents have a higher risk of poverty than any other household type. In the 50 - 64 year old age group, women are much more likely to give up work than men because of caring responsibilities. The Appellants submit that it is therefore indirectly discriminatory, subject to the question of justification, for the state pension to be withdrawn from them because their gender adversely affected their ability to earn a living and they are therefore entitled to the continuation of a differential state pension age favouring them.
79. Stated in that way, it becomes clear what a significant expansion of the law would result from such a broad application of *JD and A*. It is undoubtedly the case that many groups have traditionally suffered discrimination in the workplace because their protected characteristic meant that there were fewer opportunities open to them for advancement in stable, well-paid work. That is the case not only for women but for disabled people, for lone parents, for some BME groups and for transgender people. The eradication of those disparities of opportunity is in large part the purpose of the



anti-discrimination law that has been put in place. That does not mean, however, that every measure that has that kind of prejudicial effect on a disadvantaged group in society amounts to unlawful discrimination entitling that group to more favourable treatment unless the measure can be justified.

80. The way in which the Divisional Court expressed its conclusion at [73] may appear a little unfortunate. If they were suggesting there that, where the disadvantage suffered by those with a protected characteristic arises from traditions and cultural norms, it does not deserve protection, then we respectfully disagree. Such a conclusion would make a very substantial inroad into the application of anti-discrimination legislation. There is nothing inherently disadvantageous about being born female or a member of a BME group and there never has been. The problem is that centuries of traditions and cultural norms have unjustifiably created such disadvantages. The ECtHR said as much in *Vrountou v Cyprus* (Appn 33631/06) 13 October 2015, a case of direct sex discrimination:

“75. ... The advancement of gender equality is today a major goal in the member states of the Council of Europe and very weighty reasons would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention. In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example States are prevented from imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family.”

81. It is also not right to say that the removal of the state pension from this cohort of women has not exacerbated the problems they suffer. It has deprived them of income and the SSWP has not argued that all those women affected have had that loss made up by other benefits. What the Divisional Court were, we think, seeking to express in that paragraph was that there is no sufficient causal link between the measure and the disadvantage suffered by the women in this case. Even the broad test expressed at [85] of *JD and A* still states that indirect discrimination exists where a policy or measure produces a particularly prejudicial impact on certain persons *as a result of* a protected ground, such as gender or disability, attaching to the situation. The Appellants’ argument is that the causal link between the withdrawal of the pension and the protected characteristic is established because (i) the availability of the pension matters more for the wellbeing of disadvantaged members of society than it does for better off people, and (ii) people with a protected characteristic are disproportionately represented in the cohort of disadvantaged people, therefore (iii) it is indirectly discriminatory to deprive them of that benefit even though (iv) the criterion for access to that benefit is equally capable of being satisfied by people with and without that protected characteristic.
82. We do not accept that the causal link needed to establish a claim of indirect discrimination can be satisfied by that chain of reasoning. If it were, then there may well be other groups with a different protected characteristic combined with age who can also show that because they have suffered disadvantage in the work place over the course of their lives, they are more reliant on a state pension than comparator groups and so were adversely affected to a greater degree by the increases in pension age

since 1995. To say that it is unlawful not to provide a state pension to every such group would turn the state pension into something which it is not; another means-tested benefit. The state pension is not a means-tested benefit but is linked to payments of national insurance contributions over the course of the claimant's working life. There are other benefits provided which are means-tested, such as universal credit for those below the state pension age and pension credit for those above. These are the benefits designed to achieve a minimum level of income for poorer people; that is not the function of the state pension.

83. In our judgment, therefore, there is no sufficient causal link here between the withdrawal of the state pension from women in the age group 60 to 65 and the disadvantage caused to that group. The fact that poorer people are likely to experience a more serious adverse effect from the withdrawal of the pension and that groups who have historically been the victims of discrimination in the workplace are more likely to be poor does not make it indirectly discriminatory to apply the same criterion for eligibility to everyone, if that criterion is not more difficult for the group with the protected characteristic to satisfy.
84. The same reasoning applies to the increase from 65 to 66 for both genders. The parties' evidence did not focus separately on a comparison between women aged between 65 – 66 and men in that age group. Even if it could be shown that women of that age were statistically more likely to be reliant on a state pension for an adequate income, that would not be sufficient to establish that applying the same state pension age was indirectly discriminatory.

*(b) Justification in respect of sex discrimination or sex/age discrimination under Article 14*

85. Even if the Appellants were able to establish that the current state pension age regime is indirectly discriminatory for the purposes of Article 14, we are satisfied that the Divisional Court were right to find that the regime is justified so that the challenge on this basis must fail. The SSWP submitted that the test for justification for a measure challenged on the basis of indirect discrimination is the MWRF test we described earlier in the context of age discrimination. The first issue between the parties here is whether, as the Appellants submit, a different, more stringent test applies for justification either because the MWRF test is not the right test or because the content of that test is different when it applies in a case of sex discrimination.
86. Sir James submitted that, whatever controversy may persist in other areas of discrimination law, it is now firmly established that the MWRF test applies to the justification of decisions about welfare benefits. He relied for that proposition on the decision of the Supreme Court in *DA*. Lord Wilson JSC traced the origins of the MWRF test to *James v United Kingdom* (Appn 8793/79) (1986) 8 EHRR 123, at [46] through *Stec v United Kingdom* (Appns 65731/01 and 65900/01) (2006) 43 EHRR 47, at [52] and then to *Carson* at [55] onwards. He referred then to the different path taken by Lord Mance JSC in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] 1 AC 1016. Lord Wilson stated that he had been too quick in the first benefits cap case (that is *R (SG) Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449) to reach for the observations of Lord Mance and that he had previously expressed himself too widely:

“65. ... For by then there was - and there still remains - clear authority... 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.”

87. Ms Hill argued that, shortly after the decision in *DA*, doubt was cast on the application of the MWRP test by the judgment of the ECtHR in *JD and A*. This, she submitted, limited the application of the MWRP test to specific circumstances. The ECtHR in *JD and A* said: (citations omitted)

“87. In the context of Article 1 of Protocol 1 alone, the Court has often held that in matters concerning, for example, general measures of economic or social strategy, the States usually enjoy a wide margin of appreciation under the Convention. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”.

88. However, as the Court has stressed in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality. Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination. Hence, in that context the Court has limited its acceptance to respect the legislature’s policy choice as not “manifestly without reasonable foundation” to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality.

89. Outside the context of transitional measures designed to correct historic inequalities, the Court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced, and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified. The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very

weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.”

88. In our judgment the Appellants are not entitled to rely on *JD and A* before this Court as authority for a stricter test for justification than the MWRF test in this case. This is for two reasons. First, as a matter of precedent, this Court is bound by the Supreme Court’s decision in *DA* see e.g. *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 (*JCWI*) at [133]. Secondly, the situation here is precisely the situation that the ECtHR referred to in *JD and A* as the situation where the MWRF test does apply, namely the effect of transitional measures to correct historical inequalities. This case does not therefore present either the opportunity or the challenge of deciding whether the MWRF test applies outside the scope of welfare benefits or as to the effect of *JD and A* on the Supreme Court’s decision in *DA*.
89. Turning to the content of the MWRF test as applied here, the Appellants argue that, because the discrimination alleged here is based on gender or a combination of gender and age, the MWRF test is to be more stringently applied than it is when the alleged discrimination is based on a factor which is not so core to the purposes of Article 14. They rely for this proposition on the comments of Hickinbottom LJ in *JCWI* when he said at [136] that whether the MWRF test applied or not was not “a simple binary question”. This was because the area of judgement afforded to an arm of Government may be different if the discrimination alleged is based on for example race, nationality, gender, religion or sexual orientation.
90. We do not read Hickinbottom LJ’s judgment in *JCWI* (with which Henderson and Davis LJJ agreed on this point) as moving away from the guidance given by Lord Wilson JSC in *DA* and endorsed by this Court in *Langford*. By recognising that a variety of case-specific factors come into play when applying the MWRF test in a particular case, the Court in *JCWI* was not transposing the debate about whether the MWRF or some other test applies into a debate about the precise content or stringency of the MWRF test in a case when it unquestionably applies. Hickinbottom LJ cited Baroness Hale’s statement in *Humphreys v HM Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545 at [19] when she said that “the normal strict test for justification of sex discrimination in the enjoyment of Convention rights gives way to the ‘manifestly without reasonable foundation’ test in the context of state benefits”. Hickinbottom LJ also said at [148(iv)]:
- “As *Humphreys* confirms (quoted at paragraph 129 above), even where discrimination is on the basis of a core attribute such as sex or race, great weight still has to be afforded to the assessment of Parliament in respect of a measure which implements economic or social policy, and its assessment that such discrimination is proportionate to the legitimate aim of the measure.”
91. The reasons why the MWRF test is appropriate in a case like the present appeal were explained by Leggatt LJ in *R (SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615 at [87]:

“... [T]here are compelling reasons for according the full area of judgment allowed to the UK under the [ECHR] in matters of social and economic policy to the legislature and the executive. Within the UK’s constitutional arrangements, the democratically elected branches of government are in principle better placed than the courts to decide what is in the public interest in such matters. Those branches of government are in a position to rank and decide among competing claims to public money, which a court adjudicating on a particular claim has neither the information nor the authority to do. In making such decisions, the legislature and the executive are also able and institutionally designed to take account of and respond to the views, interests and experiences of all citizens and sections of society in a way that courts are not. Above all, precisely because decisions made by Parliament and the executive on what is in the public interest on social or economic grounds are the product of a political process in which all are able to participate, those decisions carry a democratic legitimacy which the judgment of a court on such an issue does not have. For such reasons, in judging whether a difference in treatment is justified, it is now firmly established that the courts of this country will likewise respect a choice made by the legislature or executive in a matter of social or economic policy unless it is ‘manifestly without reasonable foundation’.”

92. The Pensions Acts are primary legislation which deal with matters of the highest economic and social importance aiming to ensure intergenerational fairness, to make pensions affordable at a time of great pressure on public finances, and to reflect changing demographics, life expectancy and social conditions. The evidence provided by Mr Gilchrist shows that the Government was fully aware of the disparity between the financial position of men and women as a result of discrimination against women throughout their working lives. For example, the need to mitigate the effect of the state pension age equalisation by other elements of the package of measures was acknowledged by the Minister when the Bill which became the Pensions Act 1995 was introduced into the House of Lords for its second reading. The Equal Opportunities Commission had presented evidence that women’s work patterns were very different from men’s and seriously affected their pension provision. The statistics demonstrated how unequal the position was and how unequal it was likely to remain well into the 21<sup>st</sup> century. The Minister responded saying that he did not take issue with that analysis but referred to other changes being introduced and the fact that an increasing proportion of women would be able to take up and develop occupational pension schemes which meant that overall the position of women would be improved.
93. We agree with Sir James’ submission that these measures dealt with controversial matters of huge political weight and clearly fall within the macro-political field. They were not MWRP and we therefore dismiss Ground 2 of the appeal.

## **6. GROUND 3: notification**

94. The Appellants argue that the SSWP is in breach of an obligation to notify them of their new pension age. They submit that a duty to notify the women in the Appellants' cohort adequately and effectively arose for two reasons. First, they had a legitimate expectation of notification because the legislation in place for most of their working lives provided that they would receive a state pension from age 60 and they reasonably expected this would continue. Secondly, notification was required at common law to ensure procedural fairness. State pension age is a matter of great importance to many people who make their life decisions on the basis of when they expect to receive their state pension.
95. Mr Mansfield formulated the scope of the legal proposition for which he contended as follows:
- “Where a primary or secondary legislative proposal substantially alters well-established individual rights or entitlements, and thereby causes a serious adverse effect upon the basic welfare and wellbeing of an identifiable group, that group is entitled to expect adequate, effective, individualised notice of the change.”
96. He confirmed during argument that although the formulation refers to a legislative *proposal*, this duty of notification is distinct from the duty of consultation and applies after rather than before the measure is adopted. Mr Mansfield accepted that there was no authority that established his formulation as a proposition of law. He also accepted that this was not a conventional legitimate expectation case because the Appellants could not point to any unambiguous statement, representation or undertaking given to them by the SSWP to the effect that they would be notified if their pension age were altered. Nor was there any previous practice of notifying people of changes to their pension age that might give rise to an expectation that there would be notice in this case. Mr Mansfield argued, however, that such a duty would represent an appropriate extension of the common law duty of fairness. It was that duty which had prompted the development of the concept of procedural and substantive legitimate expectation. It should now be developed to make good the failure of Parliament to include in the Pensions Acts any statutory obligation on the part of the SSWP to notify the people whose pension age had been changed. It was, he submitted, a less onerous duty than a duty to consult since it did not affect the legislative process; the courts should more readily imply such a duty as a matter of common law procedural fairness.
97. We start from the proposition that there can be no legitimate expectation arising from the fact that different state pension ages for men and women were maintained over many years. As Lord Rodger of Earlsferry said in *Wilson v First County Trust (No. 2)* [2003] UKHL 40, [2004] 1 AC 816, at [192], individuals and businesses run the risk that Parliament may change the law governing their affairs; no one has a vested right to the continuance of the law as it stood in the past.
98. Can there nonetheless be an obligation to notify those affected when such a change does occur? The ability of the court to impose a procedural obligation as a condition for exercising a statutory power was considered by the House of Lords in *R v Secretary of State for the Environment ex p Hammersmith and Fulham LBC* [1991] 1

AC 521. Lord Bridge of Harwich (with whom the other members agreed) said at p 598E-F that:

“The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure fairness of procedure for the protection of parties who may suffer a detriment in consequence of administrative action. Clearly this principle applies to decisions whereby citizens may be affected in their person, their property or their reputation.”

99. In that case, the claimant local authorities sought to imply into primary legislation additional procedures to be followed by the Secretary of State before he took a decision to cap a local authority’s budget. Lord Bridge went on to say at p 599C – E that, in a statutory context, he was “very doubtful as to whether it would be appropriate for the court to imply terms in the statute derived from the doctrine of *audi alterem partem*”. He did not need to consider the point, however, because the legislation had prescribed a procedure which allowed the claimants to make representations and that procedure had been followed. We do not see that this case supports the Appellants’ argument that the uncontroversial principle expressed by Lord Bridge should be extended to enable the courts to imply a duty of notification into primary legislation.

100. Mr Mansfield relied in support of his formulation primarily on *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 (*‘BAPIO’*). That case concerned the decision taken without consultation by the Home Office to abolish permit free training for doctors who lacked the right of abode in the UK. One issue for the court was whether there was any principle of law that made consultation with those affected a precondition of the rule change where the statute empowering the change of rules did not itself require it and where there was no previous practice of consultation. Sedley LJ was careful to emphasise that no such duty could arise in relation to primary legislation:

“34. ... the preparation of Bills and the enactment of statutes carry no justiciable obligations of fairness to those affected or to the public at large. The controls are administrative and political.”

101. He held that no such immunity applied to delegated legislation or to the Immigration Rules. He referred to the duty of fairness in procedures which the common law will supply; “although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature”: *per* Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180. Sedley LJ held that there was no duty to consult in the case before him:

“43. The real obstacle which I think stands in the appellants’ way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive

government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive. Some have been touched on above – for example the requirements of candour and open-mindedness where either law or established practice calls for consultation. The duty to give reasons is another area in which there has been marked growth. It is not unthinkable that the common law could recognise a general duty of consultation in relation to proposed measures which are going to adversely affect an identifiable interest group or sector of society.

44. But what are its implications? The appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought not to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration. All of this, I accept, will have to be lived with if the obligation exists; but it is at least a reason for being cautious.

45. The proposed duty is, as I have said, not unthinkable – indeed many people might consider it very desirable - but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things.”

102. Mr Mansfield relies on the final sentence of paragraph 43 quoted above where Sedley LJ described it as “not unthinkable” that the common law would recognise a general duty of consultation. Read in context, however, Sedley LJ explained why, although at first blush it was not unthinkable, thinking about it “makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts”. Sedley LJ concluded at [47] that he was not prepared to hold that there was any obligation at common law to consult those affected before introducing the material change to the Immigration Rules. He stated that this was not to be elevated to a general rule “that fairness can never require consultation as a condition of the exercise of a statutory



function” but a duty to consult in that context would require a specificity which the courts, concerned as they are with developing principles, cannot furnish without assuming the role of the legislator.

103. Maurice Kay LJ agreed with Sedley LJ’s reason for concluding that a duty to consult did not arise, namely the non-specific nature of the alleged duty and the lack of clear principle by which to define it. He took a stricter approach than Sedley LJ, accepting the Home Secretary’s submission that the duty to consult cannot generally be superimposed on secondary legislation which is made pursuant to a statutory rulemaking procedure which requires the intended rules to be laid before Parliament and subjected to the negative resolution procedure:

“58. I tend to the view that, in these circumstances, primary legislation has prescribed a well-worn, albeit often criticised, procedure and I attach some significance to the fact that it has not provided an express duty of prior consultation, as it has on many other occasions. The negative resolution procedure enables interested parties to press their case through Parliament, although I acknowledge that their prospects of success are historically and realistically low.”

104. That led Maurice Kay LJ to reject an appeal to procedural fairness as the basis of a legal duty of consultation. Rimer LJ identified a divergence of approach between Sedley and Maurice Kay LJ, describing the latter as favouring a “more sharp-edged view” that where Parliament has prescribed a particular procedure for the rulemaking process, there will generally be no scope for the superimposition by the courts of additional procedural safeguards on the grounds that fairness requires a duty to consult. Rimer LJ preferred and agreed with the views expressed by Maurice Kay LJ: [65]. It was no part of the scheme set out in primary legislation for the adoption of the Immigration Rules that there should be any consultation: “and if that is the legislature’s scheme, it is not for the courts to rewrite it”.
105. We agree with the conclusion of the majority in that case. That conclusion applies with even more force when the measure under challenge is itself primary legislation, as Sedley LJ also recognised.
106. The case of *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 on which the Appellants also rely is not comparable. In that case the claimants challenged changes to the discretionary scheme for compensating victims of miscarriages of justice. In a comprehensive exploration of the development of the principles of legitimate expectation, Laws LJ posed the question when a public decision maker would be required to consult potentially affected persons before changing policy where there had been no previous promise or practice of notice or consultation: [47]. He concluded at [49] that such a legitimate expectation “will not often be established”:

“the impact of the authority’s past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular

benefit: not necessarily forever, but at least for a reasonable period to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.”

107. It will immediately be apparent how far the Appellants’ position is from that of the potential claimant envisaged by Laws LJ. The Appellants themselves had no particular reason to expect the state pension age to remain the same for them if it was changed for other women in their age group. Moreover, Laws LJ’s comments, circumspect as they were, were directed at a change in administrative policy not to a change brought about by primary legislation.
108. In our judgment, the reasons that led the court in *BAPIO* to reject the ability of the common law to supplement procedural safeguards laid down by a statutory scheme apply as much to any proposed duty to notify as they apply to a duty to consult. Although Mr Mansfield’s proposed formulation limits the duty to those who suffer a “serious adverse effect”, he did not explain how the SSWP can identify those within the overall cohort of men and women affected who have been seriously adversely affected. Not every woman aged 60 to 65 is in the same difficult circumstances as the Appellants and not every man aged 65 to 66 is reliant on the state pension to make ends meet. A duty to notify every man and woman affected by the change would therefore go substantially beyond the proposition put forward by Mr Mansfield. The attempt to spell out the scope of any such duty makes it rapidly plain here, as it was in *BAPIO*, that if it is to be introduced it should be by Parliament and not by the courts.
109. Notification was certainly desirable and the Department recognised this through the wide-ranging notification exercises in fact undertaken. Ms Fox’s evidence explains the numerous steps taken to publicise both generally and in a targeted way the changes to the state pension age before and after they were enacted. The publication of successive Green and White Papers and the Parliamentary process for passing primary legislation also provided information to those affected and sparked public debate. Employers, trades unions and private pension providers have worked with Government to inform their employees, members and customers about the changes. The notification exercise must be seen in the context that Parliament introduced a lead time of a minimum of 14 years and 10 months from the date the Pensions Act 1995 was passed before any woman reached a state pension age that had been increased.
110. The Department of Social Security published a number of information leaflets starting with ‘*Equality in State Pension Age: A Summary of the Government’s Proposals*’, which was produced at the same time as the 1993 White Paper. The leaflet explained the proposed changes and included a table showing dates of birth and the new state pension ages for women. There were posters displayed in social security offices and a telephone information line was set up to allow people to request a copy of the leaflet. Following the enactment of the Pensions Act 1995, press releases were issued with new leaflets including one called ‘*Equality in State Pension Age – a Summary of the Changes*’ produced in July 1995. Further leaflets were produced in 1996 and 1997 and other leaflets produced during the 1990s and 2000s referred to the changes or directed readers to leaflets which explained them.
111. Since 1995 it has been possible for a person to request a State Pensions Forecast which gives them an estimate of their likely individual state pension amount and the

earliest date on which they can claim it. In addition to forecasts sent out on request, Ms Fox says that the DWP sent out 17.8 million unsolicited statements to working age individuals between 2003 and April 2007. These explained the changing position of women's state pension age although these did not include the date on which the pension could be claimed by that individual. This information was deliberately omitted because of the risk of fraud perceived to arise from sending unsolicited personal data to someone at an address that might be out of date. In 2016 an online service for state pension forecasts was introduced and over 12 million forecasts had been viewed online by the time Ms Fox's first statement was made in March 2019.

112. In 1997 a Pension Education Working Group was formed to advise government with the aim, according to its published remit, of "ensuring that existing pensions education and awareness initiatives were co-ordinated, well targeted and effective". In response to the recommendations of that Working Group, the DSS devised a large scale pensions education campaign to encourage people to take responsibility for their pension planning. The campaign included a new range of leaflets approved by the Plain English Campaign including one specifically aimed at women referring to the effects of the Pensions Act 1995 on the equalisation of the state pension age. The campaign used a wide range of channels including lifestyle magazines aimed at women.
113. Pensions education measures covering all aspects of pension preparedness continued during the early 2000s including advertising on television and in newspapers and magazines and direct marketing. From January 2001 to March 2002 the campaign received 1.1 million responses via its website, telephone helpline and returned coupons and more than 1.5 million guides were ordered. From 2004 the DWP updated a range of Pension Service booklets to include references to state pension age changes. Ms Fox says that work on pension education continued throughout the decade with plans to produce content such as case studies and newsworthy research that would be attractive to broadcasters, to distribute pensions leaflets through GP surgeries and to send direct mail to individuals who had registered their interest.
114. In about 2007 the DWP began to plan the use of individual direct mail letters to give people affected by the Pensions Act 1995 tailored information about how the Act would affect their state pension age. This was prompted by survey evidence which suggested that whilst most people knew that women's state pension age was going to be raised from 60, most women did not know their correct state pension age. Such direct mailing also became more feasible, Ms Fox says, once the DWP had access to the Customer Information System ('CIS') database which reduced concerns about address data being out of date. Between April 2009 and March 2011, the DWP mailed 1.16 million women using the postal address held on the CIS database. Women closest to the state pension age were mailed first informing them of the change to the law. It also informed the recipient of the earliest date from which she would be entitled to a state pension. Since the enactment of the Pensions Act 2014, the DWP has continued to notify people by direct mailing of changes to their state pension age. A recent exercise between December 2016 and May 2018 mailed about 1 million people whose state pension age will change under that Act.
115. It is true that, despite this, there is plenty of evidence that many women, like the Appellants, do not know when they will reach state pension age. Ms Glynn's evidence is as follows:

“I first became aware of the change to the state pension age for women in 2015 when I overheard a conversation on the Metrolink travelling into work. I was stunned as I had heard nothing about it before and had received no letter from the DWP informing me of this change. I was working at Manchester City Council at the time. I mentioned the conversation to my colleagues within a couple of weeks of overhearing it. The majority were not aware. I went online and googled the changes and stumbled upon the Back to 60 Facebook page.”

116. Ms Delve says she became aware of changes to the state pension age in around 2010/11 but says that she was led to believe at the time that she would not be affected by the changes. She continued to expect to receive her state pension aged 60 in 2018. It was only through conversations with a colleague in 2014 that she realised she would be 66 before she was eligible. Had she known this, she says, she would have arranged her working life differently. In April 2012 she had decided to take voluntary exit from her job so that she could care for her mother who was suffering from ill health. She says that she decided to leave her job, aged 54, on the basis that she would receive her pension when she reached 60. She started to draw her civil service occupational pension from August 2012 at a lower rate than she would have been entitled to had she stayed in her job until she reached 60. She worked full time in a local job which paid half the salary of her previous work and she now works two days a week for that employer.
117. Ms Fox’s evidence is that a survey on attitudes to pensions carried out in 2012 showed that only 41% of women were definitely or possibly sure that women could not receive their state pension aged 60. When asked at what age they expected to receive their own state pension, only 26% of women within 10 years of their state pension age correctly identified their own state pension age compared with 74% of men. Women tended to expect to reach state pension age sooner than they would in fact. However, only 6% of women within 10 years of their state pension age still expected to receive their pension at age 60. Ms Willis Stewart also cites studies such as one by Age UK in 2011 showing a lack of awareness of women about their pension age or their ability to obtain a pension forecast.
118. Ms Fox acknowledges that there has been criticism of government communications on the subject, particularly alleging insufficient use of direct mailing or other more individually tailored information. She describes the limitations of the address databases available prior to the CIS database:

“Therefore, my understanding is that it would have been very difficult if not impossible for the DWP to send its 17.8 million [Automated Pension Forecasts], which provided general state pension information to individuals, or any other kind of mailing providing information tailored to individuals, any earlier than its eventual 2003 start date, and that financially any business case would have been far stronger after 2005. It would not, for example, have been realistically feasible to carry out a nationwide individual direct mail exercise by co-ordinating local benefits offices to undertake a manual identification and

mailing exercise. Such an exercise, if possible at all, would likely have been hugely time-consuming, expensive, inconsistent and subject to human error.”

119. Even with the use of the CIS database, experience shows that a proportion of direct mailing will be undelivered and some of the letters which arrive at their destination are discarded without being read or understood. Research carried out in November 2014 found that of those who recalled receiving a direct mail letter about their pension, just over half say that they read some or all of it, 33% say that they “just glanced at it” and 8% said that they did not look at it at all.
120. In the light of this evidence, the Divisional Court were fully justified in holding that they could not conclude that the notice provided to the Appellants’ cohort had been inadequate or unreasonable. We therefore dismiss Ground 3 of the appeal on the basis that there was no duty to notify those affected by the change in state pension age and that the Divisional Court were entitled to conclude as a fact that there has been adequate and reasonable notification given by the publicity campaigns implemented by the Department over a number of years.

#### **7. GROUND 4: Delay**

121. CPR 54.5(1) provides that a claim for judicial review must be made “promptly and ... in any event not later than 3 months after the grounds to make the claim first arose.” This time limit cannot be extended by agreement between the parties but CPR 3.1(2)(a) empowers the court to extend or shorten the time for compliance even if that time has expired. The Senior Courts Act 1981 section 31(6) provides that, where there has been “undue delay” in making an application for judicial review, the court may refuse to grant permission or relief:

“... if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.”
122. The expression “undue delay” in that provision is to be read as meaning a failure to act promptly or within three months: *R v Dairy Produce Quota Tribunal ex p. Caswell* [1990] 2 AC 738 at 746.
123. In her ruling when she granted permission to apply for judicial review, Lang J held that the Appellants had established arguable grounds that the implementation of the changes to their pension age was in breach of their legitimate expectations and that it had resulted and continued to result in age and gender discrimination. She said that “[i]f proved, these are continuing unlawful acts, and so, in my view, the Claimants are not time-barred from challenging them in the courts.” She nevertheless provided in her order dated 30 November 2018 that an extension of time to 30 July 2018 for filing the claim was granted, in case it was required.
124. We disagree with Lang J’s analysis as regards the application of the time limit here. Unlawful legislation is not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial review rolls forward for as long as the legislation continues to apply. If that were the test, there would effectively be no time limit for

challenging primary or secondary legislation or for that matter administrative conduct which continues to affect a claimant unless or until the action is withdrawn or revised. The Appellants rely on *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 to argue that this is a case of continuing illegality. In that case the Supreme Court held that the time limit for bringing a claim in respect of disciplinary proceedings brought by the Bar Standards Board started to run only from the end of the proceedings when the claimant's appeal against the decision was allowed and not from the start of the proceedings when the BSB decided to pursue the case against her. That case does not in our judgment assist the Appellants. What the Court was looking at there was a series of acts comprising a course of conduct occurring over an extended period of time, not the continuing effect of a single act. There is no continuing series of acts here. The adoption of each Pensions Act affecting the Appellants' pension age was a single act which was completed for this purpose at the latest when the legislation was brought into effect.

125. Given that this case does not involve a series of acts, when did the time limit in CPR 54.5 start to run? The principles governing the application of the time limit for bringing judicial review proceedings were recently reviewed by this Court in *R (Badmus) and others v Secretary of State for the Home Department* [2020] EWCA Civ 657. That case concerned a challenge to the rate of pay fixed by the respondent for work carried out by detainees in immigration detention centres. The regime introducing a standard rate of pay for paid work across all detention centres was implemented through a Detention Services Order starting in 2008 and reviewed periodically thereafter. The applicants in *Badmus* had become subject to immigration detention and challenged the legality of the flat rate they were paid for work between August 2017 and July 2018. The question was when the grounds to make the claim "first arose" for the purposes of CPR 54.5(1).
126. The Court held at [77] that the correct principle was that the grounds for making a judicial review claim first arise when a person is affected by the application to him or her of the challenged policy or practice. That is the case at least where the legislation is mandatory and involves no independent consideration by anyone as to whether or not it should be applied in the particular case. The claimants were not affected by the flat rate rule until they were detained in a detention centre in which that rule applied. It was only then that they had the standing and the grounds to bring their claim, and that was when time started to run: [78]. The Court recognised that this enabled a claimant to undermine a long established rule, policy or practice that had been applied to many people in the interim. That could operate to the detriment of good public administration and create legal uncertainty. The answer to that was that the three month time limit for judicial review applications and the one year time limit for bringing proceedings under section 7 of the Human Rights Act 1998 would in practice constrain the number of former detainees who could pursue proceedings.
127. Applying that principle to the present case, we find that the Appellants had standing to bring judicial review proceedings challenging the Pensions Acts which affected them as soon as those Acts were passed. Mr Mansfield submitted that if the Appellants had brought judicial review proceedings shortly after enactment, their claim would have been dismissed as premature by the Administrative Court. He argued that standing to challenge the legislation arose only at the point when the Appellants reached their 60th birthdays and did not receive a state pension. We reject

that submission. It was inevitable once those Acts were passed that the Appellants' entitlement to a state pension would be deferred. Questions about their awareness of the effect of the legislation on them before they reached the age of 60 were relevant to the exercise of the court's discretion whether to extend time in their case. Their awareness or lack of it was not relevant to the question of their standing which would have existed from that moment. These claims were, therefore, substantially out of time and could only be brought if time was extended.

128. In the light of Lang J's grant of permission and extension of time, the question whether the proceedings were time barred was not argued before the Divisional Court. Lang J did not reserve the SSWP's entitlement to reargue the point at the substantive hearing either in the terms of her order or by directing a rolled-up hearing for permission and substantive issues, as she might have done. The issue of delay therefore arose only as a factor in the Court's consideration of the discretionary grant of relief.
129. The Divisional Court were undoubtedly right to say at [124] that, if the Court had upheld any of the grounds of discrimination, the long delay in bringing these claims would have made it almost impossible to fashion any practical remedy. The Appellants point out that they have limited the relief they are seeking to a declaration of unlawfulness rather than seeking an order directing the SSWP to put right the unlawfulness that they allege exists. That does not avoid the problem of the damage to good public administration that would be caused by any attempt to unwind the pension equalisation regime or the raising of the state pension age from 65 to 66. The raising of the state pension age for women to 65 was completed by November 2018 and the raising of the state pension age for both sexes to 66 will be completed by October 2020. 3.17 million women and 80,000 men would be affected by a reversal of those changes. It is not surprising that Mr Gilchrist estimates that the administrative costs of such a reversal together with the substantive costs of paying state pensions for the additional years would run to well over two hundred billion pounds.
130. In the course of his oral submissions, Sir James referred to the decision of this Court in *R v Lichfield District Council and another ex p Lichfield Securities Ltd* [2001] EWCA Civ 304, suggesting that a court hearing a substantive application for judicial review may revisit the question of whether time should have been extended at the permission stage, even if the respondent had not appealed against the extension of time. On further analysis, we are satisfied that *Lichfield* is not authority for that proposition. In *Lichfield* the application was made within the three month time limit. At the oral hearing for permission, the respondent argued nonetheless that leave should be refused for lack of promptness. Keene J rejected that argument and granted leave. At the substantive hearing, Turner J revisited the issue of promptness without reference to the decision of Keene J and concluded that there had been a lack of promptness. The claimant argued on appeal that Turner J had no power to reopen the issue.
131. The Court of Appeal held that where the respondent complained of lack of promptness within the three months following the challenged decision, the judge hearing the substantive application could permit the respondent to re-canvass, by way of alleging undue delay, an issue of promptness that had been decided in the

applicant's favour at the leave stage but only in four limited circumstances set out at [34].

132. The Court expressly stated that the case before it was not a case concerning the reopening of an enlargement of time given on the grant of leave. The law in such a case was decided by the House of Lords in *R v Criminal Injuries Compensation Board ex p A* [1999] UKHL 21, [1999] 2 AC 330. In that case the claimant's challenge to the decision of the respondent Board to refuse her compensation was brought over a year after the refusal was notified to her. Carnwath J gave her leave to move for judicial review though his ruling showed that he thought it would remain open to the Board to raise the question of delay at the substantive hearing. His order stated simply that leave was granted and did not say in terms that time was extended. At the substantive hearing, Popplewell J ruled that he was entitled to reconsider the question of delay and refused to extend time. Lord Slynn of Hadley noted that their Lordships had been told that this approach had been followed in practice in other cases where it was considered that the granting of leave did not amount to an extension of time. Lord Slynn disagreed with that approach. If leave is given, then an application to set it aside may be made though, he said, "this is not to be encouraged". If leave is given and is not set aside, then it cannot be re-opened at the substantive hearing on the basis that there is no ground for extending time. The court has already granted leave and it is too late to "refuse" it. What the court can do under section 31(6) is to refuse to grant relief. Lord Slynn therefore held that the issue of leave had been concluded by the decision of Carnwath J. The other members of the court agreed, Lord Nolan noting that if a judge is minded to grant leave on the merits but retains some doubt about whether there was good reason to extend time, he can defer that issue for determination at the substantive hearing.
133. The present position is even stronger given that Lang J expressly extended time by her order if, contrary to her view, an extension of time was needed. The court hearing the substantive application can still refuse relief under section 31(6) on the ground of undue delay because the extension of time does not negative the existence of undue delay. An argument to the contrary has been firmly rejected: see per Lord Goff of Chieveley in *R v Dairy Produce Quota Tribunal for England and Wales ex p Caswell* [1990] 2 AC 738 at 747.
134. We therefore reject Ground 4 of the appeal.

## **8. Conclusion**

135. For the reasons set out above, the appeal is dismissed.