



8 February 2017

PRESS SUMMARY

In the matter of an application by Denise Brewster for Judicial Review (Northern Ireland)
[2017] UKSC 8
On appeal from [2013] NICA 54

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Dyson

BACKGROUND TO THE APPEAL

This case concerns a requirement in the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2009 (the “2009 Regulations”) that unmarried co-habiting partners be nominated by their pension scheme member partner in order to be eligible for a survivor's pension. The survivor must also show that he or she has been a cohabitant for two years before the date on which the member sent the nomination and has been in that position for two years before the date of death. There is no similar nomination requirement for married or civil partner survivors. The Department of the Environment of Northern Ireland (DENI) included a nomination requirement in the 2009 Regulations in order to ensure “parity” with other local government pension schemes in Scotland and England and Wales, which at the time had similar requirements.

The appellant, Denise Brewster, lived with her partner, William Leonard McMullan, for around ten years before December 2009. On Christmas Eve that year, they became engaged. Mr McMullan died two days later. At the time of his death, Mr McMullan was employed by Translink, a public transport operator, for whom he had worked for approximately 15 years. Throughout that time he had been a member of, and had paid into, the Local Government Pension Scheme (the scheme). Ms Brewster believes that Mr McMullan had completed a form in which he nominated her to be eligible for a survivor's pension, but the Northern Ireland Local Government Officers' Superannuation Committee (NILGOSC), which administers the scheme, says it did not receive any form. Accordingly, NILGOSC refused to pay her a survivor's pension.

Ms Brewster applied for a judicial review of this decision. The High Court held that the requirement of nomination of a cohabiting partner in the 2009 Regulations was incompatible with article 14 of the European Convention on Human Rights (which prohibits discrimination) read together with article 1 protocol 1 (peaceful enjoyment of possessions) (“A1P1”). The Court of Appeal allowed the respondents' appeal, finding that the nomination requirement was neither unjustified nor disproportionate. In the meantime, prompted by the judgment of the High Court, the equivalent regulations in England and Wales and in Scotland were amended to remove the nomination requirement in those schemes. When the appellant became aware of these changes, she applied to the Court of Appeal for her appeal to be re-opened. Her application was refused and she now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Ms Brewster's appeal and declares that the requirement in the 2009 Regulations that the appellant and Mr McMullan should have made a nomination be disapplied;

and that the appellant is entitled to receive a survivor's pension under the scheme. Lord Kerr gives the judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The parties are agreed that a survivor's pension, as a "possession", falls within the ambit of A1P1 and that the appellant, as a surviving unmarried cohabiting partner, enjoys a relevant status for the purpose of article 14 and is in an analogous situation to a surviving married partner or civil partner [44-47]. The only issue, therefore, is whether the interference with the appellant's right to property has been "objectively justified". The starting point in assessing justification must be the duty of the state under article 14 to "secure" the appellant's right to equal treatment. The duty to secure rights calls for a more proactive role than the requirement to respect rights. The question of justification must be assessed objectively, but the court should not substitute its view for that of the decision-maker, particularly in matters of socio-economic policy [49].

According to DENI, the objective behind the nomination requirement was to establish the existence of a cohabiting relationship equivalent to marriage or civil partnership and identify the wishes of the scheme member [29]. The 2009 Regulations, however, already require a surviving partner to establish that a genuine and subsisting relationship existed, so the nomination requirement adds nothing to this evidential hurdle. The confirmation of the member's wishes has no intrinsic value [31]. Although the status of cohabitation is not an immutable characteristic but a matter of choice, this was not a factor that was considered by the decision-maker [59]. The desirability of establishing a bright-line rule is also of marginal significance in this case, as no thought was given to the possible difficulties with administration that might arise if the nomination procedure was not included and no evidence was produced that it would cause significant problems in administering the scheme, particularly as in England and Wales it is considered that the nomination procedure is not necessary [62]. Given DENI's acceptance that the provision of a survivor benefit engages A1P1 and that the appellant has the requisite status to rely on article 14, the objective behind the nomination requirement must have been to eliminate unwarranted differences of treatment between married or civil partner survivors on the one hand and unmarried long term partners in a stable relationship on the other [34].

When it comes to general measures of economic or social strategy, the court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" [53-55]. 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. 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 [64]. A matter is not immune from review purely on account of coming within the realm of social or economic policy - it must be shown that a real policy choice was at stake. In the present case, not only were socio-economic factors not at the forefront of the decision-making process, but the attempt to justify retention of the procedure was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the appellant's case [65]. There is no rational connection between the objective, which was to remove the difference of treatment between a longstanding cohabitant and a married or civil partner, and the imposition of the nomination requirement and therefore its discriminatory effect cannot be justified [67].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>