Neutral Citation Number: [2020] EWHC 77 (QB)

Case No. QB-2019-00321

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 21 January 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

(1) ERIC CARTER
(2) JUNE CARTER

Claimants

- and -

THE CHIEF CONSTABLE OF ESSEX POLICE

Defendant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Interested Party

- - - - - - - - - - - - - - - - - - - -

Chris Buttler (instructed by **Slater & Gordon LLP**) for the **Claimants**
Simon Forshaw (instructed by **Essex Police Legal Department**) for the **Defendant**
Keith Bryant QC (instructed by **Government Legal Department**) for the **Interested Party**

Hearing dates: 17-18 September 2019

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Approved judgment

I direct that pursuant to CPR PD39A para. 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. Eric Carter has lived a remarkable life. Born on 9 November 1924, he served in the Royal Marines at the end of the Second World War and is one of the few surviving men who, with astonishing bravery, stormed the beaches under heavy enemy fire on D-Day. All who take for granted the freedom of living in a peaceful and democratic society owe him and his generation an enormous debt.

2. After the war, Mr Carter served as a police officer between 4 November 1948 and his retirement on 28 February 1977. Although he worked full time for another decade and then part-time for a further 3½ years, Mr Carter has now drawn his police pension for almost 43 years. Mr Carter married his first wife, Jean, in July 1944. She died in 1979 and Mr Carter married June in 1981. Despite marrying after Mr Carter's retirement from the police force, they have now been married for 38 years.

3. The police pension scheme offers the benefit of a reduced widow's pension upon an officer's death. Such benefits are, however, only payable under the scheme applicable in this case to any widow to whom Mr Carter was married at the time of his police service. The scheme was subsequently changed such that pensions are now payable to post-retirement widows in respect of their late husbands' service after 5 April 1978. Since, however, Mr Carter was married to Jean throughout his police career and retired before 5 April 1978, no widow's benefit will be payable to June in the event that she survives her husband.

4. Mr and Mrs Carter argue that such exclusionary rule is unlawful:

    4.1 First, Mrs Carter argues that it breaches her convention rights in that, should she outlive her husband, the rule will unlawfully discriminate against her as the post-retirement widow of an officer who retired before 1978.

    4.2 Secondly, the Carters argue that the rule indirectly discriminates against Mrs Carter on the ground of Mr Carter's age in that it operates disproportionately to the detriment of the widows of men over 90.

POLICE PENSIONS

POLICE PENSIONS REGULATIONS 1987

5. Mr Carter's pension rights are governed by the *Police Pensions Regulations 1987*. By regulation C1, the widow of a retired police officer is entitled to a widow's ordinary pension. Regulation C5(1) provides:

> "A widow shall not be entitled to a widow's ordinary … pension under regulation C1 … unless she was married to her husband during a period before he last ceased to be a regular policeman."

6. This restriction on the payment of a widow's pension had been in place throughout Mr Carter's police service. As already indicated, from 5 April 1978 pensions were also payable to post-retirement widows in respect of their late husbands' police service after that date. This change was effected by regulation C5(3), which provides:

> "A widow of a regular policeman who, but for paragraph (1) … would be entitled to an award under regulation C1 … shall, instead, be entitled to a pension calculated in accordance with Part IV of Schedule C …"

and by Part IV of Schedule C, which specifies a proportionate pension in respect of any service after 5 April 1978. Of course, regulation C5(3) does not assist the Carters since Mr Carter retired in 1977.

7. In passing I should observe that, like their predecessors, the 1987 regulations referred to a widow's pension. For the avoidance of doubt, the provisions were gender specific even as recently as 1987; indeed, the scheme did not provide an equivalent widower's pension for the surviving spouses of female officers until 1990. While by the social norms of the day such equivalent benefit was not apparently considered necessary, women police officers paid a lower contribution rate reflecting the inferior nature of their pension benefits.

THE HISTORY OF POLICE PENSIONS

8. When Mr Carter joined the police, his pension was regulated by the *Police Pensions Regulations 1948* that came into force earlier that year. He was required to pay a contribution of 5% of his salary. Upon retirement after 30 years' service, he would be entitled to a pension of two-thirds of his final salary.

9. The police pension scheme has changed enormously over the 71 years since Mr Carter joined the Essex Constabulary as a young officer. I summarise some of the key changes in the table below:

<table>
<tr><th>Years</th><th>Accrual rate</th><th>Age</th><th>Contribution</th><th>Widow's pension</th></tr>
<tr><td>1948-1956</td><td rowspan="6">1/60th for first 20 years
2/60th for next 10 years

Maximum pension: two-thirds of final salary after 30 years</td><td rowspan="6">Compulsory retirement age: 55</td><td>5%</td><td>Basic pension for pre-retirement widows</td></tr>
<tr><td>1956-1972</td><td>6¼%</td><td>One-third of the officer's pension for pre-retirement widows</td></tr>
<tr><td>1972-1978</td><td>7%</td><td>One-half of the officer's pension for pre-retirement widows</td></tr>
<tr><td>1978-1982</td><td>7%</td><td rowspan="3">One-half of the officer's pension for pre-retirement widows and, in respect of service after 5 April 1978, post-retirement widows</td></tr>
<tr><td>1982-2006</td><td>11%</td></tr>
<tr><td>2006-2015
New joiners</td><td>1/70th
Maximum pension: half of final salary after 35 years</td><td>Only payable from 55</td><td>9.5% rising to 11-12.75%</td><td rowspan="2">Survivor's pension payable irrespective of date of marriage</td></tr>
<tr><td>2015-
New joiners</td><td>1/55.3
Maximum pension: half of career-average revalued salary after 27 years 8 months</td><td>Reduced pension from 55; full pension not payable before 60</td><td>12.44-13.78%</td></tr>
</table>

10. Accordingly:

10.1 Between 1948 and 1982, the contributions made by officers grew significantly from 5% to 11%.

10.2 Over the same period, the benefits payable to an officer's widow were greatly enhanced. There was, however, a disconnect in that the enhancement of a pension for post-retirement widows was introduced in April 1978 and yet the contribution rate did not increase until 1982.

10.3 More recent amendments made in 2006 and 2015 eroded the value of a new officer's pension while also increasing the level of contributions.

11. By comparison with his modern counterparts, Mr Carter paid lower rates of contribution for a significantly more generous final-salary scheme. An officer joining the police today would have to work for 27 years 8 months and wait until age 60 before being able to draw a pension of half of his or her career-average salary. Against that, Mr Carter's pension package was less generous in that no pension will be payable to Mrs Carter should she survive him.

12. Successive reforms of public sector pension schemes, including the scheme for police officers, have been prospective:

    12.1 In 1956, the increased widow's pension of one-third of the officer's own pension was introduced in respect of service after 1 April 1956. In fact, serving officers were not obliged to accept the new terms. An officer interested in the enhanced terms:

        a) could opt to pay the increased contribution rate of 6¼% and thereby start to accrue an enhanced entitlement to a widow's pension for service after 1 April 1956; and

        b) if he so opted, he was then also obliged to buy additional years' enhancement in respect of any period of earlier service or, if he did not wish to pay the enhancement costs immediately, elect to take a 1% reduction in his own pension benefits upon retirement.

    12.2 In 1973, the increased widow's benefit of one-half of the officer's own pension was introduced in respect of service after 1 April 1972. It was therefore slightly backdated but was not generally available in respect of earlier periods of service unless an officer elected to buy additional years' enhancement.

    12.3 As already recounted, the new post-retirement widow's benefit introduced in 1978 was only payable in respect of service after 5 April 1978.

13. As early as 1941, Lord Snell's report on Police Widows' Pensions recommended that the police pension scheme should be amended to extend benefits to post-retirement widows where there was either a child of the relationship or at least three years had elapsed between the marriage and the officer's death. In order to fund this and other improvements to the pension scheme, Lord Snell recommended an increase in contributions from 5% to 7%. Such package was rejected by the Police Federation and the Snell report was not implemented. The matter was reviewed in 1947 and 1949 but it was not thought that there was any case for removing the exclusionary rule.

14. The question of pensions for widows who had married retired servicemen was raised by Airey Neave MP in a debate in the House of Commons on 19 January 1971. Mr Goringe, an official within the Pensions Branch of the Home Office, prepared a departmental briefing on the issue on 5 March 1971 in advance of ministers' meeting a deputation of MPs led by Mr Neave. Mr Goringe noted that the requirement that the marriage had to have taken place before retirement was longstanding. He referred to the Snell report and continued:

> "The main reason for the restriction is that it is not seen as a requirement of an occupational pension scheme that it should cover commitments entered into after the man has left the service. Members of the police and fire services are not required to retire until age 55. Many choose to retire on pension before that age (as early as 44 for some policemen). By doing so they give themselves a better chance, among other things, of finding new pensionable employment. It is reasonable to look to the second employer to provide cover for the man's dependants if he acquires them during that second employment. In addition, in the case of police and fire, a widow who married before retirement has had to put up with all the inconveniences of life arising from these services which a woman who married after the man's retirement would not experience. There is also the general consideration that there may be stronger moral grounds for paying a pension to a divorced wife who married during the man's service than to a widow who married after the man's retirement. Finally, there is no unfairness in the sense that the conditions of the occupational pension scheme are available for the information of all parties."

15. Finally, Mr Goringe observed that a review of the police pension scheme would be put in place once the government announced its plans to reconstruct the National Insurance scheme. He added:

> "Both Official and Staff Sides have a number of improvements to the schemes for consideration, but benefits for widows who marry retired policemen or firemen have not been listed. There is no reason why this and the contribution aspect should not be considered in the review. The likely cost of covering these widows and adjusting contributions is not known, but it would be significant and any proposals for change would have to be looked at in the context of the effect on the general employees' contribution rates, available funds and other priorities."

16. A further government paper following the meeting between the MPs and ministers was prepared by Mr Herbecq on 12 March 1971. Mr Herbecq discussed Mr Neave's half-way house proposals but concluded that if a change were to be made, the Home Office should "go the whole hog." Interestingly, predicting the circumstances of the instant case, Mr Herbecq observed:

> "We have always recognised that a very reasonable case can be made out for doing something about post-retirement marriage. The hardest case has always seemed to us to be the man who has paid the full contributions due for a widow's pension, loses his wife shortly after retiring and finds on remarriage that his second wife has no entitlement, notwithstanding the contributions he has already paid."

17. The Carters' case is indeed such a hard case as foreseen by Mr Herbecq's paper nearly 49 years ago. That said, he might well have had less sympathy for the case of such an officer who himself drew his own pension for over four decades. Mr Herbecq continued:

> "But the drawing of defensible lines is difficult and, apart from the general point that we ought not to burden employers with responsibility for dependants acquired after the individual has left employment, there are one or two other reasons for avoiding any early commitment here.
>
> In the first place, to cover post-retirement marriages would certainly add to the cost of pension schemes. How much is still under investigation. This must therefore compete for any money that may be available with other contenders for improvements in the schemes. The Armed Forces apart, staff interests have not hitherto shown much interest in this item, and all the indications are that they would accord it much lower priority than some of the other improvements on which they have set their sights, including in particular an increase in the provision now made for widows at present covered by the schemes. Finally, while I should not wish to make too much of this point, the valuation of schemes will be made more complicated if new and unforeseen liabilities can arise for dependants acquired after the retirement of employees, and where widows' benefits are contributory, difficulties would arise in respect of the individual who had not paid the necessary contributions at the time of his retirement."

18. In a separate memorandum of the same date, Mr Herbecq noted that the Ministry of Defence and the Home Office would each investigate the costs involved in extending benefits to post-retirement spouses and the children of such marriages.

19. A further government paper dated 25 November 1971, summarised the conclusions of the Civil Service Department, which had agreed to lead on the issue since it affected all public sector pension schemes:

    19.1 First, the department urged that the government should strongly resist any suggestion that a future extension of benefits to post-retirement spouses should be retrospective since, among other matters, the former members would not have paid the appropriate contributions; extensive retrospection would reopen the question of whether pensions should be paid to the widows of men who retired before widows' pensions were introduced; and it would be "very costly."

    19.2 More generally, the paper made the following points:

        a) It was wrong in principle that the schemes should carry unknown liabilities in respect of dependants acquired after the member left service.

        b) The staff side had not pressed for the change and would resent priority being given to this issue while other improvements in terms and conditions were denied.

        c) It was wrong to regard the man as "buying" an entitlement that he could bestow on any woman he chose to marry, rather the dormant entitlement to a widow's pension was acquired by the member's wife when he retired.

        d) No country in Europe then gave unlimited pension rights to post-retirement spouses.

e) As a matter of principle, where a man retired early and was capable of further work, the subsequent employer should provide for any new dependants.

20. In the course of debate in the House of Commons on 9 May 1973, Mr Neave welcomed provisions in the bill that was subsequently to introduce the State Earnings-Related Pension Scheme ["SERPS"] that provided, for the first time, pensions for post-retirement widows. He observed that the previous rules were "designed apparently to prevent fortune hunters marrying old men, especially generals" and lamented that the new pension entitlement would not be retrospective. The minister, Mr Dean MP, indicated that the perceived problem of deathbed marriages could perhaps be addressed by a provision excluding marriages that had only lasted a short time. Otherwise, he referred to the reform as an "improvement for a comparatively small but very deserving group of widows."

21. Sara Alderman, a policy adviser on police pensions, has provided some figures as to the likely cost of enhancing the benefits retrospectively in favour of post-retirement widows. After correction, it appears that the likely net present value of such pension enhancements is between £73-110 million. Such cost will no doubt continue to fall as more officers outlive their post-retirement wives and surviving post-retirement wives themselves die. This was not, however, the contemporaneous cost in the 1970s when such officers were still of working age.

MR CARTER'S PENSION

22. In 1956, Mr Carter opted to enhance his then wife's contingent right to a widow's pension by agreeing to pay the increased contribution rate and by accepting the eventual reduction in his own pension benefits under the scheme. In 1973, Mr Carter did not further enhance his wife's pension rights in respect of past service. Accordingly, had Jean survived her husband, she would have been entitled to a widow's pension, being:

22.1 one-third of Mr Carter's own pension for his service from 1948 to 1973; and

22.2 one-half of his pension for his service from 1973 to 1977.

23. Jockeying for forensic advantage:

23.1 Mr Forshaw stresses that Mr Carter has now drawn his final-salary police pension for over 42 years and was able both to draw his pension and to work for some 13½ years after his early retirement, while

23.2 Mr Buttler points out that Mr Carter has made significant contributions towards a widow's pension, both between 1956 and 1977 by way of increased contributions and in retirement by the 1% reduction that he agreed in 1956, for which his second wife can never receive any benefit.

Neither of these submissions is, however, ultimately helpful. The answer to the issues in this case do not depend upon some assessment of whether Mr Carter has, or has not, had a good deal from the scheme. It is the nature of pensions that there will be winners and losers; indeed, actuaries depend upon such matters when

ensuring that defined-benefit schemes are properly funded. The elections made by Mr Carter have not worked out for him, or indeed any man who survived his then wife, but they did secure enhanced pension provision for his late wife.

RETROSPECTIVITY

24. Chris Buttler, who appears for the Carters, realistically accepts that he cannot complain about the difference in treatment of post-retirement widows before and after 1978. He concedes that Parliament acted rationally in following its usual practice of making changes prospectively to the pension scheme. He argues, however, that the exclusionary rule that applied throughout Mr Carter's police service was unlawful in that it discriminated against post-retirement widows. Accordingly, the proper comparator is a pre-retirement widow under the pre-1978 law. Further, he argues that the scheme discriminated against the widows of older men since officers now in their nineties (who were retiring in the late 1970s) were more likely to have remarried than their younger counterparts now in their sixties (being the youngest group who were then working as police officers).

25. The Carters' claims depend upon legislation which came into effect between 2000 and 2006:

    25.1 Mrs Carter claims that, but for the discriminatory effect of the 1987 regulations in denying a pension to post-retirement widows in respect of their husbands' pre-1978 service, she would be entitled to a widow's pension should she survive Mr Carter. She therefore argues that s.3 of the *Human Rights Act 1998*, which came into effect on 2 October 2000, requires the court to read and give effect to the regulations in a way that is compatible with her convention rights.

    25.2 The *Framework Directive* 2000/78/EC required the UK to implement the prohibition on age discrimination by 2 December 2006. Such discrimination was first prohibited in this jurisdiction by the *Employment Equality (Age) Regulations 2006* with effect from 1 October 2006 (and 1 December 2006 for provisions concerning pensions), and later by the consolidating legislation, the *Equality Act 2010*.

26. Of course, these arguments could not have been made before 2000 and 2006 respectively. Simon Forshaw, who appears for the Chief Constable, argues that Mrs Carter's claim crystallised upon her marriage in 1981. Accordingly, he argues, she cannot now rely on convention rights that she did not acquire for a further 19 years, or upon alleged age discrimination which was not unlawful until the Carters had celebrated their silver wedding anniversary. Making much the same point, Keith Bryant QC, who appears for the Secretary of State for the Home Department, argues that the right to a widow's pension was extinguished upon Jean Carter's death in 1979. Against that, Mr Buttler argues that Mrs Carter's claim remains contingent unless and until she becomes a surviving widow. Since Mr Carter is still alive, he contends that her claim has not yet crystallised and that she will only be treated less favourably than a pre-retirement spouse when, upon Mr Carter's death, the Chief Constable does not pay her a pension.

THE APPROACH TO SECTION 3

27. Section 3 of the *Human Rights Act 1998* makes plain that the obligation to read and give effect to legislation in a way which is compatible with convention rights applies to legislation "whenever enacted." It does not, however, follow that claimants can always rely on s.3 in respect of claims that arose before the Act came into force. This issue was considered by Lord Nicholls in *Wilson v. First County Trust Ltd* [2003] UKHL 40, [2004] 1 A.C. 816, at [18]-[22]:

> "18. Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of s.3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court. Parliament cannot have intended s.3(1) should operate in this unfair and arbitrary fashion.
>
> 19. The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests … As always … the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All E.R. 712, 724:
>
> > 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree– the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'
>
> Thus, the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.
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> 20. Applying this approach to the *Human Rights Act 1998*, I agree with Mummery LJ in *Wainwright v. Home Office* [2002] Q.B. 1334, 1352, para 61, that in general the principle of interpretation set out in s.3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The *Human Rights Act* was not intended to have this effect.
>
> 21. I emphasise that this conclusion does not mean that s.3 never applies to pre-Act events. Whether s.3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important

instance different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.

22. In the present case Parliament cannot have intended that application of s.3(1) should have the effect of altering parties' existing rights and obligations under the *Consumer Credit Act 1974*. For the purpose of identifying the rights of Mrs Wilson and First County Trust under their January 1999 agreement, the *Consumer Credit Act 1974* is to be interpreted without reference to s.3(1)."

28. In support of his argument, Mr Buttler referred me to three convention cases. First, *JT v. First Tier Tribunal (Social Entitlement Chamber)* [2018] EWCA Civ 1735, [2019] 1 W.L.R. 131:

28.1 JT was sexually assaulted and raped as a child in the 1960s and 1970s by her stepfather. Her 2012 application to the Criminal Injuries Compensation Authority was rejected on the basis that the statutory scheme provided that compensation was not payable to victims of crime before 1979 who had, at the time, been living together with their assailants as members of the same family. The Court of Appeal found that the 2012 scheme, which retained the "same-roof rule" in respect of criminal injuries sustained before 1 October 1979, unlawfully discriminated against JT on the ground of her status as the victim of a same-roof crime.

28.2 Leggatt LJ treated, at [49]-[53], the causation question as whether JT would have had an enforceable right to receive compensation but for the allegedly discriminatory treatment.

29. In *Re. Brewster* [2017] UKSC 8, [2017] 1 W.L.R. 519, some 2009 regulations provided that a local government pension was payable to the surviving spouse, civil partner or "nominated cohabiting partner" of a deceased member. To qualify as a nominated cohabiting partner, several conditions had to be met: the member and partner had to have lived together as man and wife or civil partners for at least two years; the partner had to be financially dependent on the member, or they had to be financially interdependent; and the member and partner had to have signed a formal declaration to that effect. Mr McMullan was a member of the scheme who died in December 2009. His cohabiting partner, Ms Brewster, met the substantive conditions but the couple had not signed a formal declaration to that effect by the time of Mr McMullan's death. Mr Buttler argues that the Supreme Court treated the discrimination as occurring when the pension authority refused to pay Ms Brewster's pension.

30. *Langford v. Secretary of State for Defence* [2019] EWCA Civ 1271 is another pension case. Mrs Langford had lived with Air Commodore Green for 15 years before he died in 2011. Throughout their relationship, she had, however, remained married to her estranged husband. While the Armed Forces pension scheme provided a pension to the surviving unmarried partners of deceased members, it excluded from benefit partners who remained married to another person. Mr Buttler

submits that the breach of article 14 occurred when the pension authority refused to pay Mrs Langford a pension on her application following her partner's death.

31. None of these cases is of great assistance since the retrospective effect of s.3 was simply not in issue:

31.1 Indeed, retrospectivity could not have arisen on the facts of either *Brewster* or *Langford*. The claimants' partners in those cases died in 2009 and 2011 respectively when they were still in service.

31.2 At first blush, there might have been a time point in *JT*. However, neither the Court of Appeal nor the Upper Tribunal ([2015] UKUT 478 (AAC)) addressed the issue of the retrospective effect of s.3. I agree with Mr Forshaw that retrospectivity was probably not in issue since there is no freestanding right to compensation for criminal injury. Thus, once the CICA admitted the claim, it was bound to deal with it lawfully in accordance with the 2012 scheme.

THE EU JURISPRUDENCE

32. In *Walker v. Innospec Ltd* [2017] UKSC 47, [2017] 4 All E.R. 1004, the Supreme Court considered the related question of whether the *Framework Directive* 2000/78/EC has retrospective effect. While such issue was one of European law, Lord Kerr referred first, at [22], to the position in English law citing the following proposition from *Bennion on Statutory Interpretation* (6th Ed., 2013), at section 5.12:

> "If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of the law. '… those who have arranged their affairs … in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset.'"

33. Turning to EU law, Lord Kerr observed that the Court of Justice of the European Union ["CJEU"] has developed two principles to establish the temporal application of EU legislation: the no-retroactivity principle and the future-effects principle. He said, at [24]:

> "the policy behind the no retroactivity principle is thus similar to that described in *Bennion* - the need to ensure 'legal certainty' and to protect the 'legitimate expectations' of those who have relied on the law as it is previously understood. The future effects principle is simply the other side of the same coin. It is a method developed by the CJEU to avoid any retrospective effect and to ensure the immediate prospective application of legislation to ongoing legal relationships."

34. Lord Kerr explained that an ongoing employment contract was a paradigm example of the future-effects principle. The application of new EU legislation from the date that it came into force to an ongoing contract of employment is not to apply the new provision retrospectively but to apply it immediately to the future performance of the contract. He then added, at [25]:

> "The CJEU draws a distinction, therefore, between the retroactive application of legislation to past situations (which is prohibited unless expressly provided for) and its immediate application to continuing situations (which is generally permitted). The distinction was elucidated by Advocate General Cosmas in *Andersson v. Sweden* (case C-321/97) EU:C:1999:9 (opinion), EU:C:1999:307 (judgment), [1999] ECR I-3551, [2000] 2 CMLR 191 (para 57):
>
> > 'Retroactive effect consists in the application of the rule to situations which were permanently fixed before that rule came into force. Immediate effect, which in principle, works likewise according to the principle *tempus regit actum,* consists in applying the rule to situations which are continuing.'"

35. The *Walker* case also concerned an occupational pension scheme. Lord Kerr observed, at [26]:

> "The application of these principles presents a challenge when one is dealing with entitlement to an occupational retirement pension. Conventionally, the right to a pension accumulates over decades. During the time that the right is accruing, actuarial assumptions are made based on existing legal conditions, notwithstanding that the pension is payable in the future. Those assumptions are upset when, because of changes in social values, a new equal treatment provision is introduced. It is not immediately easy to identify the point at which entitlement to a pension becomes 'permanently fixed' – whether for example at the date of retirement or when the pension is paid."

36. Mr Walker had lived with a male partner since 1993 and, as soon as the law allowed, he and his partner entered into a civil partnership and then married. Mr Walker retired in March 2003 and claimed that the rule in the scheme allowing a widow's pension but not a pension to his husband was unlawful discrimination on the grounds of his sexual orientation. His right to argue such a claim therefore depended on the *Employment Equality (Sexual Orientation) Regulations 2003*, later incorporated into the *Equality Act 2010*, and the *Framework Directive*; none of which were in force before December 2003. Accordingly, the issue was whether the unequal treatment occurred at the time when Mr Walker retired or the later date when, should he outlive Mr Walker, his husband's claim would otherwise fall for payment.

37. On these facts, Lord Kerr concluded, at [56]:

> "The point of unequal treatment occurs at the time that the pension falls to be paid. If Mr Walker married a woman long after his retirement, she would be entitled to a spouse's pension, notwithstanding the fact that they were not married during the time that he was paying contributions to his pension fund. Whether benefits referable to those contributions are to be regarded as 'deferred pay' is neither here nor there, so far as entitlement to pension is concerned. Mr Walker was entitled to have for his married partner a spouse's pension at the time he contracted a legal marriage. The period during which he acquired that entitlement had nothing whatever to do with its fulfilment."

38. In theory, as the Supreme Court observed, Mr Walker might have remarried a woman by the time of his death. Had he done so, a pension would have been payable in any event. As Lords Carnwath and Hughes observed at [78], the question as to who qualified as Mr Walker's spouse "fell to be answered at a date when it was unlawful under the Directive to discriminate as between heterosexual and same-sex marriages."

39. In *Ministry of Justice v. O'Brien (No. 2)* (Case C-432/17), EU:C:2018-879, [2019] I.C.R. 505, the CJEU considered the question of the assessment of compensation payable to a part-time judge who had been discriminated against because, at that time, the UK only paid pensions to salaried judges. Mr O'Brien had sat as a Recorder from 1978 to 2005, but most of his service had been before the *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000* made such discrimination unlawful. The question referred to the CJEU was whether Mr O'Brien's claim was limited to the pension rights referable to his last 5 years' service or whether he was entitled to a pension for the full 27 years. The CJEU rejected the UK government's argument that pension rights were essentially deferred pay. The court observed, at [35]:

> "… it must be noted that it cannot be concluded from the fact that a right to a pension is definitively acquired at the end of a corresponding period of service that the legal situation of the worker must be considered definitive. It should be noted in this respect that it is only subsequently and by taking into account relevant periods of service that the worker can avail himself of that right with a view to payment of his retirement pension."

40. Accordingly, the CJEU concluded, at [36]-[37]:

> "36. Consequently, in a situation in which the accrual of pension entitlement extends over periods both prior to and after the deadline for transposition of Directive 97/81, it should be considered that the calculation of those rights is governed by the provisions of that Directive, including with regard to the periods of service prior to its entry into force.
>
> 37. Such a situation is, in that regard, to be distinguished from the situation … of the colleagues of the claimant who retired before expiry of the period for transposition of Directive 97/81."

41. Mr Buttler relies on *O'Brien* for the proposition that the discrimination is to be judged on the date when the pension would otherwise be payable. Against that, Mr Forshaw submits that the true decision is that the critical date is when the claim was definitive.

THE MILLER CASE

42. When this judgment was about to be sent out to the parties in draft, the Supreme Court gave judgment in *Miller v. Ministry of Justice* [2019] UKSC 60. While I have not had the benefit of submissions on the *Miller* case, I have considered its relevance to the Carters' claim. The issue in *Miller* was whether the limitation period of three

months for bringing claims in the Employment Tribunal for unlawful discrimination in failing to provide pensions to part-time judges ran from the end of such part-time appointments or the later date when the judges retired from their subsequent salaried positions. The Supreme Court recognised that this was an issue of domestic law. Nevertheless, Lord Carnwath considered the decision on EU law in *Walker*. He said, at [35]:

> "Lord Kerr's judgment in *Walker* is helpful in that respect. Although he was not concerned with the application of a comparable time limit, that does not detract from the generality of his statement that 'the point of unequal treatment occurs at the time that the pension falls to be paid'. It is consistent also with Lord Reed's statement in *O'Brien* that 'it is unlawful to discriminate against part-time workers when a retirement pension falls due for payment'. In my view, that also accords with the common sense of the matter. It may be that the appellants could have complained of less favourable treatment, as compared to their full-time colleagues, by reference to the lack of any equivalent provision for a pension in their terms of office. But that does not detract in any way from the less favourable treatment they undoubtedly suffered, or would suffer, at the point of retirement."

DISCUSSION

43. In *Brewster, Langford* and *Walker,* the die was not cast until the claimants' partners died. Until that point a surviving partner's pension would have been payable in accordance with the rules of the respective pension schemes if:

43.1 Mr McMullan and Ms Brewster had simply signed the required declaration;

43.2 Mrs Langford had divorced her estranged husband; and

43.3 rather less probably, Mr Walker had left his partner and remarried a woman.

Accordingly, even if one tweaked the facts of those cases such that the men who were members of the occupational pension schemes had retired before 2 October 2000 but died after that date, I consider that there would have been no retrospectivity issue and s.3 of the 1998 Act would have required the court to read the relevant regulations in accordance with the ECHR.

44. By contrast, in this case, the effect of the exclusionary rule extinguished any right to a widow's pension decades ago:

44.1 Given that Mr Carter was married to Jean throughout his police service, the effect of regulation C5 was that a widow's pension could only be paid to her. This position crystallised in 1977 when Mr Carter retired and there could be no question of any widow's pension in this case at any point following his first wife's death in 1979.

44.2 June Carter has been adversely affected by the exclusionary rule since her marriage in 1981.

45. Of course, Mrs Carter might not outlive her husband. Equally, there is at least the theoretical possibility that the Carters might divorce. (No offence is intended. Divorce seems most improbable after all these years of apparently happy marriage,

but it is no more improbable than the Supreme Court's suggestion that Mr Walker might have left his male partner of many years for a woman.) It is for these reasons that Mrs Carter's claim remains contingent. The difference, however, is that while in *Brewster, Walker* and *Langford*, there remained a theoretical possibility of the payment of a survivor's pension in accordance with the terms of the schemes in those cases, here there has been no prospect of a widow's pension for forty years.

46. Such conclusion is not, in my judgment, disturbed by the decision in *O'Brien,* assuming for current purposes that that case would have been decided in the same way had the issue been the retrospective effect of s.3 of the 1998 Act and not a European Directive. In *O'Brien*, there was no possibility of a pension upon Mr O'Brien's retirement until the law was changed. Mr O'Brien's pension rights were, however, still in the course of being accrued right up until his retirement after the implementation of the legislation on which he relied. Here, by contrast, the pension entitlement was set in stone upon Mr Carter's retirement and there was no post-2000 service during which Mr Carter continued to accrue pension rights.

47. For these reasons, I conclude that Mrs Carter is not entitled to rely on the *Human Rights Act 1998* in seeking declaratory relief against the Chief Constable. This is a claim seeking to challenge the effect of legislation that extinguished the right to a widow's pension many years before the passage of the 1998 Act in which there was no post-2000 service.

48. I reach the same conclusion under EU law. Borrowing from the observation of Advocate General Cosmas, this claim seeks to give retrospective effect to the *Framework Directive* and 2006 regulations in order to challenge a situation that was permanently fixed long before such provisions came into force.

49. These conclusions are sufficient to dismiss this claim. Lest, however, I am wrong, I nevertheless consider the merits of the Carters' claims below.

THE CONVENTION CLAIM

(1) OTHER STATUS

50. Article 14 of the 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."

51. Mrs Carter's case is put on the basis that, in the event that she outlives her husband, the pension rules will discriminate against her as a post-retirement widow. This, she argues, is an "other status" within the meaning of article 14.

52. In *R (Stott) v. Secretary of State for Justice* [2018] 3 W.L.R. 1831, Lady Black identified, at [56], the principles upon which the House of Lords had operated prior to the decision of the European Court of Human Rights in *Clift v. United Kingdom* (2010) CE:ECHR:2010:0713:

> "(i) The possible grounds for discrimination under article 14 were not unlimited but a generous meaning ought to be given to 'other status'.
>
> (ii) The *Kjeldsen* test of looking for a 'personal characteristic' by which persons or groups of persons were distinguishable from each other was to be applied.
>
> (iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible 'other status'.
>
> (iv) There was support for the view that the personal characteristic could not be defined by the differential treatment of which the person complained.
>
> (v) There was a hint of a requirement that to qualify the characteristic needed to be 'analogous' to those listed in article 14, but it was not consistent … and it was not really borne out by the substance of the decisions.
>
> (vi) There was some support for the idea that if the real reason for differential treatment was what someone had done, rather than who or what he was, that would not be a personal characteristic, but it was not universal.
>
> (vii) The more personal the characteristic in question, the more closely connected with the individual's personality, the more difficult it would be to justify discrimination, with justification becoming increasingly less difficult as the characteristic became more peripheral."

53. After reviewing subsequent decisions in the Supreme Court, Lady Black added, at [63]:

> "Returning to the list of propositions derived from the House of Lords' decisions which is to be found at para. 56 above, it seems to me that the subsequent authorities in the Supreme Court could be said to have continued to proceed upon the basis of propositions (i) to (iii), which have also continued to be reflected in the jurisprudence of the ECtHR. Proposition (iv) lives on, in *R v. Docherty* [2017] 1 W.L.R. 181, but perhaps needs to be considered further, in the light of its rejection in *Clift v. United Kingdom*: see further, below. The 'analogous' point, which features at proposition (v), is reminiscent of the *ejiusdem generis* argument advanced in *Clift v. United Kingdom* …, but not addressed head-on by the ECtHR. That court's answer to the argument was, it will be recalled, to give quite wide-ranging examples of situations in which a violation of article 14 had been found. With the continued expansion of the range of cases in which 'other status' has been found, in domestic and Strasbourg decisions, the search for analogy with the grounds expressly set out in article 14 might be thought to be becoming both more difficult and less profitable. However, that should not, of course, undermine the assistance that can be gained from reference to the listed

> grounds, taken with examples of 'other status' derived from the case law. It may not be helpful to pursue proposition (vi) abstract; whether it assists will depend upon the facts of a particular case. Proposition (vii) comes into play when considering whether differential treatment is justified, rather than in considering the 'other status' question and need not be further considered at this stage."

54. As Lady Hale observed, at [209], article 14 is not limited to personal qualities, whether innate (such as sex, race, colour, birth or sexual orientation) or acquired (religion, political opinion, marital/non-marital status or habitual residence), but extends to non-personal qualities such as property rights.

55. The breadth of the approach is best demonstrated by examples:

55.1 In *Stott,* the difference in treatment between prisoners sentenced to extended determinate sentences and those sentenced to conventional sentences of imprisonment was a difference on the ground of "other status."

55.2 In *Mathieson v. Secretary of State for Work & Pensions* [2015] 1 W.L.R. 3250, the Department of Work & Pensions stopped paying disability living allowance because the claimant had been in hospital for more than 84 days. The Supreme Court held that he had an "other status" either on the basis that he was a severely disabled child in need of lengthy in-patient hospital treatment or as a child hospitalised free of charge in an NHS hospital.

55.3 In *R (DA) v. Secretary of State for Work & Pensions* [2019] 1 W.L.R. 3289, a benefits cap was applied to lone parents who were not working for at least 16 hours per week. The Supreme Court accepted that the parents' status as lone parents with children under the age of two was an "other status" that could be compared with the treatment of lone parents with children under the age of 5. Lady Hale observed, at [138]:

> "Lone parent is clearly a status within the meaning of article 14. And I agree with Lord Wilson and Lord Kerr of Tonaghmore JJSC that it can be sub-divided according to the ages of the children, and in particular that having a child or children under compulsory school age is obviously a status for this purpose, just as being a disabled child who needed more than 84 days' hospital in-patient care was a status in *Mathieson* … and indeed being a particular type of prisoner was a status in *Stott* …"

55.4 In *JT,* the Court of Appeal accepted that the "other status" was being a claimant under the Criminal Injuries Compensation Scheme who was assaulted by someone living under the same roof.

56. In *Stevenson v. Secretary of State for Work & Pensions* [2017] EWCA Civ 2123, Henderson LJ, commenting on the clear direction of travel in the Strasbourg jurisprudence, observed at [41]:

> "In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."

57. Clearly, being married is a status within the meaning of article 14. As Lady Hale put it in *Stott*, it is an acquired personal characteristic. Equally, being a widow is obviously a status. Just as one can sub-divide the status of prisoners (*Stott*), disabled children (*Mathieson*), lone parents (*DA*) and claimants under the Criminal Injuries Compensation Scheme *(JT),* so, in my judgment, one can properly sub-divide widows into those who married before and after their partners' retirement. I therefore accept Mr Buttler's argument that Mrs Carter's current status as a post-retirement spouse (and potential status, should she outlive her husband, as a post-retirement widow) of an officer with pre-1978 service qualifies as an "other status" within the meaning of article 14.

(2) ANALOGOUS SITUATION

58. While I have found that Mrs Carter has established an "other status", there can be no claim under article 14 unless the post-retirement widows (such as, potentially, Mrs Carter) are in an analogous position to the pre-retirement widows with whom they compare themselves. In *R (Carson) v. Secretary of State for Work & Pensions* [2006] 1 A.C. 173, Lord Nicholls explained, at [3]:

> "Article 14 does not apply unless the alleged discrimination is in connection with a convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate to its adverse impact."

59. Citing Lord Nicholls' observations in *Carson,* Lady Hale noted in *Re McLaughlin* [2018] UKSC 48, [2018] 1 W.L.R. 4250, that few Strasbourg cases have been decided on the basis that the situations are not analogous rather than on the basis that the difference in treatment was justifiable.

60. In *Carson,* those non-resident in the UK were held not to be in an analogous position to those resident in the UK for the purposes of pension provision since the former group did not contribute to the UK economy and pay tax: *Carson v. United Kingdom* (2010) ECtHR (Application 42184/05), at [86].

61. In *R (Harvey) v. London Borough of Haringey* [2018] EWHC 2871 (Admin), [2019] Pens. L.R. 3, a woman challenged the non-payment of a local government pension upon the death of her cohabiting partner. The pension scheme only paid a survivor's pension to unmarried cohabitees in respect of service after 1 April 2008. The claimant argued that she, as a pre-2008 cohabitee, was discriminated against by

comparison with both pre-2008 spouses and post-2008 cohabitees. Julian Knowles J accepted that being a pre-2008 cohabitee was an "other status" within the meaning of article 14 but found that the claimant was not in an analogous position to either the pre-2008 spouses or the post-2008 cohabitees because their entitlement to a pension was a costed benefit that had been paid for by contributions. He explained, at [170]:

> "The comparison here is not simply between spouses and unmarried persons. It is between a spouse *whose deceased husband was a member of the 1997 Scheme* and an unmarried person *whose unmarried partner was a member of the 1997 Scheme.* The italicised words are crucially important in identifying the right context. The claimant's complaint is that a wife whose husband had precisely the same length of service from 1997-2003 as Mr Roe, and who died on the same day in 2016 as he did, would get a pension, whereas she does not. But the answer is that is because the deceased husband paid for that benefit for his wife, whereas Mr Roe did not pay for that benefit for the claimant. I have explained by reference to the evidence that when a pension scheme is being designed, the package of benefits to be provided are costed and reflected (in part) in the level of contributions which members make to the scheme. Hence, the comparative spouse is merely receiving what her husband paid for through his contributions to the scheme. The claimant is not in a relevantly comparative position as the comparator wife for the simple reason that Mr Roe did not pay for such a benefit to be afforded to her, because that was not part of the 1997 scheme and so was not reflected in the contributions which Mr Roe made. Someone who does not receive a benefit which has not been paid for in their case is not in a comparable position to someone who does receive the benefit which *has* been paid for in their case."

62. Mr Buttler relies on the *Brewster* case. Julian Knowles J rejected a similar argument in *Harvey*, observing that not only was comparability conceded in *Brewster* but Ms Brewster was denied a benefit that had been costed for both surviving spouses and nominated unmarried partners.

63. Mr Buttler argues in any event that *Harvey* was wrongly decided and that to hold that a person whose benefit has not been paid for is not in a comparable position would have alarming consequences for discrimination law. He illustrates the point by observing that a pension scheme that only paid benefits to a white widow could, on such reasoning, be defended on the basis that a black widow would not be in a comparable position because the possibility of paying her a pension had not been costed. Further, he relies on *Langford,* in which, if the reasoning in *Harvey* is correct, the refusal of a pension to Mrs Langford could have been defended on the simple basis that she was not in a comparable position to other cohabiting partners since the scheme had not costed the potential liability to survivors who remained married to earlier partners.

64. If *Harvey* was rightly decided then plainly such reasoning applies equally in this case. Mrs Carter is simply not in the same position as a pre-retirement spouse because the scheme in this case was inevitably costed (and the contributions from time to time set) on the basis of the benefits payable under the scheme. I confess,

however, some doubt that the question of costing can be decisive of itself since otherwise an obviously discriminatory scheme, such as the extreme case of one offering benefits only to white, heterosexual or able-bodied survivors, could always be defended upon the basis of costing and the setting of contributions. Following the advice of Lord Nicholls, I therefore prefer to decide the matter on the basis of justification.

(3) DISCRIMINATION

65. The regulations undoubtedly treat post-retirement widows less favourably than pre-retirement widows. I turn therefore to justification.

(4) JUSTIFICATION

The proper approach to justification

66. In the fields of welfare benefits and social policy, it is now settled that the test of justification is to ask whether the rules as to entitlement are manifestly without reasonable foundation ["MWRF"]: *DA,* at [59]. It was common ground that such test was applicable here notwithstanding the fact that this case concerns the benefits payable to surviving partners under an occupational pension scheme for certain public-sector workers, rather than a challenge to welfare benefits or social policy applicable to the population as a whole. A similar concession was made in *Langford* in which the Court of Appeal applied the MWRF test to Mrs Langford's claim for pension benefits upon the death of Air Commodore Green. Indeed, McCombe LJ dealt with the point simply in a footnote at [54]. Like the Court of Appeal in that case, I am content to proceed on this basis.

67. Lord Wilson explained the operation of the MWRF test in *DA,* at [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 …? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The relationship 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 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."

68. I accept Mr Buttler's submission that the MWRF test is essentially one of proportionality. Leggatt LJ said as much in *R (SC) v. Secretary of State for Work & Pensions* [2019] EWCA Civ 615, at [89] before *DA* was decided. More importantly, Lord Carnwath observed in *DA*, at [118], that the MWRF test was "a means of

allowing the political branches of the constitution an appropriately generous measure of leeway when assessing the proportionality of measures concerning economic and social policy."

69. While the MWRF test plainly accords deference to Parliament's assessment of proportionality, the courts are less deferential in respect of ex post facto justification proffered in support of social policy. In *Brewster,* Lord Kerr said at [50]-[52]:

> "50. But the margin of discretion may, of course, take on a rather different hue when, as here, it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken. In such circumstances, the court's role in conducting a scrupulous examination of the objective justification of the impugned measure becomes more pronounced. An example of this is to be found in *Belfast City Council v. Miss Behavin' Ltd* [2007] 1 W.L.R. 1420, paras 46-47, where Lord Mance asked:
>
> > 'what is the position if a decision-maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the convention? The court is then deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on convention issues. The court's scrutiny is bound to be closer, and the court may... have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider.'
>
> 51. The claimant has submitted that where the decision-maker has not made any judgment, in advance of its decision, about the factors which it later deploys in support of that decision, 'no institutional deference can be due to such post hoc logic.' Ms Mountfield QC … has argued that those factors must be judged on their own terms. They should be given only such weight as their cogency and any supporting evidence warrant. While accepting that such factors could, in principle, attract weight as a result of the particular experience or expertise of the deciding body, she argues that the court should not exercise restraint by virtue of the body's constitutional responsibility for taking the decision, because the factors advanced post hoc did not form any part of the reasoning behind the body's discharge of its function.
>
> 52. I am not prepared to accept this submission without qualification. Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made this will call for a greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

70. Lord Kerr added at [59] and [64]:

> "59. …. Where the state authorities are seen to be applying 'their direct knowledge of their society and its needs' on an ex post facto basis, a rather more enquiring eye may need to be cast on the soundness of the decision ...
>
> 64. Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished."

71. There must, however, be some justification rather than simply an assertion that that is how things have always been done. Indeed, in *JT,* Leggatt LJ observed at [109] that it is not a reasonable foundation for a decision to retain an otherwise unjustifiable rule simply to say "'twas ever thus."

72. Equally, discrimination cannot usually be justified on cost alone. The eradication of discrimination invariably costs money and if cost alone could readily justify discrimination then little progress would be achieved. (See *Woodcock v. Cumbria Primary Care Trust* [2011] I.C.R. 143, at [31]-[32].)

73. Drawing these principles together, the proper approach to this case is as follows:

    73.1 First, it is for the state to put forward its reasons both for the original policy decision and, in so far as it seeks to do so, any further ex post facto justification for such policy.

    73.2 Secondly, the court must consider whether the matters relied upon by the state amount to reasonable justification for the impugned policy.

    73.3 Thirdly, a policy in the fields of welfare benefits and social policy will be justified unless the court is satisfied that it is manifestly without reasonable foundation.

    73.4 Fourthly, in assessing whether such a policy is manifestly without reasonable foundation, the court will differentiate between its approach to the reasons for the original policy decision and any additional arguments subsequently relied upon by the state to justify the policy:

        a) As to the former, considerable deference should be afforded to the conscious decisions of the state in allocating finite resources. As Lord Kerr put it, such decisions are the "stuff of government."

        b) As to the latter, the court should respect the bona fide retrospective judgment of the decision-maker if made within its sphere of expertise. The court can, however, be less reticent in examining matters for itself and, in doing so, may need to cast a more enquiring eye upon the soundness of the policy decision.

73.5 Fifthly, it is not justification simply to retain a rule because that it is how it has always been done.

73.6 Sixthly, cost is not irrelevant. After all, it is the stuff of government to balance competing calls for limited public finances. But the cost of eradicating discrimination will rarely of itself amount to justification.

73.7 Seventhly, the less personal the characteristic relied upon, the less difficult it will be to justify.

Justification in this case

74. As already explained, the Carters accept that they cannot complain about the difference in treatment of post-retirement widows before and after 1978. They accept that Parliament acted rationally in following its usual practice of making changes prospectively to the pension scheme. The focus of the enquiry is therefore on whether the exclusionary rule that applied throughout Mr Carter's police service was always, or at least became, unlawful in that it discriminated against post-retirement widows.

75. Mr Buttler argues that the exclusionary rule had no greater justification than to respond "'twas ever thus." Alternatively, the rule was based on an irrational concern that young women might lure old men to marry them on their deathbeds in order to benefit from widows' pensions. He argues that in so far as the justification was cost, cost alone can never justify discrimination.

76. The defence case was neatly encapsulated by Mr Forshaw's submission that you get what you pay for. This was a defined-benefits scheme in which the level of contributions was assessed from time to time by actuaries in order to ensure that the scheme was properly funded. Further, Mr Bryant points to the alternative justifications identified in the contemporaneous government papers.

77. I do not accept the submission that the justification in this case is no more sophisticated than to say 'twas ever thus. There is no clear evidence as to the original reasons for the exclusionary rule, but there is evidence before me as to the government's analysis of the issues from at least the early 1970s. Such reasoning provided, albeit in the context of considering the case for reform, its contemporaneous justification for the retention of the exclusionary rule. Even if properly viewed as post hoc, I consider that I should respect the bona fide judgment of the government as to the justification for the rule.

78. I accept that the rule cannot easily be justified simply on the basis of concern as to the abuse of deathbed marriages. As the government papers of the day recognised, such concern could be addressed more proportionately by requiring the marriage to have persisted for a minimum period of time before the widow acquired any pension rights. Indeed, that is how regulation 41(7) of the *Police Pensions Regulations 2006* subsequently addressed the issue. While the anecdote of the young "fortune-hunter" luring the old general into a deathbed marriage was referred to by a

backbench MP in light-hearted parliamentary debate in 1973, I do not, however, accept that the contemporaneous justification was solely based upon such concerns.

79. In my judgment, the government's contemporaneous justification for the retention of the exclusionary rule was more complex:

79.1 First, the government recognised that the extension of pension rights to pre-retirement widows would inevitably have a cost and that increased benefits would lead to increased contributions. Accordingly, the government chose to focus first upon the enhancements to terms and conditions sought by the Police Federation and other staff-side representatives of the day.

79.2 Secondly, this case concerns taking a snapshot in time during the post-war evolution of thinking in terms of pensions. Initially, pensions were seen as principally a benefit payable to retired workers. Pensions for members' dependants were somewhat rudimentary at the end of the second world war although social policy developed over the course of Mr Carter's working life as it was increasingly perceived to be important to provide a proper pension for members' widows. Until the 1970s, the prevailing view in government appears, however, to have been that the employer's obligation was to provide for dependants acquired before or during the course of a member's service. This limitation was thought to be particularly appropriate in the case of police and fire officers and military personnel. There were two reasons for this view:

a) A widow's pension was in part compensation for the sacrifices of a life married to a serviceman; for the anti-social hours, weekend shifts and risks of a life in the services.

b) Further, officers in the services retired well before the then state retirement age. They therefore had the opportunity of a second career and, it was thought, it was reasonable for the subsequent employer to provide a pension for the benefit of any subsequently acquired dependants.

80. Cost was therefore a factor. I accept, however, Mr Bryant's argument that it was not the sole factor. This is, as he put it, a case of "cost plus." In any event, the cost was not simply a matter of the cost to the government since enhanced benefits would lead in due course to enhanced contributions. Accordingly, the government was entitled to consider the fact that the Police Federation was not calling for this enhancement and to give greater priority to other improvement in terms and conditions sought by staff-side representatives.

81. In my judgment, it cannot be said that the government's justification for retaining the exclusionary rule was manifestly without reasonable foundation. Accordingly, even if Mrs Carter is entitled to rely on s.3 of the *Human Rights Act 1998*, her claim would in any event fail on the basis that the discrimination against post-retirement widows about which she complains was justified.

82. As is evident from my review of government papers of the day, there came a point in 1973 when the government was persuaded of the case for reform. Plainly social policy is not immutable and inevitably there will be cases, like this, where changing attitudes mean that government no longer supports the continuation of its previous approach to an issue. Mr Buttler's fallback position was therefore to argue that the exclusionary rule could no longer be justified after 1973.

83. I accept that there might come a point beyond which a rule can no longer be justified. I do not, however, accept that the continued operation of a rule becomes unlawful overnight on the basis that the government becomes persuaded of the need for reform. In any event, I am entitled to take judicial notice of the fact that the mid-1970s was a period of intense economic and political crisis:

    83.1 In the midst of an oil crisis, uncontrolled inflation and a strike by the coal miners, the Heath government introduced a three-day week at the beginning of 1974. The government called an election asking the question "Who governs Britain?" The electorate failed to provide a clear answer when the first election of 1974 ended in a hung parliament. A second election was called later that year resulting in a new Labour government.

    83.2 Inflation peaked at over 20% under the Labour government of 1974-9. In 1976, the new Callaghan administration was forced to apply to the International Monetary Fund for a loan of $3.9 billion.

84. It is quite impossible to say, upon the evidence before me and against the proper context of the economic climate of the day, that an exclusionary rule that was justified in 1973 on a basis that was not manifestly without reasonable foundation became unlawful by reason of the failure of government to introduce reforms before 1978.

AGE DISCRIMINATION

(1) THE PCP

85. Mr Buttler argued that a retired officer in his nineties is more likely than an officer in his sixties to have remarried. Accordingly, the exclusionary rule on post-retirement widows was, pursuant to s.19 of the *Equality Act 2010,* indirectly discriminatory in that it applied a provision, criterion or practice (commonly known by discrimination lawyers as a "PCP") which:

    85.1 would put the older officers at a particular disadvantage when compared with the younger cohort; and

    85.2 was not a proportionate means of achieving a legitimate aim.

86. I accept Mr Buttler's submission that the exclusionary rule was a PCP that was applied neutrally to the cases of all officers employed before 1978.

(2) PARTICULAR DISADVANTAGE ON THE GROUNDS OF AGE

87. It is logical to assume that any individual is more likely to have remarried by the age of 90 than by 60. While he did not have data for men born in 1924, Mr Buttler relied on data from the Office of National Statistics ("ONS") that plainly made good this obvious point at least between the ages of 60 and 80 for men born in 1925. It is likely that the same point would hold good at age 90, although this was not formally conceded and Mr Forshaw points out that the mortality rate between ages 80 and 90 is so high that one cannot assume that the proportion of remarried men at age 90 would still exceed those at age 60. I am, however, prepared to assume in Mr Carter's favour that:

    87.1 remarried men fare no less well than their peer group in surviving to 90; and

    87.2 the remarriage rate at 90 might be modestly higher since more men will have been widowed or divorced and some of these men (albeit rather fewer as a percentage than in the case of younger widowers and divorced men) will have remarried by the age of 90.

88. More importantly, Mr Forshaw powerfully demonstrated the flaw in Mr Carter's central argument. This case does not require a comparison between the remarriage rates of men born in the 1920s in their sixties and their nineties. Rather, it requires a comparison between the remarriage rates among men who are now in their nineties with those who are now in their sixties (being the youngest group that could have been in service before 1978). While the likelihood of these younger men having remarried also increases with age, so significant has been the change in the divorce rate between Mr Carter's pre-war generation and the so-called baby boomers with whom he compares himself that the data simply does not support Mr Buttler's argument. I tabulate the core data below where it is available for any particular birth year. I start with 1925, the first year of the ONS data. I then include the data for men born in 1929 (who celebrated their 90th birthday in 2019) and the data for the younger cohort represented by those born in 1950 (who were 69 in 2019), 1954 (who are now 65) and then 1959 (who are now 60):

Year of birth	**Remarriage at age**					
	58	**60**	**65**	**70**	**75**	**80**
1925	10.6%	11.2%	12.4%	13.3%	13.8%	14.2%
1929	11.6%	12.2%	13.3%	14.1%	14.6%	14.9%
1950	23.5%	24.1%	25.2%	-	-	-
1954	23.1%	23.7%	-	-	-	-
1959	21.6%	-	-	-	-	-

89. It will be noted that the rate of remarriage among the younger cohort, even at the age of 58, is significantly higher than the remarriage rate among the older men at age 80. Even allowing for some modest increase in the older men's remarriage rate

by the age of 90, it is evident that the complaint of age discrimination is fatally undermined by the statistical evidence.

90. Recognising the force of this point, Mr Buttler sought to change tack in his submissions in reply:

90.1 First, he suggested that Mr Carter might be able to compare himself with men now in their seventies. While I rejected other technical pleading points, it cannot be open to the Claimants in their submissions in reply to change the comparator. In any event, it doesn't work:

a) We know that 14.2% of men born in 1925 remarried by 80.

b) Men now in their seventies were born between 1940 and 1949. The ONS data shows a remarriage rate among this cohort by age 70 of between 21.7% and at least 25.5%. (I say at least since there is no data for age 70 for men born in 1948 and 1949; however, it is clear from the data that the remarriage rate will not be lower than 25.5%.)

90.2 Secondly, Mr Buttler argued that the PCP discriminates not against the older men who remarried but rather those that had the ability to remarry. In other words, the comparison should be between the relative numbers of men in the two age groups who were widowed or divorced. Again, such late change of case is not open to the Claimants. There is, however, no evidence that it assists Mr Carter:

a) Necessarily all of the men who remarried will first have either been widowed or divorced. Since some widowers and divorcees will not remarry, the number of men in each cohort who had the ability to remarry will therefore be greater than the numbers set out above. There is, however, no evidence to quantify the increase.

b) There is no reason to assume that the number of widowers and divorcees in the older cohort who do not remarry is so much greater than among the younger widowers and divorcees that the position tabulated above would be reversed. Indeed, the significant difference in the rate of remarriage between the two age groups makes such proposition inherently unlikely.

91. Accordingly, Mr Carter has failed to prove that any PCP puts him and other men over the age of ninety at a particular disadvantage. Such conclusion is sufficient to dismiss the age discrimination claim and the question of whether the PCP is a proportionate means of achieving a legitimate aim does not arise.

CONCLUSIONS

92. For these reasons, I dismiss this claim. In doing so, I record my thanks to all counsel for the quality of their very helpful submissions.