from influencing the scope of public policy, the significance of this reasoning is that while the case was framed in terms of ordinary domestic torts, the Supreme Court nevertheless recognised that the alleged conduct of foreign states would prima facie breach international *ius cogens* norms.

Belhaj is a remarkable and progressive judgment, not just because of the extensive, if sometimes dense, reasoning on the foreign act of state doctrine, but also because it signals to the UK Government that English courts will not shy away from holding it to account for human rights abuses.

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BREWING UP REASONS

IT is trite law that good reasons must be given to justify infringements of fundamental rights protected by the European Convention on Human Rights, as incorporated into domestic law by the Human Rights Act 1998. But what reasons can one count as good reasons? In *Re Brewster's Application* [2017] UKSC 8; [2017] 1 W.L.R. 519, the United Kingdom Supreme Court addressed the question of how much deference courts should afford to post hoc rationalisations of decisions challenged for non-compliance with the Convention. The answer given by Lord Kerr, with whom Lady Hale, Lord Wilson, Lord Reed and Lord Dyson agreed, is interesting in its own terms and may have implications outside the confines of the Convention.

William McMullen died suddenly. He had been entitled to a government pension. His fiancée and cohabiting survivor, Denise Brewster, was entitled to receive his pension. But she had to have been nominated. And the agency that administers the pension scheme never received a document nominating her. Accordingly, it refused Brewster's Application.

The general tendency in this area has been from opt-in schemes (where the pension holder must actively choose another beneficiary) to opt-out schemes (where those in a close family relationship with the pension holder are presumed to be beneficiaries, subject to the pension holder's right to exclude them) (see Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law. Com. No. 307) (Cm. 7182)). In England and Wales, and Scotland, the nomination requirement has been removed: see now the Local Government Pension Scheme Regulations 2013, SI 2013/2356 and the Local Government Pension Scheme (Scotland) Regulations 2014, SSI 2014/164.

But the nomination requirement was never removed from the relevant Northern Ireland Regulations – the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009, SI 2009/32 – even though, as Lord Kerr explained, it was difficult

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to identify the purpose the requirement served (at [23] and [30]). By contrast, married partners and those in a civil partnership were not subject to the nomination requirement: their entitlement arose automatically (at [36]).

Brewster sought judicial review, alleging on the basis of Article 14 (equal treatment) and Protocol 1, Article 1 (property) of the European Convention on Human Rights, that the nomination requirement for unmarried partners amounted to unlawful discrimination.

Given that the parties agreed that Brewster had a property right under Protocol 1, Article 1 and a protected status under Article 14, the question was whether the discriminatory treatment of unmarried cohabitees relative to those in a more "formal" relationship could be justified. At first instance ([2012] NIQB 85) Treacy J. found in favour of Brewster but the Northern Ireland Court of Appeal reversed on appeal ([2013] NICA 54 (Higgins and Coghlin L.JJ., Girvin L.J. dissenting)).

In allowing Brewster's appeal, the Supreme Court homed in on an important point: in determining whether the admitted infringement of the Convention was justified, which reasons for the infringement could be considered? A review of the legislative and regulatory history drove Lord Kerr to the following conclusion: "The only discernible reason operating at the time the 2009 Regulations were made was that it was considered necessary and/or desirable that they should mirror the provisions in England and Wales" (at [37]).

But a better reason had been proffered, post hoc, in an affidavit prepared by the Department of the Environment for Northern Ireland, which administers the Regulations. According to the Department's affidavit (quoted from by Lord Kerr at [38]), the measures were "designed to establish in a formal manner, the intentions of the deceased about a matter which has testamentary significance", in the context of "cohabiting relationships", which "are different from marriage and civil partnerships insofar as they may be commenced and ended without legal formality and do not involve a change of an individual's legal status". Thus the Regulations represented, in the Department's view, "an appropriate means by which to determine the existence, formality and status of the relationship in addition to obtaining independent verification of the deceased's wishes".

Lord Kerr recognised that, ordinarily, in the "field of socio-economic policy", government authorities have a "wide margin of discretionary judgment" (at [49]). After all, "[w]here 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", for "[d]ecisions on social and economic policy are *par excellence* the stuff of government" (at [64]).

This is not a blank cheque, of course: see *R. (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 A.C. 621, especially at [47]–[58], per Lord Wilson and at [74–77], per Lady Hale. More

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generally, "the margin of discretion may . . . 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" and accordingly "the court's role in conducting a scrupulous examination of the objective justification of the impugned measure becomes more pronounced" (at [50]). Some "respect" should be given even to "retrospective" justifications that are within a decision-maker's "sphere of expertise", but these will be subject to "greater scrutiny" (at [52]).

Viewed in a light appropriate to close judicial scrutiny, the justifications were found wanting. Even the argument that a bright-line rule was necessary to streamline the administration of the scheme was rejected, because "no thought was given to possible difficulties with administration" and no "tangible evidence that there would be significant problems" had been produced (at [62]). It was also notable "that in England and Wales, where a significantly greater number of applications require to be transacted, it is considered that the nomination procedure is not necessary" (at [62]). The respondent here was "motivated solely by the desire to maintain consistency" between Northern Ireland and England and Wales (at [64]). And, in the circumstances, this motivation was insufficient justification for the discriminatory treatment of Brewster.

Care should be taken not to read too much into a one-off case with unusual facts. Nonetheless, two broader points should be made, one about the Convention, the other about the common law.

First, although Lord Kerr cited with approval the views of Lord Mance and Lady Hale in *Belfast City Council v Miss Behavin' Ltd.* [2007] UKSC 19; [2007] 1 W.L.R. 1420 – to the effect that where a decision-maker has not considered a problem its views will be entitled to less weight – he did not go so far as to say, as Lord Mance and Lady Hale there did, that the Court had "no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider" (*Miss Behavin'*, at [47]). Instead, "the attempt to justify retention of the procedure on those grounds was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the appellant's case" (at [65]), such that the nomination requirement was unlawful (at [67]). This is a much more modest approach than that taken in *Miss Behavin'* and, it is submitted, a better approach, because it greatly reduces the risk that a reviewing court will step into the shoes of the front-line decision-maker.

Second, Lord Kerr's reasoning could be embraced in other contexts. Public bodies are increasingly required in judicial review proceedings to justify their actions by providing good reasons for their decisions. But the focus has generally been on whether good reasons exist at the time of the court case, not necessarily at the time the decision was taken.

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Focusing on good rather than contemporaneous reasons can lead to unfairness, if the public body is permitted to bolster its position by including additional reasons in documents filed with the court. Affected individuals might well take the view that, had they been aware of these additional reasons for a decision before it was implemented, they could have advanced counter-arguments that might have convinced the public body to choose a different course of action. Extending Lord Kerr's hard line to other areas would doubtless cause some public bodies to complain of administrative inconvenience. To this one might well respond that good administration would be helped, not hindered, if public bodies were to be given incentives to reach optimal decisions at the first time of asking. Preventing them from brewing up reasons post hoc would be fairer to those affected by their decisions and incentivise effective and efficient administration.

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WHOLE LIFE ORDERS: ARTICLE 3 COMPLIANT AFTER ALL

The exercise of the Secretary of State's power to release from prison a murderer sentenced to a whole life order would be controversial and politically fraught. The Grand Chamber of the European Court of Human Rights' ("ECtHR") succinct summary of the offending leading to the whole life order imposed on the applicant in *Hutchinson v United Kingdom* (57592/08), Judgment of 17 January 2017, demonstrates quite why a Secretary of State would find exercising their compassionate release powers so politically unpalatable: "In October 1983, the applicant broke into a family home, where he stabbed to death a man, his wife and their adult son. He then repeatedly raped their 18-year-old daughter, having first dragged her past her father's body" (at [10]). Yet the power to release life sentence prisoners on compassionate grounds under s. 30 of the Crime (Sentences) Act 1997 has become the fig leaf covering a more fundamental disagreement between the domestic courts and the ECtHR: whether it is possible to commit offences of such gravity that, for the purposes of retribution and deterrence, a person must forfeit their right to liberty for the duration of their life.

In July 2013, the Grand Chamber of the ECtHR had held in *Vinter and others v United Kingdom* (2016) 63 EHRR 1 that the English whole life order was incompatible with Article 3 of the European Convention on Human Rights, which proscribes torture and inhuman and degrading treatment. This followed the Court's earlier decision in *Kafkaris v Cyprus* (2009) 49 EHRR 35 that the imposition of an irreducible life sentence "may raise an issue under Article 3" (at [97]). In *Vinter*, the UK

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