



Neutral Citation Number: [2019] EWHC 1484 (Admin)

Case No: CO/491/2019

**IN THE DIVISIONAL COURT**

**On An Application For Judicial Review**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/06/2019

**Before:**

**LORD JUSTICE COULSON**  
and  
**MR JUSTICE ANDREW BAKER**

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**Between:**

<b>R On the application of ERIC AND JUNE CARTER</b>	<b><u>Claimants</u></b>
<b>- and - CHELMSFORD CROWN COURT</b>	<b><u>Defendant</u></b>
<b>-and- (1) THE CHIEF CONSTABLE OF ESSEX POLICE</b>	<b><u>Interested</u></b>
<b>(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Parties</u></b>

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**Mr Chris Buttler** (instructed by **Slater Gordon**) on behalf of the Claimants  
The Defendant did not appear and was not represented

**Mr Simon Forshaw** (instructed by **Essex Police**) for the First Interested Party  
**Mr Keith Bryant QC** (instructed by the **Government Legal Department**) for the Second Interested Party

Hearing Date: 23<sup>rd</sup> May 2019  
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**Approved Judgment**

## **Lord Justice Coulson :**

### **1 Introduction**

1. This matter came before the Divisional Court on 23 May, after a long and rather tortuous journey. At the end of the hearing, we explained why the underlying appeal in this case was jurisdictionally flawed, and set out directions by which it is hoped that the right issue can be decided by the appropriate court in an efficient manner. However, because there was a point of wider application under the Police Pensions Regulations 1987 (“the Regulations”), we indicated that we would provide the reasons for our decision in writing. That is the purpose of this short judgment.
2. I deal with the issues in the following way. In Section 2 I set out the factual background; in Section 3 I outline the decision of the Crown Court; and in Section 4 I set out the current proceedings for judicial review. Thereafter, in Section 5, I deal with the fundamental issue as to whether this was ever a properly constituted appeal under Regulation H5(1) of the Regulations. In Section 6, I set out the next steps that were, by the end of the hearing on 23 May, the subject of general agreement between the parties and the court.

### **2 The Factual Background**

3. The first claimant, Mr Eric Carter, is plainly a remarkable man. He is a 95-year-old D-Day veteran who saw action at Sword Beach on 6 June 1944. He subsequently became a police officer and has been entitled to a police pension for many years. He married the second claimant, Mrs June Carter, after he had retired. She is now 91.
4. On the face of Regulation C5(3) (and Part IV of Schedule C to the Regulations), in the event that her husband predeceases her, Mrs Carter will not be entitled to a widow’s pension. This is because Mr Carter married her after he retired. A suggestion that this is unfair was taken up on behalf of the Carters with Essex Police, the first interested party. On 2 February 2018, Essex Police wrote to the Carters’ solicitors explaining in detail how and why the Police Pension Scheme did not provide for a pension for Mrs Carter, and resisting the suggestion of unfairness.
5. Those advising the Carters originally brought a claim in the Employment Tribunal (which claim was in fact started prior to the letter of 2 February 2018). Apparently, those proceedings were then stayed and, instead, the Carters lodged a notice of appeal in the Chelmsford Crown Court, pursuant to Regulation H5(1). That and other relevant Regulations are set out in Section 5 below.

### **3 The Decision of the Crown Court**

6. The argument put forward in the Crown Court on behalf of the Carters was to the effect that the Regulations should be ‘read down’ in such a way as to make them compatible with the Human Rights Act (and therefore Convention rights) and/or the EU Framework Directive. It was said that, to act in compliance with either the Convention or the Directive required Regulation C5(3) to be disapplied.
7. The Crown Court hearing took three days. There was live evidence and five lever arch files of material. But at the outset of the hearing, the Crown Court judge (HHJ

Morgan), who was sitting with two lay magistrates, raised as a preliminary issue “whether the appeal procedure as set out in the Regulations was the appropriate procedure, given the discrimination HR issues raised.” There was some argument on this point, Mr Buttler submitting on behalf of the Carters that the hearing should proceed. Although that is what happened, it is quite clear that the judges remained concerned about this critical issue.

8. That disquiet can be seen from their eventual judgment dated 16 November 2018. Having set out how, on their face, the Regulations operated to deny Mrs Carter a pension if her husband should predecease her, the Crown Court deliberately avoided answering what appeared to be the central question. Instead they said:

“Mr Buttler invited us, where we concluded that we had no ‘jurisdiction’ to make such an order, or those considerations...do not make it just to do so, to go on and consider whether to disapply the rule against widow’s pensions for post-retirement spouses pursuant to the Human Rights Act 1998 and/or directive 2000/78/EC.

We decline to do so as we feel (a) that it is beyond the intended ‘jurisdiction’ of an appeal brought pursuant to Regulation H5 and (b) beyond our experience and expertise. As to (a) we are clear that Regulation H5 limits us to considering whether a person has ‘a claim to receive as of right an award’.”

#### **4 Judicial Review Proceedings**

9. The Carters were aggrieved with this result and asked the Crown Court to state a case in order to bring the matter to the Divisional Court as an appeal by way of case stated. The Crown Court refused to do so. Accordingly, these proceedings began as judicial review proceedings arising out of the Crown Court’s refusal to state a case. Permission to bring that claim was refused on paper. However, on 9 April 2019 at an oral hearing, Pepperall J granted the Carters permission to apply for judicial review of the Crown Court’s refusal to state a case.
10. On 18 April 2019, the Crown Court indicated that they did not contest the application for judicial review against its refusal to state a case. In those circumstances, the correct course for the Divisional Court is to proceed directly to determine the appeal by case stated, assuming it has the material before it to be able to do so (for example, as in the present case, because it can treat the judgment of the Crown Court as the case stated) (*see R v Blackfriars Crown Court ex parte Sunworld* [2000] 1 WLR 2102 at 2106F-H).
11. By the time of the hearing of the appeal on 23 May, the Carters were seeking the remission of those parts of the original appeal with which the Crown Court had declined to deal, to a differently constituted Crown Court. But that would only have been appropriate if it could be demonstrated that the matter had been properly before the Crown Court in the first place. In other words, if this had never been a properly constituted appeal under Regulation H5(1), there was nothing to remit to the Crown Court.

#### **5 Was This An H5(1) Appeal?**

12. Part H of the Regulations is headed ‘Appeals and Medical Questions’. Regulation H1 is headed ‘Reference of Medical Questions’ and provides:
- “(1) Subject as hearing after provided, the question whether a person is entitled to any and if so what awards under these Regulations shall be determined in the first instance by the Police Pension Authority.
- (2) Where the Police Pension Authority are considering whether a person is permanently disabled, they shall refer for a decision to a duly qualified medical practitioner selected by them the following questions –
- (a) whether a person concerned is disabled;
- (b) whether the disablement is likely to be permanent; ...”
13. Regulation H5 is entitled ‘Appeal by a member of a home police force’. The relevant paragraph reads:
- “(1) Where a member of a home police force, or a person claiming an award in respect of such a member, is aggrieved by the refusal of the Police Pension Authority to admit a claim to receive as of right an award or a larger award than that granted or by a decision of the police pension authority as to whether a refusal to accept medical treatment is reasonable for the purposes of regulation A12(1A) or by the forfeiture under regulation K5 by the pension supervising authority of any award granted to or in respect of such a member, he may, subject to Regulation H7, appeal to the Crown Court and that court, after inquiring into the case, may make such order in the matter as appears to it to be just.”
14. Before considering whether or not Mr and Mrs Carter fall within these provisions, it is first necessary to analyse more generally which (if either) of them has a claim and, if so, the precise nature of that claim.
15. Our first conclusion was that any claim in this case can be that of Mrs Carter only. Although Mr Buttler made a number of references to Mr Carter’s claim, on analysis he has no claim at all. He has received his full pension entitlement throughout his well-earned retirement. To use the language of Regulation H5(1), the Police Pension Authority has always ‘admitted his claim as of right’. I consider that this starting-point, which does not appear to have been previously identified, should have been made clear from the outset.
16. Any claim is therefore a claim by Mrs Carter only. It is her claim that, if her husband predeceases her, she should be entitled to a widow’s pension.
17. The next question is the precise nature of her claim. It seems clear that it is a contingent claim. Happily, it is not a claim that has yet arisen. It may never arise. It will only arise at some point in the future if Mr Carter predeceases his wife. It is therefore a contingent claim and no more.
18. Of course, such claims are well-known to the law. The mere fact that the claim has not yet crystallised (and may not ever crystallise) does not of itself prevent the party concerned from seeking redress in the courts. The usual way in which a contingent

claim is formulated is by way of a claim for declaratory relief pursuant to CPR Part 8 or, if there is going to be disputed evidence, CPR Part 7.

19. In addition, Parts 7 or 8 suggest themselves as the obvious procedure to adopt in a case like this. That is despite the fact that Mr Carter was an office holder, rather than an employee (see *Attorney-General for New South Wales v Perpetual Trustee Co* [1955] 2 WLR 707), so that his benefits arose by way of statutory instrument rather than contract (see by analogy *Booth v Oldham MBC* [2009] EWCA Civ 880 at para 23(i)).
20. For that reason, and contrary to the submissions of Mr Buttler (and the tentative view of the Crown Court), it does not seem to us that judicial review would have been an appropriate course. There is a clear and obvious remedy here, namely the ordinary claim for a declaration referred to above. Judicial review is generally only granted if there is no other remedy available.
21. For those reasons, therefore, I am firmly of the view that Mrs Carter's contingent claim could and should have been the subject of a straightforward claim for declaratory relief under Parts 7 or 8 of the CPR.
22. The next question is whether, despite the availability of that remedy, Mrs Carter was obliged or at least entitled to pursue an alternative remedy under the Regulations, and Regulation H5(1) in particular?
23. She was plainly not obliged to do so. That is apparent from the wording of Regulation H5(1), which states that a person with a claim "may" appeal to the Crown Court. The option, even if it were available, is not therefore mandatory.
24. The final question is whether, even if it was not mandatory, Mrs Carter was entitled to make a claim under Regulation H5(1). For the reasons outlined below, I do not think that she was.
25. The wording of Regulation H5(1) is restrictive. It does not allow an aggrieved party to appeal to the Crown Court in relation to any decision by the Police Pension Authority. If that were the case, it would simply say so. On the contrary, it carefully restricts the circumstances in which such an appeal can be made to a) a refusal to admit a claim as of right; b) a refusal to admit a claim to a larger award than that granted; c) a decision as to whether a refusal to accept medical treatment is reasonable and d) forfeiture of any award. Mrs Carter's contingent claim cannot on any view fall within b)-d). So does it fall within a) (ie does she have a claim as of right to an award)?
26. The whole appeal process under Part H, starting at Regulation H1, is concerned with "the question whether a person *is entitled* to any, and if so, what awards ..." (emphasis supplied). As we have seen, as things currently stand, Mrs Carter is not presently entitled to any award, even on her own case. She is not, nor is she claiming to be, "a person [who] is entitled" to an award. A person who may be entitled to an award in the future, on the happening of other events, does not fall within the rubric of H1(1).

27. Similarly, by reference to the words in Regulation H5(1), Mrs Carter is not someone with a claim to receive “as of right an award”. She has a contingent claim which may or may not crystallise in the future.
28. This analysis is borne out by a wider consideration of the Regulations. They deal in detail with the rights of widows. Happily, Mrs Carter is not a widow. So again her contingent claim, which only arises when and if she becomes a widow, is outside the scope of the Regulations.
29. For these reasons, therefore, it seems clear that the limited appeal mechanism identified in Regulation H5(1) would not include contingent claims such as that made on behalf of Mrs Carter. Furthermore, that should not come as a surprise. The appeal process set out in Regulation H5(1) is clearly designed to be a quick and straightforward process, dealing with black-and-white questions of entitlement as of right, or errors in computation. It is not designed to deal with contingent claims of the sort that arise here, which may themselves fall outside the expertise of the Crown Court in any event.
30. These conclusions bring us back to the judgment of the Crown Court in this case. Although perhaps not articulated in the way that a civil lawyer might do it, it was clear from the outset of the hearing that the judges were troubled as to whether they had the jurisdiction to deal with the sorts of points that were being raised on behalf of the Carters. For the reasons given, I consider that they were right to harbour those concerns: on a proper analysis, this claim should not have been brought before the Crown Court under Regulation H5(1).

## **6 The Next Steps**

31. It follows from the reasoning set out in Section 5 above that this court cannot remit the appeal to the Crown Court. The Crown Court never had the jurisdiction to deal with it in the first place.
32. However, as we made plain, we were anxious not simply to dismiss the claim and force the Carters to start all over again. This is an unusual case and we are alive to the background circumstances. In the end, following a helpful discussion with counsel, we agreed on the following solution.
33. The case would be transferred to a single judge of the QB, to be treated as if it was a claim commenced under Part 8. The findings of fact in the Crown Court judgment will be treated as binding. The parties will exchange full skeleton arguments dealing not only with the law but with all matters of fact on which each side rely, and the weight to be given to such facts as are relied on. There will be a period of 21 days between the service of the skeleton argument on behalf of Mrs Carter and those of the two interested parties, who are now properly defendants to Mrs Carter’s claim. It will be important for the skeleton served on behalf of Mrs Carter to identify with precision the precise relief sought.
34. It was agreed that, whilst Essex Police would have the burden of most of the response to Mrs Carter’s claim, the issues of justification arising out of article 14 and the Framework Directive (which are the same or very similar) would be dealt with by the Secretary of State. There would be no overlap between the two: the Secretary of State

would deal only with the justification aspects of the claim and Essex Police would deal with all of the others.

35. It was agreed that one day's pre reading would be specified, and the hearing would be fixed for two days, in the hope and expectation that the actual hearing itself would be finished by lunchtime on the second day.
36. Points were raised as to costs. Insofar as the parties have informally agreed to stay particular arguments about the costs in the Crown Court, that informal stay should be maintained. In relation to certain costs that are currently live before the Crown Court (which related to those aspects of the claim which were withdrawn or dismissed), we considered that it would be inappropriate for us to make any order, save to invite the parties to inform the Crown Court of the result of the hearing on 23 May and, if appropriate, this judgment.

**Mr Justice Andrew Baker :**

37. I agree.