

## Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

### Complaint summary

1. Mrs E's complaint is that the suspension or cessation of her widow's pension upon re-marrying or upon co-habiting with an individual as husband and wife infringes upon her rights under the European Convention on Human Rights as incorporated into the domestic law of the UK by the Human Rights Act 1998 as an interference with her family life contrary to Article 8 of the Convention.
2. She also complains that the distinction between widows whose husbands died before, and those of husbands who died on or after 1 April 2008 (who do not lose their widow's pension if they remarry or co-habit with someone), constitutes unlawful discrimination on the ground of age contrary to Article 14 of the Convention

### Summary of the Ombudsman's Determination and reasons

3. The complaint should not be upheld against NHS BSA, because the application and retention of regulation G1 of the NHS Pension Scheme Regulations 1995 (**the 1995 Regulations**) amounts to a proportional means of achieving a legitimate aim. Mrs E's claim of a breach of human rights has failed in this instance.

## Detailed Determination

### Material facts

4. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
5. Since 12 December 2004, Mrs E has been in receipt of a widow's pension following the death of her husband, Dr E, a consultant anaesthetist for the NHS. During Dr E's pensionable service, he was a member of the 1995 Section of the Scheme (**the 1995 Section**).
6. Each year after Mrs E's widows pension commenced NHS BSA wrote to her and provided an information leaflet about the continued payment of the widow's pension. It said that if there had been a change in her circumstances, such as re-marrying, or entering into co-habitation with a partner, she should inform NHS BSA.
7. The 1995 Section is administered in accordance with the NHS Pension Scheme Regulations 1995 (**the 1995 Regulations**), by NHS BSA. Regulation G1 states:

“(1) Subject to the following provisions of this regulation, if a male member dies in the circumstances described in any of regulations G2 to G6 and leaves a surviving widow, the widow shall be entitled to a pension as described in whichever of regulations G2 to G6 applies.

(1A) Paragraphs (2) to (7) apply if a member's pensionable employment ceases before 1st April 2008.

(2) Subject to paragraphs (3) to (5)—

(a) no widow's pension shall be payable in respect of any period during which the widow and a man to whom she is not married are living together as husband and wife; . . .

(b) the widow shall cease to be entitled to a widow's pension if she remarries;

(c) no widow's pension shall be payable in respect of any period during which the widow and a woman who is not her civil partner are living together as if they were civil partners; and

(d) the widow shall cease to be entitled to a widow's pension if she forms a civil partnership.

(2A) Paragraph (2)(c) and (d) shall not apply where the member dies before 5th December 2005.

(3) Nothing in paragraph (2) shall affect any entitlement to a widow's guaranteed minimum pension under this Section of the scheme.

(4) If the Secretary of State is satisfied that the widow will otherwise suffer severe financial hardship, the Secretary of State may pay a pension to a widow who—

(a) has remarried,

(b) has formed a civil partnership,

(c) is living together as husband and wife with a man to whom the widow is not married,

(d) is living together as if in a civil partnership with a woman who is not the widow's civil partner.

(5) If the Secretary of State is satisfied that the widow will otherwise suffer hardship, the Secretary of State may pay a pension to a widow who has—

(a) remarried and that later marriage has come to an end,

(b) formed a civil partnership which has come to an end.

(6) The amount of any pension payable under paragraph (4) or (5) may, at the Secretary of State's discretion, be equal to, or less than, the original widow's pension and the Secretary of State may (subject to any widow's guaranteed minimum pension) vary the amount, or stop paying the pension, at any time."

8. The European Convention on Human Rights (**the ECHR**) states:

"Article 8, right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

...

Article 14, prohibition of discrimination

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."

9. On 2 October 2000, the Human Rights Act 1998 (**the HR Act**) came into force, and incorporated the rights outlined in the ECHR into domestic British law. Rule 6, Acts of

public authorities, of the HR Act states that public authorities cannot act in a way that is incompatible with the ECHR, that is unless that public body is acting in accordance with statute law which cannot be interpreted in such a way to make it compatible..

10. From April 2008, the Department of Health and Social Care (**the DHSC**) proceeded with amendments to the Scheme. Thereafter, a new section of the Scheme was introduced, with an increased contribution rate, for any existing or new NHS employees (**the 2008 Section**). Members of the 1995 Section were also afforded the opportunity to join the 2008 Section.
11. On 22 May 2019, Mrs E emailed NHS BSA and said:-
  - From 10 June 2019, she would begin living with her partner, Mr H. She understood that, under the 1995 Regulations, it was possible that her widow's pension might be suspended. However, the widow's pension was her main source of income.
  - She received a letter in 2007 notifying her that from 1 April 2008 onwards, if a member died, the widow's pension would not be subject to a suspension if they moved in with a partner or remarried. At the time she paid this no mind as she was still grieving the loss of Dr E.
  - There were three reasons as to why the suspension of her widow's pension, due to co-habitation with a partner, under Regulation G1 was unlawful:
    - it interfered in her right to a private and family life by forcing her to decide between living with her partner, or losing her primary source of income;
    - with regards to remarrying, she would be forced to remain unmarried, as should the relationship breakdown, the widow's pension could be re-instated; and
    - the difference between widows who spouses died before or after 1 April 2008 constituted discrimination.
  - The judgment delivered by Knowles J in *Harvey v London Borough of Haringay* [2018] EWHC 2871<sup>1</sup> (**Harvey**) had recently been brought to her attention as permission to appeal the case was granted to the claimant; however, she understood that the claim had since been withdrawn. This case differed to her own circumstances, further it did not deal with the first or second reasons as to why suspending her widow's pension might be unlawful.
  - She did not want to set a precedent in retaining her widow's pension and would not disclose any information should NHS BSA allow her to retain its payment while co-habiting with Mr H.

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<sup>1</sup> Harvey, R (On the Application Of) v London Borough of Haringey & Anor | [2018] EWHC 2871 (Admin) | England and Wales High Court (Administrative Court) | Judgment | Law | CaseMine

12. In response, NHS BSA explained to Mrs E that:-

- The Scheme is a statutory arrangement under HM Revenue and Customs with the 1995 Regulations agreed with, and brought into effect by, Parliament. NHS BSA can only act, and pay benefits to eligible individuals, in accordance with the 1995 Regulations. It was unable to act in any other way that was not compatible with the 1995 Regulations. The 1995 Regulations were not open to interpretation.
- The applicable regulations was G1 of the 1995 Regulations, which made clear that a widow's pension would be suspended upon co-habitation/re-marrying. In Mrs E's case, the suspension was effective from 10 June 2019.
- It appreciated her claim that the implementation of regulation G1 interfered with her private and family life. While the applicable regulation may reflect an attitude that was out of date, the fact that it was not in keeping with the current times did not make it unlawful. Regulation G1 was not intended to deter her from co-habituating or re-marrying, it was simply a condition of the pension when it first came into payment.
- The 1995 Section was a final salary arrangement operated under the principles of mutual assurance. This meant that members and employers jointly funded the benefits to insure themselves of any unforeseen circumstances which included death and ill health. As a whole, the Scheme membership share all potential risks despite individual benefit shares differing from person to person.
- The changes introduced from 1 April 2008 were the result of a review into the partnership between the DHSC, NHS employers and the NHS trade unions. Following a period of consultation, it was determined that the payment of survivors benefits for life was affordable. Consequently, current members of the Schemes had their contributions rates increased to partially pay for the new provisions implemented from 1 April 2008 under the 2008 Section.
- When Dr E was a contributing member of the 1995 Section, he contributed between 5% and 6% of his pensionable salary. Following the newly implemented provisions on 1 April 2008, members of the 2008 Section paid a contribution percentage based on their pensionable earnings. If Dr E contributed to the 2008 Section, on or after 1 April 2008, his contributions would have steadily increased from 7.5% to 14.5%. To apply the changes retrospectively would place a considerable cost onto the current Scheme membership that would be both excessive and unfair.
- After her widow's pension was suspended, when she moved in with Mr H, she was still entitled to the payment of the Guaranteed Minimum Pension (**GMP**) element of the widow's pension. The current annual value of the GMP widow's pension was £2,500.

13. On 22 June 2019, Mrs E emailed NHS BSA and explained that:-

- she accepted a number of the reasons provided in NHS BSA's response. However, by suspending her pension, her private and family life were being interfered with as she was forced to decide between co-habiting with Mr H, or retaining the full value of the widow's pension. So, in her view, regulation G1 infringed upon Article 8 of the ECHR.
- The difference regarding the widow's pensions, before and after 1 April 2008, were discriminatory. This was because it discriminated against older widows as they were more likely to be adversely impacted by the death of their spouse as opposed to the younger widows who would benefit from the changes available on or after 1 April 2008.
- Regulation G1 made a clear difference between co-habiting with a partner, and re-marrying. The way in which it was worded made it sound as though re-marrying would result in the permanent suspension of the widow's pension. Whereas should a partnership breakdown during co-habitation, the widow's pension could be reinstated. NHS BSA should confirm whether her understanding was correct.

14. On 27 August 2019, NHS BSA provided its formal response to Mrs E's complaint and said:-

- It understood that she had inferred that enforcing Regulation G1 interfered with her private/family life, specifically under Article 8 of the ECHR.
- In order for NHS BSA to act in accordance with Article 8, it needed to ensure that:
  - there was a specific regulation that authorised the interference;
  - there was adequate access to the regulation in question; and
  - the regulation had to be specific enough to enable Mrs E to foresee the circumstances in which the law would, or could, be applied.
- NHS BSA believed that as there was sufficient information available, regarding the 1995 Regulations it did not believe that Article 8 had been contravened.
- The funding position of the Scheme was reviewed, during an extensive consultation period. During this time the affordability of the Scheme's dependent's benefits were reviewed. From 1 April 2008, the payment of a dependent/widow's pensions was extended for life upon remarriage, or co-habitation as if civil partners. This meant that, from 1 April 2008, the Scheme membership paid an increased level of contributions to fund this change.
- Regulation G1(4)(5), of the 1995 Regulations provides a widow's pension payable until the dependent remarries. However, if the marriage breaks down, then the widow's pension will resume if it is satisfied that the widow will suffer financial hardship. This regulation would not apply if she did not remarry or enter into a civil partnership.

15. On 6 September 2019, Mrs E asked for her complaint to be considered under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). She said that none of NHS BSA's responses had adequately addressed her queries. She accepted that NHS BSA could only pay benefits to a dependent/s that they were legally entitled to under the 1995 Regulations. However, her main point remained unanswered, which was whether regulation G1 infringed on her right to a private/family life, as made clear by Article 8 of the ECHR.
16. On 29 October 2019, NHS BSA provided its stage one IDRP response and did not uphold Mrs E's complaint. NHS BSA broadly reiterated the information provided in its previous responses to Mrs E. It also said that as the 1995 Regulations were laid down by Parliament they were not open to interpretation and NHS BSA was bound to administer the Scheme accordingly. It understood that Mrs E wished to be covered by the amendments applied on 1 April 2008; however, Dr E had not paid the increased level of contributions that were implemented on 1 April 2008. NHS BSA had no choice but to suspend her widow's pension upon her co-habitation with Mr H.
17. On 4 November 2019, Mrs E asked for her complaint to be considered under stage two of the IDRP. She added that, the provisions contained under the ECHR were incorporated into domestic law through the HR Act. Throughout her complaint she had made it clear that the 1995 Regulations contradicted the rights afforded to her by the ECHR and the HR Act, that is Regulation G1 interfered with her private/personal life. NHS BSA had yet to provide a robust response to this central point. Regulation G1 was also discriminatory, in contrary to Article 14 of the ECHR.
18. On 16 January 2020, NHS BSA provided its stage two IDRP response and said:-
  - It did not agree that the suspension of her widow's pension interfered with her private/family life. While it was correct that the widow's pension would be suspended upon co-habitation or marriage, she was not prevented from moving in with, or marrying, Mr H.
  - She was previously told that she could apply for the continuation of the widow's pension, upon co-habitation or re-marrying, if the suspension would cause her severe financial hardship. If she was suffering financial hardship, she should provide evidence to this effect.
  - Article 14 of the ECHR made clear that an individual could not be discriminated against on any grounds relating to "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status".
  - NHS BSA believed that the extension of Regulation G1 was a proportional means of achieving a legitimate aim and did not breach Article 14 of the ECHR. It had previously explained why there was a distinction between the payment of a widow's pension pre and post 1 April 2008. So, it did not accept Mrs E's claim of discrimination.

### **Mrs E's positions**

19. In suspending her widow's pension, NHS BSA had unlawfully interfered with her right to a family, and or private life, under Article 8 of the ECHR. NHS BSA had misunderstood the nature of Article 8 of the ECHR. The fact that she is not prevented from co-habiting with Mr H does not mean that her right to a family life has not been infringed upon; the test is whether it interferes with her right to respect for her family life. Due to the 1995 Regulations, she is forced to choose between the life she wants with Mr H, and losing her primary source of income which is an interference with her family life.
20. Similarly, Mrs E is also forced to live with Mr H rather than marry him, as if Mr H were to die while they were co-habiting, the widow's pension could become payable again. This was a further interference with her right to a family life by effectively removing the option of marriage due to the potentially permanent financial consequences.
21. The revisions to the widow's pension, implemented on 1 April 2008, amounted to unlawful discrimination. This unfairly affected pre-1 April 2008 widows as they were likely older and more likely to be negatively affected as opposed to their younger counter parts.
22. Regarding the reason of affordability between pre and post 1 April 2008 widows did not stand up to scrutiny. The number of widows whose husbands had died before 1 April 2008, over the course of time, would likely get smaller and smaller. This would therefore become less of a drain on the funding of the Scheme. It is also reasonable to say that the difference between pre and post 1 April 2008 benefits acknowledged that it infringed upon an individual's right to a family.
23. The removal of the widow's pension upon co-habitation, civil partnership, or marriage, was made on the assumption that the partner was able to financially provide for the widow. There was never any guarantee that the partner, could, or would want to support the recipient of a widow's pension.

### **NHS BSA's position**

24. Mrs E was entitled to be considered for the continued payment of a widow's pension upon re-marrying, or cohabitation, if it can be proved that the suspension of the widow's pension would cause severe financial hardship. Mrs E did not provide any proof that the suspension would cause financial hardship, so her widow's pension was suspended. Consequently, NHS BSA has no choice but to act in accordance with the 1995 Regulations and suspend the widow's pension.
25. It did not agree that Mrs E's rights under the ECHR had been infringed upon by implementing Regulation G1. She was still able to co-habitat with, or marry, Mr H. Her widow's pension was suspended from the date she moved in with Mr H. This shows that she was not prevented from moving in with Mr H. Mrs E was also advised that she would lose the right to the widow's pension if she married; however, she is not prevented from marrying Mr H.



26. Nor did it agree that Mrs E was discriminated against under Article 14 of the ECHR. The difference between a widow/widower's entitlement to a benefit pre and post 1 April 2008 was a proportionate means of achieving a legitimate aim.
27. Lifetime spousal/partner pensions were only applicable if a member was in active service after 1 April 2008. This was generally because, under most public service schemes, there was a general presumption against retrospective improvement to previously accrued pensions as the relevant rules/regulations of the Scheme were agreed and reflected by the pension contributions each individual paid.
28. The lifetime spousal/partner pensions, post 1 April 2008, for active members were introduced as a raft of negotiated and costed changes after a review of the Scheme between 2007 and 2008. This included changes to the contribution rates paid by active members of the Scheme which took account of the changes introduced post 1 April 2008. The contribution rates for members pre-1 April 2008 was 5/6%, after this date, the new rates were set between 5 and 8.5% depending upon the level of pensionable pay.
29. Between 2007 and 2008, the Government Actuaries Department (**GAD**) had calculated the cost of disapplying Regulation G1 and making the changes retrospective. However, due to the passage of time this information was no longer available. GAD, upon the request of the Pensions Ombudsman, recalculated the cost of disapplying Regulation G1 as of 1 April 2008 to be £41.8 million. This figure was not indicative of what the cost of disapplying the regulation would be at the current date, as doing so would increase the figure.

### **Preliminary decision**

30. I issued a Preliminary Decision on 6 June 2025. Mrs E did not accept the Preliminary Decision and made further submissions. These are summarised between paragraphs 31 and 36.

### **Summary of Mrs E's comments on the Preliminary Decision**

31. She accepted and did not dispute the effects of implementing Regulations G1(2)(a) and G1(2)(b) in that, for as long as she co-habits with Mr H, or if she chooses to marry Mr H, she is not entitled to a widow's pension. There was also no suggestion that by implementing these regulation that she would suffer any financial hardship thereby requiring the invoking of Regulation G1(4). It was also accepted that NHS BSA had no discretion in how it could, or could not, apply the 1995 Regulations.
32. Her main point of contention was that by applying the relevant regulation and suspending her widow's pension meant that her rights under the ECHR were being violated. In particular:
  - Her right to a family life under Article 8 of the ECHR was infringed upon as she was being made to choose between living with Mr H and losing her widow's pension, or retaining the pension but living apart from Mr H;

- The permanent cessation of her widow's pension upon re-marrying was interfering with her right to a family life as she was forced to live with Mr H, as opposed to marrying him. This was on the basis that if the relationship broke down her widow's pension could be restored; and
- The revisions made to the payment of a widow's pension, pre and post 1 April 2008, via the 2008 Sections introduction, were discriminatory under Article 14 of the ECHR.

33. It appeared that there was an agreement that her right to a family life had been infringed upon due to the implementation of Regulations G1(2)(a) and G1(2)(b), but that it was lawful as the Government had a finite level of resources. It was inferred that the Government had to make difficult choices about the application of any funding. Targeting and applying the finite resources, to pay for a widow's pension only while the recipient remained single, outweighed the severity of an interference on a right to a family life due to the application of Regulation G1. This argument was never advanced by the NHS BSA, as its rebuttal was always that there had been no interference on her right to a family life. NHS BSA believed this was because she was never prevented from living with, or marrying, Mr H.
34. NHS BSA had not provided any evidence of the original rationale, or intention, for retaining Regulations G1(2)(a) and G1(2)(b), for scheme member who died pre-1 April 2008, other than to retrospectively disapplying them would bring about a cost. This was in contrast to the wealth of evidence available to Fordham J in *Green and others v Commissioner of Police of the Metropolis (Secretary of State for the Home Department, interested party)* [2023] 3 All ER 845). With no evidence before her, it was incorrect for the Deputy Pensions Ombudsman to assume that the current justification for the retention of Regulation G1 was any different from the intent of the policy back in 1995. That was, "wives would in the main be supported by their husbands".
35. There also appeared to be agreement that the amendments to the Scheme, and the introduction of the 2008 Section, did result in a difference of treatment to widows whose husbands died before, or after, 1 April 2008. Enough so that Article 14 of the ECHR was applicable. However, it was not agreed that this discrimination was unlawful.
36. She believed that there was a clear way to fund the displaying of Regulation G1 for widows whose husbands died period to 1 April 2008, thereby eliminating any discrimination under Article 14. That was, increasing the contribution rates for existing Scheme members in the 2008 Section. It did not appear that the question had been asked of how much of an increase to contributions rates, for post 1 April 2008 members, would need to be to fund the payment of a widows pension, for widows whose husbands died before 1 April 2008, who were no longer single. Doing so would eliminate any interference of a right to a private/family life without interfering with finite public resources.

## **Ombudsman's Decision**

30. Mrs E's first complaint is that the suspension of her widow's pension from 10 June 2019 (the "**Suspension**") when she started co-habiting with Mr H as husband and wife under Regulation G1 of the 1995 Regulations is an interference with her right to respect for her family life contrary to Article 8 of the ECHR which is unlawful under the HR Act. She submits that she was made to choose between living her life in the way that she would like to, or losing her primary source of income, because of Regulation G1. Her second complaint is similar but in respect of the anticipated cessation of her widow's pension ("**Cessation**") in the event of remarriage. Her third complaint is that the distinction between widows whose husbands died before and those whose husbands died on or after 1 April 2008 (who do not lose their widow's pension if they remarry or co-habit with someone) constitutes discrimination on the ground of age contrary to Article 14 of the ECHR which is also unlawful under HR Act.
31. In accordance with the 1995 Regulations, Mrs E was in receipt of a widow's pension, following the death of her husband, Dr E, the original recipient of the NHS pension. Regulations G1(2)(a) and (b), of the 1995 Regulations, provide that Mrs E is entitled to the continuation of the widow's pension up until the point she remarries or enters a civil partnership in which case the pension terminates, or until she co-habits with an individual as husband and wife or as though they are civil partners, in which case the widow's pension is suspended.
32. In 2019, Mrs E informed NHS BSA that as of the 10 June 2019, she would be moving in with Mr H, her partner. In response, NHS BSA suspended Mrs E's widow's pension, from 10 June 2019; however, it said that she was still eligible to receive the GMP portion of the pension, which at the time, amounted to £2,500 a year. NHS BSA further clarified that if her relationship was to break down, then the widow's pension could be reinstated. It has also said that if after re-marrying, the marriage was to break down, the widow's pension could be re-instated if it is satisfied that Mrs E would suffer severe financial hardship as a result.

## **Legal background**

33. The Pension Schemes Act 1993, section 146(1)(a), provides me with the powers to investigate and determine complaints involving injustice as a consequence of maladministration. Rule 146(1)(c) allows me to investigate and determine disputes of law in relation to an occupational or private pension scheme. Any determination must be made in line with established legal principles and the approach taken by the courts in determining similar issues.
34. Under the HR Act it is unlawful for a public authority to act in a way which is incompatible with the ECHR(section 6 of the HR Act). It is worth setting out section 6 in full:

### **"6. Acts of public authorities**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.”

35. The first issue is to determine whether NHS BSA is a public authority for the purposes of section 6, i.e. a body whose functions are of a public nature within the meaning of section 6(4), and whether the Suspension was a private act within the meaning of section 6(5); if it was a private act, NHS BSA will not be a public authority for the purposes of the Suspension and section 6 will not apply (the “**Public Authority Issue**”).
36. If NHS BSA is a public authority and the Suspension is not a private act, the Suspension will still not be unlawful if NHS BSA was giving effect to or enforcing provisions of, or made under, primary legislation which cannot be read or given effect to in a manner that is compatible with the Convention Rights, including Article 8 (section 6(2)(b) HR Act) (the “**Legislative Requirement Issue**”).
37. If NHS BSA is a public authority in relation to the Suspension and was not giving effect to provisions of or made under primary legislation, the Suspension may be an unlawful act by NHS BSA if it was incompatible with Mrs E’s Convention Rights, including Article 8 (the “**Compatibility Issue**”).
38. Section 7 provides that a victim of any act that they claim is unlawful under the HR Act may rely on their Convention Rights in any legal proceedings provided the

proceedings are brought within one year of the event complained of (in this case, the Suspension) (section 7(1)(b) HRA 98). I consider that a complaint to the Pensions Ombudsman qualifies as proceedings for the purpose of section 7 and note that Mrs E brought her complaint within 12 months of the Suspension. Accordingly, I find that Mrs E can rely on her Convention Rights in relation to her current dispute.

39. I also note that where legislation is incompatible with Convention Rights, a declaration of incompatibility may be made by a court as provided under section 4 HR Act. The Pensions Ombudsman is not empowered under section 4 to make a declaration of incompatibility.

### **Public Authority Issue**

40. Public authorities for the purpose of the HR Act include bodies whose functions are of a public nature and who must comply with Convention Rights when exercising their public functions, but not in respect of acts which are private in nature. There is no test of universal application to determine whether functions are public. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is providing a public service<sup>2</sup> and whether the act is integral to the public function<sup>3</sup>. The fact that the function is amenable to judicial review is an indication as to whether it is a public function but is not determinative. The courts have held that a private care home is not exercising a public function when terminating the placement of local authority placed residents, whereas a registered social landlord is exercising a public function when taking steps to terminate a tenancy for social housing.

41. The following principles were found from these cases<sup>4</sup>:

- The purpose of section 6 is to identify those bodies which are carrying out functions which will engage the responsibility of the United Kingdom before the European Court of Human Rights;
- In conformity with that purpose, a public body is one whose nature is, in a broad sense, governmental;
- A “factor-based approach” should be used having regard to all the features or factors on whether the particular function under consideration is a public function or not, and weigh them in the round; “a number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case”;

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<sup>2</sup> See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1AC 546 and *YL v Birmingham City Council* [2008] 1AC 95.

<sup>3</sup> See *R (on the application of Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)* [2009] EWCA Civ 587 (“**Quadrant Housing**”) (also including a review of the authorities on what is a public function).

<sup>4</sup> See *Quadrant Housing*.

- A broad or generous application of section 6(3)(b) should be adopted;
  - The factors to be taken into account “include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service”;
42. The cases provide further guidance on those factors and how they should be approached (see the review of cases in *Quadrant House*).
43. Although the case law on judicial review may be helpful, it is certainly not determinative (see *Aston Cantlow* and *YL*).
44. Whether a particular act is a private act was considered in both *Aston Cantlow* and *YL*. In *YL* the majority held that the act of moving the Claimant out of the home was a private act. Emphasis was placed on the private source of power in issue, a notice under a contractual tenancy provision being a private act. Reviewing these, it was held in *Quadrant House* that, first, the source of the power will be a relevant factor but not determinative; second, the nature of the activities in issue are important; third, the character of an act is likely to take its colour from the character of the function of which it forms part. For instance, where the act of termination of the tenancy was so bound up with the provision of social housing, once the latter was seen as the exercise of a public function, then acts which are necessarily involved in the Regulation of the function were also held to be public acts.
45. Applying the above to NHS BSA’s suspension of Mrs E’s pension, I note that NHS BSA is an arm’s length body of the Department of Health and Social Care, responsible for providing platforms and delivering services that support the priorities of the NHS, government and local health economies. Its role in relation to the NHS Scheme and Mrs E’s pension was to administer the NHS Scheme, a statutory scheme established under the Superannuation Act 1972 for the provision of benefits to employees of the NHS. Provision of employment-related benefits for persons working in the NHS, whether employed by NHS Trusts or not, can be seen as ancillary to the provision of the NHS’ services which are publicly funded services to the public. The NHS Scheme is itself publicly funded as is NHS BSA. NHS BSA carries out public functions on behalf of the NHS and government and as such it can be seen as engaging the responsibility of the UK government. NHS BSA’s role is to implement the provisions of the NHS Scheme as set out in statutory instruments governing the scheme, in effect implementing government policy. The source of its power in relation to the provision of such pensions and the Suspension is legislation and, in particular, the 1995 Regulations and the Suspension is not therefore a private act for the purpose of the HR Act.
46. For these reasons, I find that NHS BSA is a public authority in respect of the Suspension for the purposes of section 6 of the HR Act.

### **Legislative Requirement Issue**

47. NHS BSA has explained that the 1995 Regulations are laid down by Parliament. It contends that it therefore has no discretion in how the relevant Regulations are to be applied and that the 1995 Regulations are not open to any form of interpretation as they are unambiguous in their nature. This is excepting its discretion in cases of hardship, but Mrs E has not suggested that that provision is engaged.
48. I agree that in suspending Mrs E's pension, NHS BSA was giving effect to Regulation G1 of the 1995 Regulations. The 1995 Regulations are provisions of subordinate legislation made under the Superannuation Act 1972 (i.e. primary legislation) and as such within section 6(2)(b) of the HR Act as provisions "made under" primary legislation.
49. It is worth considering Regulation G1(2)(a) to determine whether for the purposes of section 6(2)(b) it can be "read or given effect in a way which is compatible with the Convention Rights". In doing so I must have regard to section 3 of the HR Act which requires legislation to be read and given effect to in a way which is compatible with Convention Rights so far as it is possible to do so. This is inevitably connected to the issue of whether the Suspension was compatible with Mrs E's Convention Rights, including Article 8, which I consider below. As such, I will approach this at this stage only by considering whether Regulation G1 could be read or given effect to as not requiring the Suspension before considering whether the Suspension was compatible with her Convention Rights.
50. The relevant provision is Regulation G1(2)(a) that states that "no widow's pension shall be payable in respect of any period during which the widow and a man to whom she is not married are living together as husband and wife" (this is subject to other provisions maintaining the guaranteed minimum pension and dealing with hardship). While determining whether two people are living together as man and wife is not always clear, the provision is otherwise unambiguous and mandatory. Mrs E does not dispute that she is co-habiting with or, to use the language of the Regulation, living together with Mr H as man and wife and has done since 10 June 2019 and I do not therefore need to consider this point. I do not see that Regulation G1(2)(a) can be given effect to or complied with except by suspending the pension during any period when Mrs E is living together with a man as husband and wife.
51. As such, I find that NHS BSA was not acting unlawfully in suspending Mrs E's pension as NHS BSA did so to give effect to the provisions of Regulation G1(2)(a) which is a provision of subordinate legislation made under primary legislation, namely the Superannuation Act 1972, which cannot be given effect to or enforced otherwise than by suspending her pension (except as provided under Regulation G1(3) to (5) which are either being given effect to (for her guaranteed minimum pension) or are not engaged (hardship)) and its actions fell within section 6(2)(b) of the HR Act and as such was not unlawful under section 6 of the HR Act.
52. I reach the same conclusion in respect of Mrs E's complaint in respect of her right to marry Mr H, namely that Regulation G1(2)(b) which provides for the termination of her spouse's pension in the event that she remarries (subject to its discretionary

restoration under Regulation G1(4) in the event of hardship) is an interference with her right to respect for family life under Article 8. Absent the conditions for the application of G1(4), Regulation G1(2)(b) provides for the automatic termination of her pension. NHS BSA would have no discretion and is bound to administer the NHS Scheme and Mrs E's benefits in particular in accordance with this provision and, insofar as termination of her pension would be incompatible with her Convention Rights, I do not see that Regulation G1(2)(b) could be given effect or enforced in a manner that was compatible with her Convention Rights.

53. In her comments on my Preliminary Determination, Mrs E accepted the effect of Regulations G1(2)(a) and G1(2)(b) in that, for as long as she co-habits with Mr H, or if she chooses to marry Mr H, she is not entitled to a widow's pension and accepted that NHS BSA had no discretion in how it could, or could not, apply the 1995 Regulations. On this basis, however, it would seem there could be no expectation that I would uphold the complaint since if the actions of NHS BSA are within section 6(2)(b) of the HR Act, they are not unlawful under section 6 and I have no other basis for upholding the complaint.

### **Compatibility Issue**

54. While I have determined that NHS BSA was not acting unlawfully as the Suspension fell within section 6(2)(b) of the HR Act and likewise would not be acting unlawfully in implementing any Cessation under Regulation G1(2)(b) in the event of her remarriage, for completeness, I shall consider whether the Suspension (and Cessation) would otherwise be incompatible with Mrs E's Convention Rights and Article 8 in particular. For convenience, I will refer only to the Suspension, partly as no Cessation has yet occurred.

55. NHS BSA has said that the implementation of Regulation G1 does not in any way prevent Mrs E from actually moving in with, or marrying, Mr H. Regulation G1(4) and (5) also provide that, if it can be proven that the Suspension will result in severe financial hardship, there is discretion for the widow's pension to continue in spite of co-habitation or remarriage. However, Mrs E has not claimed that she will suffer severe financial hardship and the discretions under Regulation G1(4) and (5) are not engaged.

56. Mrs E's position is that her Article 8 right is a right not to have her family life "interfered with" rather than "prevented", and her right to family life is being interfered with if she can only enjoy the family life she wants by giving up her pension for the time being. As framed in her comments on my Preliminary Determination, her right to a family life under Article 8 of the ECHR was infringed upon as she was being made to choose between living with Mr H and losing her widow's pension, or retaining the pension but living apart from Mr H.

### **Article 8 case-law**



57. Article 8 protects the right of an individual to respect for their private and family life, their home and correspondence. While much of the case law on family life has focused on immigration and deportation, there are directly relevant precedents relating to the provision (or non-provision) of benefits under social security schemes or public sector pension schemes that hinge on marital status and cohabitation as well as cases setting down the approach to justification and the public interest exceptions.

58. Article 8 was considered by the Supreme Court in *R (on the application of Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45 (“**Quila**”). While the case concerned immigration rules, it sets out the proportionality test for determining whether a public interest exception under Article 8(2) will be met as follows:

“Article 8.2 allows restrictions of Article 8 in some circumstances:

‘2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Assessing whether Article 8 will be breached requires ascertaining (as per Lord Bingham in *R (Razgar) v SSHD*):

- will the [proposed removal] be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- if so, is such interference in accordance with the law?
- if so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- if so, is such interference proportionate to the legitimate public end sought to be achieved?”

59. *Quila* also provides one of the authorities on the test for proportionality as applied in both Article 8 and Article 14 cases. This was summarised in *Brewster* [2017] UKSC 8 by the Supreme Court as follows:

“The test for the proportionality of interference with a Convention right or, as in this case, the claimed justification for a difference in treatment, is now well settled — see the judgments of Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at para 45, Lord Sumption in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 para 20 and Lord Reed in *Bank Mellat* at para 74. As Lord Reed said,

‘... it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter’.”

60. *Brewster*, although an Article 14 case, is also authority on the approach to be taken in assessing any justification:

“The question whether justification has been demonstrated must be assessed objectively (see *R (SB) v Governors of Denbigh School* [2006] UKHL 15)(...). That is not to say, however, that the court should substitute its view for that of the decision-maker. Indeed, it may be appropriate to accord a wide margin of discretionary judgment to the conclusion of a decision-maker, particularly where it is the legislature that makes the choice and where the conclusion lies within the field of socio-economic policy. (...) 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.”

This is explained by reference to the fact that the court does not have the benefit of the primary decision-maker's opinion so that the court has “no alternative but to strike the balance for itself”.

61. *In re McLaughlin* [2018] [2018] UKSC 48 (**McLaughlin**), the Supreme Court held that a provision of social security legislation that denied Ms McLaughlin a widowed parent's allowance on the basis that she was neither married nor in a civil partnership was incompatible with the Article 8 (and Article 14), finding that the purpose of the allowance was to diminish the financial loss of families with children and that such loss is the same whether or not the parents are married or in a civil partnership. It was held that denial of an allowance on the basis of a person's marital status could be an interference with family life.

62. In *Lennon v The Department for Social Development* [2020] NICA 15 SSA (**Lennon**) the Court of Appeal had to consider the suspension of a widowed parent's allowance under a provision that stated that 'a widowed parent's allowance shall not be payable ... (b) for any period during which the surviving spouse ... and a person of the opposite sex to whom she or he is not married are living together as husband and wife'. The allowance was paid to M while the child lived with her in a single-parent household, suspended when she co-habited with JL and then terminated when she married JL. M applied for judicial review on the basis both of Article 14 and Article 8. The Court of Appeal rejected the appeal and approved the approach of the judge in finding that a single surviving spouse with dependent children, was in an unmistakably and manifestly different situation to M when she was cohabiting and then married to JL and that there was a readily identifiable policy rationale and aim of equitable distribution of finite public funds which justified the provisions which bore 'the hallmarks of rationality, fairness and balance'. The case clarified that, while the ECHR does not require domestic law to provide a widowed parent's allowance, where it does, the entitlement is within the ambit of Article 8. The allowance being within the ambit of Article 8 also means that under Article 14 differential treatment in relation to the payment of the allowance to one person compared to another may give rise to a potential complaint.
63. Contrasting those two cases, I note that while denial of a benefit may fall within the ambit of Article 8 (i.e. as an interference with such rights even if does not prevent such rights), differentiating by reference to the marital status may not be justified (i) where the purpose is to address the financial loss suffered by the family on the death of one of the adults in the family if such financial loss is unaffected by marital status, (ii) whereas suspending or terminating the benefit when the family ceases to be a single-adult family on cohabitation or remarriage may be objectively justifiable as a proportionate way of focussing limited financial resources on the needs of families that lose one of the adults, i.e. it may fall within one of the public interest exceptions in Article 8(2), namely that such limitation is necessary in the interests of the economic well-being of the country.
64. Similar to *McLaughlin* but in the context of pension benefits, it was held in *Langford v Secretary of State for Defence* [2019] 076 PBLR (021) that a scheme rule which provides death benefits to an unmarried partner of a scheme member, but which excludes unmarried partners who are still legally married to another person, amounts to unlawful discrimination which cannot be justified or proportionate. This contrasts with *Green* (discussed below) where the cessation of a survivor pension on remarriage and its suspension on cohabitation was accepted as justified.
65. I also note the case of *Carter v Chief Constable of Essex Police* [2020] EWHC 77 (QB) (**Carter**) (an Article 14 case) where it was argued that the relevant pension scheme provisions discriminated against the widows of post-retirement marriages when compared with those of pre-retirement marriages. Applying the approach summarised in the *Brewster* case, the court held that while suitable deference should

be given to Parliament's assessment of proportionality, less deference should be given to *ex post facto* justifications put forward in support of social policy.

66. The case of *Green and other v Metropolitan Police Department and Secretary of state for Home Department* [2022] EWHC 1286 (**Green**) is very similar to the present. In that case, Fordham J had to determine whether Regulation C9 of the Police Pension Scheme (**the PPS**) which provided for the suspension of a widow's pension upon re-marrying or co-habiting, infringed upon the claimants' Convention Rights. The approach taken in this case, albeit not in relation to Article 8 which was not considered on appeal, was upheld by the Court of Appeal in *Green and others v Commissioner of Police of the Metropolis (Secretary of State for the Home Department, interested party)* [2023] 3 All ER 845 (**Green (CA)**).
67. In *Green*, Fordham J held that Regulation C9 (Cessation), although not a penalty or levy on marriage, constituted a significant interference in the right to respect for family life both in that it caused a direct loss of income because of the cessation of the survivor pension (referred to as "deprivation") and because it could detrimentally affect those who are in receipt of survivor pensions in relation to how they approach relationships by having a chilling effect on the development of those relationships because of the deprivation they might face (referred to as "inhibition"). Consequently, he held that, in the absence of demonstrable proportionality of the interference, the claimants would be victims of an Article 8 breach.
68. Evidence was also provided of the original rationale behind regulation C9 of the PPS as being to "...provide some measure of financial compensation for the loss of financial support that the beneficiary had received from their late husband or wife. So, if the beneficiary remarried or cohabited, the expectation was that they would look to their new spouse or partner for financial support." It was agreed by the parties and accepted by Fordham J, that the provision was outdated and various materials from the House of Commons and government departments were provided to that effect as it perpetuated the idea that "...the wife is, by definition, dependent on her husband and should be provided for unless she remarries and thereby becomes dependent on her new husband." Fordham J therefore had to consider whether retention of a provision that interfered with a Convention Right could be justified notwithstanding that its objective had an outdated rationale.
69. Turning to the issue of Article 8(2) exceptions or proportionate justifications, Fordham J accepted that, in conscious and contemporaneous policy decision-making, the Home Secretary had identified the legitimate objectives of retaining the integrity of clear scheme rules with their design, costing and contribution, and of not revising those rules to enhance pension benefits referable to those whose active scheme membership had ended, declining to depart from an important and coherent policy principle of basic prospectivity (i.e. that legal changes including improvements in rights will be brought in prospectively and not have effect in respect of a period before the change in law). Fordham J concluded that retention of Regulation C9 struck a fair balance because the serious impacts and implications for the claimants (and others) were outweighed by the importance of the objectives pursued, seen in the light of the

economic implications of a retrospective disapplication of Regulation C9 (and its inevitable logic for other pension schemes) and held that the Article 8 claim failed. Despite accepting that the original rationale for retaining Regulation C9 of the PPS no longer applied (as outdated), Fordham J accepted that the Home Secretary had effectively discharged the onus of justifying the retention of Regulation C9.

70. Fordham J said:

“As part of that examination, the questions of human rights compatibility require the Court to ‘zoom out’. The Court has to look at the ‘bigger picture’: what is happening in the retention of Regulation C9 and why, by reference to the factual and legal context, and the wider implications on all sides. Furthermore, the Court is enjoined to approach the issues by reference to objective standards which serve to remind the judicial review judge that they are not the policy maker and pension scheme rule-maker. In my judgment, for the reasons which I have given, there is no human rights violation in this case and the claim must fail.”

71. In reaching his decision, Fordham J considered a number of factors including the following:-

- There can, in principle, be a legitimate justification for retaining a restriction, within a public service pension scheme, despite its original intention being outdated, particularly, when benefits are referable to service and member contributions.
- There was good, relevant, conscious, and contemporaneous policy decision making to reject repealing certain rules.
- What the economic implications of disapplying certain regulations would be. In the PSS case, removing Regulation C9 for all police survivors and reinstating those already surrendered would result in an estimated cost of £198 million.
- As also held in *Harvey* and *Carter*, the cessation of the pension was not a penalty or levy on marriage or cohabitation, nor would it place those affected in poverty.
- That the intrusive aspects of the enforcement of restrictive regulations were a necessary consequence of the design of the applicable scheme rules and does not undermine the justification.
- The retention of the restrictive regulation was a policy choice of an economic and social nature. The Home Secretary has a “latitude” as to the making of the policy choices.

## **Government materials**

72. There is a helpful review of the policy reasons for inclusion of re-marriage restrictions in a House of Commons library paper at Number 0709 issued on 23 April 2019<sup>5</sup>. This references the Government's policy on making changes to public sector schemes in relation to remarriage restrictions. This paper was referred to in the *Green* case by Fordham J. In relation to the Ministry of Defence schemes, it is noted that:

"It has been the long-standing policy of successive Governments that discretionary changes to improve the benefits from public service pensions schemes should be implemented from a current date for future service only. Improvements to pension schemes are not applied retrospectively as to do otherwise would make any worthwhile improvements unaffordable. When scheme modifications are introduced on this basis, active members of the scheme may be given an opportunity to pay for the new benefit to apply to their accrued service, but pensioners and deferred pensioners should receive only those benefits which they earned when they were themselves active members. It would not be possible to make an exception for former Service personnel, as this would require a change for all public service schemes. Such a move would be at great public expense and has been judged unaffordable by successive Governments."

73. It was also noted in relation to Armed Forces Pension Schemes, in February 2014, spokesperson for the former Government, Lord Astor of Haver, said:

"Successive Governments have reviewed pensions for life, but changes cannot be taken in isolation from other public sector schemes, including those for the NHS, teachers, police and the fire service, which have similar rules in place for their older Schemes. It is a fundamental principle, which has been applied by successive Governments, including that of the noble Lord, that public service occupational pension terms should not be improved retrospectively for those who are no longer active members of these pension schemes or for their dependents."

74. The paper confirms that the Government has departed from its general policy in limited circumstances; in relation to police pensions in Northern Ireland, survivors of scheme members of the Royal Ulster Constabulary retain their pension for life.

### **Incompatibility of Suspension and Cessation with Article 8**

75. Mrs E is currently living her life in the way that she wishes by co-habiting with Mr H. However, in doing so, Mrs E has suffered the suspension of the non-GMP element of her widow's pension. Due to the continued application of Regulation G1(2), Mrs E also feels inhibited from marrying Mr H, if she wished to, as this could possibly result in the permanent cessation of the widow's pension. Mrs E has not suggested she would suffer severe financial hardship and Regulation G1(4) and (5) are not engaged or expected to apply.

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<sup>5</sup> Lifetime survivors pensions from public service schemes - House of Commons Library (parliament.uk)

76. When considering the essence of Mrs E's complaint, I note that Regulation G1(2) is similar to Regulation C9 of the PPS, which was held by Fordham J to be a significant interference in the right to respect for family life because it constitutes a deprivation of financial security and because of its inhibiting effect on co-habitation or marriage. Fordham J however proceeded to conclude that it was not an unlawful interference with Article 8 rights as it fell within the exception provided in Article 8 for interference that is "in accordance with the law and (...) necessary for the economic well-being of the country". While the case is very similar I need to approach the analysis independently.
77. Applying the approach set down in *Quila*, I need to consider first whether the Cessation will be an interference by NHS BSA with the exercise of Mrs E's right to respect for her family life and whether such consequences are of such gravity as to potentially engage Article 8. The Suspension is not a levy or a penalty. It does not prevent her enjoying her family life but results in financial consequences from her chosen cohabitation. It is the application of pre-existing conditions in a determinable interest (an interest that automatically ends on the occurrence of a particular event) and not a curtailment or restriction of existing rights: Mrs E's spouse's pension was accrued in respect of Dr E's service as an interest contingent on his prior death while married to Mrs E and determinable on her remarriage and subject to suspension in the event of cohabitation. However, having regard to the decisions in *Lennon* and *Green*, I consider I am bound to determine that it is an interference with Mrs E's Article 8 rights on the basis that the Suspension causes her a loss of income, and the Cessation may do, and because she is required to choose between retaining her full widow's pension under the NHS Scheme and living with Mr H or indeed marrying him (referred to as 'deprivation' and 'inhibition' in *Green*).
78. The key issue is whether such interference is necessary within the terms of Article 8(2) for the economic well-being of the country and whether it is proportionate to the legitimate public end sought to be achieved.
79. For this I must consider the test set down in *Brewster*:
- whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
  - whether the measure is rationally connected to the objective;
  - whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
  - whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.
80. The public end sought to be achieved is a matter to be determined objectively. I take note of the various government documents relating to similar schemes for the police

and the armed forces. However, unlike in *Green*, NHS BSA has not provided any evidence of the original rationale or indeed any current justification for the policy, other than the cost of a retrospective change. I must therefore determine the legitimate public end objectively from the provisions of the 1995 Regulations themselves. I accept the need to “zoom out” as expressed by Fordham J and “look at the ‘bigger picture’: what is happening (...)and why, by reference to the factual and legal context, and the wider implications on all sides” and “to approach the issues by reference to objective standards as I am not the policy maker and pension scheme rule-maker”.

81. The 1995 Regulations provide that eligible employees working in the NHS may accrue benefits in respect of their service and by paying contributions to the NHS Scheme. Pensions under occupational pension schemes have long been recognised as part of the employee’s remuneration package. Through his service and contributions, Dr E earned not only a pension for himself payable for life but also a contingent pension for his wife should he predecease her. As already noted, that pension was not only contingent on his predeceasing her while married to her, it was also a determinable interest in that it automatically terminated if she remarried, and it would be suspended if she cohabited with another man as husband and wife. Widowers and, from 2005, civil partners have been provided for under separate provisions which are not relevant in this case.
82. The public end of providing a spouse’s pension on a basis that it continues only until remarriage or cohabitation seems to me to be to provide a spouse’s pension but at a moderate cost and focussing resources on the period of greatest need. The public end is similar to the public end of providing a widowed parent’s allowance only until cohabitation or remarriage as considered in *McLaughlin* and *Lennon* (although the purpose there was the support of a child). The cost of the benefit is met by the employees, employer and taxpayer and while a spouse’s pension may be a valued benefit for married employees (or those who may hope to marry), it is also necessary to limit the cost of it. Provision of a spouse’s pension reassures employees and their spouses that, insofar as their spouses are wholly or partly dependent on them or even just mutually financially dependent to maintain their lifestyle, their spouse will receive some replacement of the support their income provides on their death when such spouse faces the financial challenges of being in a single adult household. Provision of the pension supports family life by encouraging employees to allow their partners to become financial dependants or to become mutually dependent. That the spouse’s pension will cease to be payable if the surviving partner remarries or cohabits and once again has the benefit of pooling both income and living expenses (and any assets) with another person is consistent with the purpose of the benefit and of cost effectively addressing the impact of the death of the employee or member on their financial dependants (or mutual dependants).
83. I note that in *Green* it was agreed, and some parliamentary and government materials were provided in support, that a similar provision in the PPS was outdated. I am not convinced that Regulation G1(2) is outdated. What may be outdated was limitation of



the benefit to widows to the exclusion of surviving civil partners and unmarried partners, and the reduced provision for widowers; I agree it may be outdated to assume that a woman will be dependent on her husband and will become the dependant of her new partner if she remarries or cohabits. However, I do not see that the financial dependency or mutual financial dependency of couples is a thing of the past. It does not matter whether both parties have an income or not. Losing the income of the deceased employee or pensioner can be expected to impact the survivor. Similarly, as held in *McLaughlin* and *Lennon*, when the survivor starts to cohabit and share living expenses and pooling income (and assets) with a new partner, the loss of the financial support from their deceased partner can be expected to be partially or fully addressed. I do not see that the financial benefit of entering a new relationship is any more a thing of the past than the financial impact of losing a partner that had an income. The hardship provisions are included to address exceptions.

84. In order to enforce Regulation G1(2), when necessary, a level of intrusiveness is required by NHS BSA. To implement Regulation G1(2), when necessary, NHS BSA wrote out to Mrs E, on an annual basis, with an information leaflet about the payment of the widow's pension. Mrs E has said that she was urged to contact NHS BSA if she re-married or co-habited with a partner. In essence, NHS BSA was reliant on Mrs E informing it if there was a change in her circumstances. There was no requirement for an annual declaration to be completed. In essence, NHS BSA relied on Mrs E's truthfulness about her circumstances to implement Regulation G1 and suspend her widow's pension and the intrusiveness of this provision is limited (excepting the deprivation and inhibition impact already mentioned). As held in *Green*, I consider the intrusive aspects of the enforcement Regulation G1(2) were a necessary consequence of the design of the Regulations and do not undermine the justification.
85. I have been provided with evidence that, according to GAD, the cost of disapplying regulation G1(2) retrospectively for survivors of members who died before 1 April 2008 would be £41.8 million.
86. I also acknowledge the points made in *Green* and in the government materials referred to above that if the change were made for the NHS Scheme retrospectively it might need also to be made for other public sector schemes and that to depart from the principle of "prospectivity" in this case may further increase the cost and may affect the economic well-being of the country.
87. Addressing the *Brewster* tests on proportionality:
  - The objective of the Suspension and Cessation provisions in limiting the cost of provision of a spouse's pension and targeting finite resources at dependants when in greatest need is important enough to justify the associated interference with Article 8 in the loss of income on cohabiting or remarrying;
  - The Suspension and Cessation provisions are objectively connected to the objective of providing spouse's pensions at an affordable cost;

- Acknowledging the margin of discretion of government on such matters, I do not see that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
- Again, acknowledging the margin of discretion of government on such matters and balancing the severity of the measure's effects on the rights of Mrs E, i.e. the deprivation of income and inhibition on marrying or cohabiting that she may experience, against the importance of the objective of cost effectively providing survivors' pensions by targeting them at survivors who are single, I consider that the latter outweighs the former or could reasonably be considered to do so.

88. As such, I find that while the Suspension and Cessation are a significant interference with Mrs E's right to respect for family life because it constitutes a deprivation of financial security and because of its inhibiting effect on her co-habitation with Mr H or marriage to him, it was not an unlawful interference with Article 8 rights as it fell within the exception provided in Article 8(2) for interference that is "in accordance with the law and (...) necessary for the economic well-being of the country". I would not uphold Mrs E's first and second complaints.

#### **Article 14 complaint**

89. Mrs E's third complaint is that the distinction between widows whose husbands died before and those whose husbands died on or after 1 April 2008 (who do not lose their widow's pension if they remarry or co-habit with someone) constitutes discrimination on the ground of age contrary to Article 14 of the ECHR which is also unlawful under the HR Act.
90. Regulation G1 was amended with effect from 1 April 2008 to disapply the suspension and cessation rules under Regulations G1(2) to (7) in respect of members who died on or after 1 April 2008. Dr E died in 2004. As such, the suspension and cessation rules in Regulation G1(2) continue to apply to Mrs E whereas they do not apply to the widows of members who died after 1 April 2008 (i.e. who were not widows and not entitled to current spousal pensions at the time of the change).
91. Mrs E asserts that the difference in treatment between widows whose husbands died on or after 1 April 2008 and those whose husbands died before amounts to discrimination that is incompatible with Article 14 because older women are far more likely to be affected by this difference in treatment than younger women. This appears to be on the assumption that older women are more likely to have been married to men who died before 1 April 2008 than younger women, not that older women are more likely to remarry or cohabit after being widowed.
92. NHS BSA does not accept that the amendments to how a widow's pension is payable, pre and post 1 April 2008, amounted to discrimination. It explained that after an extensive consultation period, in addition to a variety of other changes, the affordability of a continued widow's pension upon co-habitation or re-marrying, was reviewed. Thereafter, it was determined that a lifelong widow's pension could be paid, though this would incur a cost to the membership and NHS employers.

93. To facilitate these new changes, the contribution rate for any contributing members of the Scheme, as of 1 April 2008, was increased to 7.5%, eventually increasing up to 14.5% depending upon an individual's pensionable salary. During Dr E's time as a contributing member of the 1995 Section, he paid a contribution rate of between 5% and 6% of his pensionable salary. NHS BSA believes that to retrospectively apply the changes to the widow's pension would place a considerable burden onto the current Scheme membership and NHS employers, that would be both excessive and unfair since the relevant deceased members will not have contributed to the NHS Scheme on that basis.
94. Consequently, NHS BSA submits that the changes implemented on 1 April 2008 were a proportional means of achieving a legitimate aim and did not amount to discrimination.

#### **Article 14 case law**

95. Many of the cases referred to above also address or apply to Article 14 (prohibition on discrimination). This is no accident as Article 14 rights apply in relation to the enjoyment of other Convention Rights but additionally requires them to 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". As such, Article 14 rights can only be asserted in relation to the enjoyment of other Convention Rights. Mrs E's complaint of discrimination relates to a difference in treatment in respect of the suspension or cessation of her pension on cohabitation or remarriage which is a matter that engages her Article 8 right to respect for family life. Having regard to *McLaughlin, Lennon* and *Brewster*, I find this is sufficient to engage her Article 14 rights.
96. I need then to consider whether the difference in treatment is on the ground of an Article 14 "status" or personal characteristic whether the comparators are in an analogous situation and whether the difference in treatment is objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim. The questions may be somewhat interrelated.
97. The question whether justification is demonstrated must be assessed objectively (see *Brewster and R (SB) v Governors of Denbigh School* [2006] UKHL 15 and *Carson v United Kingdom* (2010) 51 EHRR) but the court should not substitute its view for that of the decision-maker and a wide margin of discretionary judgment is to be allowed, particularly where the conclusion lies within the field of socio-economic policy. In *Brewster*, it was accepted that the *Carson* test for justification of a difference of treatment in the context of welfare benefits could also apply in the context of public sector pension schemes so that an objective justification may be established unless it is 'manifestly without reasonable foundation'.
98. *Brewster* is also authority for the principle that "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 that while decisions on social and economic policy are the stuff of government, “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” and the fact that a matter comes within the realm of social or economic policy does not make it immune from review by the courts so that it must be shown that a real policy choice was at stake.

99. The test for proportionality is as referred to above (see para [57 to 59], pages (15 to 16) and requires that I consider (1) whether the objective of the measure is sufficiently important, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used and (4) whether, balancing the severity of the measure's effects on the rights of those to whom it applies against the importance of the objective, the former outweighs the latter.
100. “Other status” has been held to include marital status and cohabitation (see *McLaughlin, Brewster, Lennon, Green*) although that is not the basis relied on by Mrs E and I think a complaint on that basis could not succeed for the same reasons as in *McLaughlin, Lennon and Green*.
101. Age has been accepted as “other status” (see *Carter and Harvey*) but not clearly if it relates solely to the application of a cut-off date for a legislative or policy change, i.e. complaints such as the present that rest on the fact that a right has been introduced or amended with effect from a certain date which has the indirect effect of benefiting older or younger people. In *Gurung* (see below), it was held that, if it does qualify as “other status”, it is a weak basis for an Article 14 claim and a rational date for the selection of the cut-off date will be sufficient for justification.
102. This is explained by Ouseley J in *R (Gurung) v Secretary of State for Defence* [2008] EWHC 1496 (Admin) (**Gurung**) in which the claimants were Gurkhas challenging army pension arrangements. The case was referred to by Knowles J in *Harvey*, in which 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 cohabitants in respect of service after 1 April 2008. This is the case that was referred to by Mrs E and is in some respects very close to the present complaint. In rejecting the complaint in *Harvey*, Knowles J referred to *Gurung* as follows:
- “Gurkha pensions from 1 July 1997 were paid at a rate equivalent to that of other army soldiers; Gurkha pensions under the Gurkha Pension Scheme established in 1949 were paid at a much less favourable rate. The claimants asserted that this amounted to indirect age discrimination, on the basis that (a) Gurkhas with more years of service were disadvantaged; and (b) those Gurkhas would on the whole be older. Ouseley J was not convinced that such an argument gave the claimants any 'other status' for the purposes of Article 14 at all; but if it did, he considered that the matter was correctly approached on the basis that the Secretary of State had a wide margin of discretion; that

the selected date of 1 July 1997 was not irrational; and that the challenge failed accordingly.

He also observed that this type of differentiation between one group and another, based upon a particular cut-off date, was inevitable whenever there was a transition from one welfare scheme to another; and this could not form a strong basis for challenging a decision on social and economic policy:

‘There may be differences of view about whether ‘age’ is a suspect ground for discrimination, requiring a more intense scrutiny, or whether ‘old age’, which is not quite the same, can be. But the grounds of differentiation here, not wholly characterised as those of age, are not suspect grounds. The grounds of difference do not arise because someone is above or below a particular age, but because the introduction of changes which are not directly age related are defined by dates, and years of service. The drawing of lines, by reference to dates, around schemes which help some and not others is an inevitable part of many legislative or policy changes; this is the more so where a past disadvantage or even wrong is being remedied retrospectively. Of course, this means that either the older or the younger will be affected; the date itself will import an indirect differentiation on age grounds. But that is a weak starting point for an assertion of indirect discrimination on age grounds. In any event, if there is a rational basis for the selection of the date as at which the changes are made, that disposes of the Article 14 challenge.’”

### **Mrs E’s Article 14 complaint**

103. Mrs E’s complaint appears to rest entirely on the fact that the cohabitation and remarriage limitations on the widow’s pension in Regulation G1 were removed with effect from a certain date without retrospection. It is an argument of indirect discrimination similar to that dismissed in *Gurung* and *Harvey*, based not truly on her being treated in a particular way because of her age but based on the fact that the disapplication of G1(2) was brought in on 1 April 2008 only for and in respect of members who were alive on that date and therefore not for widows who were already entitled to payment of a widow’s pension under Regulation G1. In effect, the limitations were removed for widows’ pensions that were still contingent on the date of the change but not those that were in payment which continued on their existing terms.
104. NHS BSA has provided justifications by reference to cost. I note from *Green* and Government materials, the principle that changes including improvements to benefits and even removal of provisions which may be seen to have an outdated rationale are conventionally made on a prospective basis. As discussed in *Gurung*, *Harvey* and *Green*, where any discrimination arises only from the fact that changes are brought in on a prospective basis, limited justification is required. Further where the decision is about social and economic policy, a generous margin of appreciation is allowed to national governments (see Lord Hoffman in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29). Reference was also made in *Gurung* to *Neill and*

*Others v UK* (App 56721/00) in which it was observed that “in making provision for the future payment of service pensions to servicemen and to their widows, national authorities are in principle permitted to set conditions governing entitlement to such pensions and, in particular, to restrict such entitlement to those who are still in service at the time of introduction of the new provisions”. In this case, the national authorities restricted them to those who were still alive rather than still in service, but I do not see that that makes a material difference.

105. The amendments implemented with the introduction of the 2008 Section, were the result of a review into the Scheme, subsequently leading into an extended consultation period. As explained in the House of Commons Library research paper similar changes were made to a number of other public sector schemes at or around the same time.
106. Considerable emphasis has been placed by NHS BSA on the fact that Dr E was not an active contributing member of the 1995 Section, prior to 1 April 2008, as he was in receipt of his pension. During the time Dr E was a contributing member, he paid between 5% and 6% of his pensionable salary. NHS BSA has argued that if the amendments brought in by the 2008 Section were applied retrospectively, a considerable cost would be placed upon the active participants of the Scheme. This could also represent a windfall for any individual in receipt of a widow's pension prior to 1 April 2008, as their spouses/partners did not contribute to the fundings of the changes brought in via an increased contribution rate under the 2008 Section. However, this also applied to members who were not in service but were alive on 1 April 2008 so while I accept that Dr E only contributed on the basis of a spouse's pension being payable on a determinable basis under Regulation G1(2), the discrimination claim is not fully answered by what he had paid for or not.
107. I do however accept that there is a justifiable economic aspect that disapplying Regulation G1(2) for all pre-1 April 2008 widows would result in a significant cost to the Scheme, which is a statutory arrangement, funded by member contributions and NHS employers and the taxpayer.
108. In the PPS' case, it was said that disapplying Regulation C9 could result in a notional cost of £198 million. My Adjudicator requested the DHSS to ask GAD to provide some figures for the cost of disapplying the remarriage/co-habitation restriction in the case of the Scheme. The DHSC have instructed GAD to provide this information for them, GAD were unable to locate valuation movement data for spouse pensions that ceased on remarriage between 2008 – 2012 but have provided information for 2012-2016, 2016-2020 and 2020-2024. GAD estimate that the approximate total liability across these years is £41.8 million. In providing this estimate it has been confirmed that GAD have relied on data provided by NHS BSA and have not carried out any independent review of the accuracy of these figures. GAD calculated the approximate ceased liability using the life expectancy assumptions from the 2020 valuation for all dates of cessation. The liability has not been rolled up to the current date and it has been confirmed that allowing for this would increase the figure shown.

109. As also referenced by Lady Asplin in the Court of Appeal in *Green (CA)* at paragraph [80], the analogous remarriage or co-habitation restriction in the PPS was not a provision designed to discourage people from marrying. It must be seen in the context of the fact that public sector pension benefits are part of a bundle of rights referable to the member's pensionable service, and the contributions they made to the PPS. Also, the integrity of the PPS was designed, costed and contributed on that basis and the retention of the regulation was consistent with the principle of making changes to prospective not past benefits. A similar analysis can be applied to the benefits payable under the 1995 Regulations in the Scheme.
110. Having regard to all of the above, I consider that, given the wide margin of discretion allowed to national authorities in such matters as explained in the cases and that it is sufficient that such justification is not "manifestly without reasonable foundation", given the evidence of conscious and contemporaneous decision making, including a consultation period, the cost of retrospectively removing the remarriage and co-habitation restriction, the detailed consideration for the funding requirements that would be put upon the active scheme membership and the general historical government policy of only making discretionary improvements for future benefits together provide a legitimate justification for the retention of Regulations G1(2) to (7) for spouses of members who died before implementation of the change on 1 April 2008.
111. I also consider that the impact on Mrs E's rights was not disproportionate in that (1) the objective of ensuring the affordability of the change, complying with the prospectivity principle and limiting the burden on current members and employers and the taxpayer is sufficiently important, (2) limitation of the change to pensions for members alive at the date of the change is rationally connected to the objective, (3) the measure is not particularly intrusive in that Mrs E's rights were unchanged and (4) balancing the severity of the measure's effects on Mrs E against the importance of the objective, the former outweighs the latter as her complaint is only that the spouses of members dying after the change are treated more generously.
112. As such, I do not consider that the application of Regulation G1(2) to Mrs E when such provision has been disapplied for widows of members of the NHS Scheme who died on or after 1 April 2008 is incompatible with Mrs E's Article 14 rights.

## **Final Conclusion**

113. To summarise my determinations in this case, I find that:

- NHS BSA is a public authority and the suspension of Mrs E's pension, and its potential cessation are not private acts for the purpose of section 6 of the HR Act;
- However, in implementing the suspension of Mrs E's widow's pension for the period of her cohabitation with Mr H, NHS BSA has not acted unlawfully in the terms of section 6 of the HR Act as, if and insofar as such suspension was incompatible with her Article 8 and Article 14 rights, NHS BSA was giving effect to or enforcing a provision made under primary legislation namely Regulation G1(2) of the 1995 Regulations which is made under the Superannuation Act 1972 and which could not be read or given effect to in a compatible way; and
- In any event, the suspension of Mrs E's widow's pension during any period of cohabitation with Mr H and its potential cessation in the event of her remarriage are not incompatible with her rights under Article 8 and the difference in treatment between Mrs E and widows of members who died on or after 1 April 2008 arising from the disapplication of the suspension and cessation provisions in respect of cohabitation and remarriage for such widows is not incompatible with Mrs E's Article 14 rights on the grounds of age, so that NHS BSA is not acting unlawfully under section 6 of the HR Act.

114. I do not uphold Mrs E's complaint.

**Cammilla Barry**

Deputy Pensions Ombudsman

16 July 2025