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Judgment: approved by the Court for handing down | *Delivered:* **19/4/21**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Norma Mitchell

Plaintiff;

and

The Defence Council

and

Secretary of State for Defence

Defendants.

Master Bell

INTRODUCTION

[1] Norma Mitchell and Robert Maynard lived together for 30 years. They lived in a property on which they held a joint mortgage. There they raised their two children. They had two joint bank accounts from which they paid their bills. Mr Maynard served some 22 years with the Royal Irish Rangers and latterly with the Ulster Signals Regiment. When Mr Maynard died in March 2016, and was by then in receipt of his pension, Ms Mitchell wrote to the Armed Forces Pension Scheme asking to be considered as the full beneficiary of Mr Maynard's pension.

[2] The Ministry of Defence replied to her on 13 April 2016 stating that unfortunately there was no provision within the Reserve Forces Non-Regular

Permanent Staff (Pension and Attributed Benefits Schemes) Regulations 2011 (hereafter "the Regulations") to award family pension benefits to anyone other than a surviving spouse or a civil partner. In effect the Ministry of Defence said that she could not benefit because she had not been married to Mr Maynard, but rather had only cohabited with him.

[3] In 2018 Ms Mitchell issued a writ in which she sought the following relief:

> "(1) A declaration that the failure of the defendants to make provision for the payment of a survivor's pension to her under the Regulation discriminates against her, and continues to discriminate against her, under article 14 of the European Convention on Human Rights taken in conjunction with article 1 of the First Protocol to the ECHR and/or article 8 of the ECHR;
>
> (2) Damages under section 8 of the Human Rights Act 1998 to compensate her for the continuing unlawful act of failing to make such provision from and after the date of Mr Maynard's death on 3 March 2016."

[4] The defendants have now filed an application for an order:

> "(1) Striking out the statement of claim under Order 18 Rule 19 of the Rules of the Court of Judicature on the ground that it fails to disclose any reasonable cause of action against the defendant and/or it is an abuse of the process of the court;
>
> (2) Staying the proceedings, pursuant to the inherent jurisdiction of the court, as vexatious or an abuse of the court's process."

[5] Mr Sayers appeared on behalf of Ms Mitchell, instructed by the Northern Ireland Human Rights Commission. Mr Egan appeared for the defendants, instructed by the Crown Solicitor. I am grateful to both counsel for their oral submissions and their multiple written submissions.

[6] The issue before me is not the issue of whether Ms Mitchell is entitled to Mr Maynard's pension. Rather, the issue before this court is whether the court should strike out her claim under Order 18 Rule 19 of the Rules because it is unarguable or almost incontestably bad. In particular, the defendants assert that she has breached a legal rule known as the Exclusivity Rule which was established by the House of Lords decision in *O'Reilly v Mackman* [1983] 2 AC 237. This rule prevents litigation from proceeding as an ordinary civil action when its essence is that the claimant is seeking to establish that a

decision by a public authority infringed rights to which they were entitled under public law and the litigation ought therefore to have proceeded by way of judicial review. This is not an inconsequential point. If the defendants are correct in their argument that the case ought to have proceeded as a judicial review then Ms Mitchell requires the leave of the court before an application can be made and her application ought to have been made promptly, and in any event within three months unless the court considers that there is a good reason to extend time.

[7] The defendants' application was one of those applications where, once the initial written submissions were filed, the positions of the parties evolved, requiring new supplementary submissions and then further supplementary submissions. Indeed, over a period of almost 11 months, the parties between them filed a total of 8 different skeleton arguments. The final position of the application was therefore inevitably significantly different from its initial incarnation. The defendants characterise this evolution as "a tactical recasting of the plaintiff's case in an attempt to avoid the fact that this claim is now, and always has been, a challenge to allegedly discriminatory statutory provisions." I would not be so critical of the evolution which took place. As Wilcox J observed, albeit in a very different context, in *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd; Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2005] EWHC 2101 (TCC)

> "The pleadings will continue to evolve and the issues be refined up to the time of trial."

This is the civil litigation process as it is designed to operate. A plaintiff serves a statement of claim. If matters are unclear then the defendant issues a Notice for Further and Better Particulars seeking appropriate clarity. If there are portions of the statement of claim which are unsupported by medical evidence, or are otherwise unstainable, then they are attacked by the normal procedural means and either the plaintiff agrees to amend his or her pleadings or the court strikes them out. As a result of this process the issues between the parties are narrowed and the scope of a future trial can be focused and limited to the disputed issues. This evolution of the issues between the parties which require to be decided upon at trial is therefore at the heart of the litigation process and is highly desirable both for the minimisation of the parties' costs and the efficient use of court time.

THE DECLARATION ISSUE

[8] The defendants began by attacking the application for a declaration. They contended that it was an abuse of process to apply for a declaration in proceedings begun by Writ rather than by using the judicial review procedure laid down in Order 53 of the Rules.

[9] In my view the application for a declaration served as a lightning rod attracting an application that these were "judicial review proceedings in disguise". Such an application may ultimately have been made by the defendants even in the absence of Ms Mitchell seeking a declaration, but the inclusion of the reference to a declaration made such an application almost inevitable. In the defendants' first skeleton argument they, not unreasonably, characterised the plaintiff's action as seeking to establish the alleged unlawfulness of certain provisions of the pension scheme.

[10] As a result of this challenge to the terms of the Writ and the statement of claim, the plaintiff eventually submitted:

> "Moreover the declaration claimed in the prayer of the statement of claim was not for a declaration that the Regulations were unlawful, but that the failure of the defendants to make provision for her by regulations amounted to unlawful discrimination against her. None of this is acknowledged by the defendants. In any event the declaration sought in the statement of claim is not a necessary or essential part of the plaintiff's claim. A 'finding' by the court (qualitatively similar to a finding of negligence) is all that is required. The plaintiff is therefore amending her statement of claim to delete it from the prayer thereof."

[11] Although, following this concession, a formal amended statement of claim has, I understand, not yet been served, I agree that it should be and I direct that the amendment should be served within 28 days of the issue of this judgment.

[12] Does Ms Mitchell's concession resolve the difficulty which the defendant has highlighted? An answer to this question requires an exploration of the Exclusivity Rule and its application.

THE EXCLUSIVITY RULE

[13] As I have indicated, the defendants' core submission in this application is that the plaintiff is not entitled to sue because of the legal rule known as the Exclusivity Rule. This rule finds its origin in the decision of the House of Lords in the case of *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237. In that case the plaintiffs were all prisoners who had been charged with disciplinary offences before the prison's board of visitors. The offences were proved to the satisfaction of the board. The plaintiffs then litigated in the High Court. Three plaintiffs alleged in Queen's Bench proceedings that, *inter alia*, the board had acted in breach of the rules of natural justice. The fourth

alleged in Chancery proceedings that there had been bias. Each of the four plaintiffs sought a declaration that the board's adjudication was void. In each of the cases the defendants applied to strike out the proceedings but those applications were initially dismissed. However the Court of Appeal reversed that decision and struck out the plaintiffs' proceedings on the grounds that they were an abuse of process and that the plaintiffs' only proper remedy was by way of judicial review under Order 53. With his customary clarity, Lord Denning said:

> "In modern times we have come to recognise two separate fields of law: one of private law, the other of public law. Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-à-vis public authorities. … Now that judicial review is available to give every kind of remedy, I think it should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty. … If a plaintiff should bring an action - instead of judicial review - and the defendant feels that leave would never have been granted under R.S.C., Ord. 53, then he can apply to the court to strike it out as being an abuse of the process of the courts. It is an abuse to go back to the old machinery instead of using the new streamlined machinery. It is an abuse to go by action when he would never have been granted leave to go for judicial review."

[14] The House of Lords subsequently dismissed the plaintiffs' appeals against the Court of Appeal's decision. It held that, since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiffs were void, it would be an abuse of process to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals.

[15] Lord Diplock said:

> "…. it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary

> action and by this means to evade the provisions of Ord 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis: a process that your Lordships will be continuing in the next case in which judgment is to be delivered today (see *Cocks v Thanet DC* [1982] 3 All ER 1135)."

[16] *Cocks v Thanet District Council* [1982] 3 All ER 1135 was a case where the plaintiff had applied to the council, the local housing authority, for permanent accommodation for himself and his family. The council provided temporary accommodation until December 1981. The plaintiff then commenced civil proceedings in the County Court for a declaration that the council was in breach of its duty to house him permanently, and for damages. The case was removed to the High Court for determination of a preliminary issue as to whether the plaintiff was entitled to proceed with his claim in the County Court or should instead proceed by way of application for judicial review. The judge held that the plaintiff was entitled to proceed with his claim in the County Court. Thanet District Council appealed directly to the House of Lords. Their Lordships allowed the appeal, holding that as a general rule it would be contrary to public policy and an abuse of process to allow a person to proceed by way of an ordinary action in order to establish that a public authority's decision had infringed rights entitled to protection under public law.

[17] Lord Bridge, delivering the leading speech, applied the principles expounded by Lord Diplock in *O'Reilly v Mackman* but did note:

> "As Lord Diplock has observed in *O'Reilly's* case, the validity of a public law decision may come into question collaterally in an ordinary action. In such a case the issue would have to be decided by the High Court or the county court trying the action, as the case might be."

[18] In *Lonrho plc v Tebbit* (1991) 4 All ER 973 Sir Nicolas Browne-Wilkinson was invited to strike out the plaintiff's claims on the basis that the claims

related to public duties and should therefore have been brought by way of judicial review. He held:

> "But in my judgment *O'Reilly v Mackman* does not establish that in every action where the validity of the exercise of the statutory power is challenged it is an abuse of the process of the court not to proceed by way of judicial review. In *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1134, [1983] 2 AC 237 at 285 Lord Diplock made it clear that the House was not laying down categories of cases in which it would always be an abuse of process. Moreover Lord Diplock expressly refers to possible exceptions in cases where 'the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law'. In *Cocks v Thanet DC* [1982] 3 All ER 1135, [1983] 2 AC 286 the House held that the *O'Reilly v Mackman* principle in general applied where the plaintiff's cause of action for breach of one statutory duty depended upon the plaintiff first setting aside an earlier decision made under statutory powers. But Lord Bridge again drew attention to the exceptional case where the validity of a decision in public law may come into question collaterally in an ordinary action (see [1982] 3 All ER 1135 at 1140, [1983] 2 AC 286 at 295).
>
> The question therefore is whether this action falls within the general principle or within the exception to the principle. In my judgment it falls within the exception. The essence of the claim is for breach of a private law right, ie a claim in negligence. The requirement to show that the negligent act complained of was ultra vires is not purely collateral, but it is only one ingredient in the cause of action. For the rest, the case is wholly appropriate for decision in the ordinary courts and not in the Crown Office list. If it were to be held that the defendants' actions were ultra vires, that decision would not have any general retrospective effect on the public administration—a factor of great importance in requiring that public law matters should in general be ventilated by way of the speedy process of judicial review with its tight timetable. Moreover, to strike out the claim on this ground and require the case to be brought by way of judicial review would in all probability lock out Lonrho from the remedy in damages it seeks. Lonrho is long out of time to bring proceedings under RSC Ord 53. Such proceedings could not now be brought without leave and unless leave were given the power to award damages under Ord 53, r 7 would not be exercisable. This is a point which weighed with the House of Lords

> in *Davy v Spelthorne DC* [1983] 3 All ER 278 at 284, 286, [1984) AC 262 at 274, 277 per Lord Fraser and Lord Wilberforce. Moreover, Lonrho says it was not aware of the facts on which it seeks to found its present claim until long after the time for bringing proceedings by way of judicial review had expired.
>
> In all the circumstances I reach the conclusion that it would not be right to characterise the bringing of these proceedings in the ordinary courts as an abuse of the process of the court and I decline to strike out the claim on this ground also."

THE DEFENDANT'S SUBMISSIONS

[19] The defendants submit that Ms Mitchell's proceedings seek to establish in a writ action the alleged unlawfulness of certain provisions of the pension scheme. They submit that the plaintiff has therefore raised in her action an issue of pure public law. The effect of her challenge is not limited to her alone but has significant collateral consequences for anyone with the same status who has cohabited with a member of the scheme at the time of the member's death. They argue that the relief claimed can and should be sought in an application for judicial review and that it is contrary to public policy and an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which she was entitled to protection under public law to proceed by way of ordinary action and by that means to avoid the provisions of Order 53. As I have previously indicated, those protections include the requirement to obtain the leave of the court before any application for judicial review is made and that applications for leave must be made promptly and in any event within three months unless the court considers that there is a good reason to extend time.

[20] The defendants submit that the Exclusivity Rule has been consistently considered and applied since its articulation in *O'Reilly v Mackman* and point to two recent examples of this in *Trim v North Dorset District Council of Norden* [2010] EWCA Civ 1446 and *Beadle v Revenue and Customs Commissioners* [2019] UKUT 101 (TCC).

[21] *Trim v North Dorset District Council of Norden* arose in a planning context where the plaintiff sought a declaration that the breach of planning notice served on him had been so long after the alleged breach that his failure to comply was in fact lawful.

[22] Lord Justice Carnwath, giving the judgment of the court, said:

> "The main issue in the present case turns on the effect of the so-called exclusivity principle, established in *O'Reilly v*

Mackman [1983] 2 AC 237: that is, that in general it is an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. Among the factors leading to this conclusion was the streamlined procedure by then available for judicial review, the requirement for leave, and the short time-limit (normally three months) for commencing proceedings. Lord Diplock said:

> "The public interest in administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision." (p 281A, see also p 284E)

Subsequent experience has shown that a clear division between public and private law is often difficult to maintain, and the rigidity of the rule has had to be relaxed accordingly. *Wade and Forsyth Administrative Law* 10th Ed p 570-81 gives a valuable description of this evolutionary process, leading to the emergence of "signs of liberality", and to some abatement of the "rigours of exclusivity" under the new Civil Procedure Rules. A particular area of difficulty was in relation to private law disputes involving public authorities, for example employment and contractual relations (*ibid* p572). In *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624, the scope for relaxation of the rule was acknowledged by the House of Lords, when they accepted that private law rights could be enforced by civil action, even though they might involve a challenge to a public law decision or action (*ibid* p578).

De Smith's Judicial Review 6th Ed para 3-097 contains a similar account, suggesting that a "new approach" is required following the replacement in 2002 of Order 53 by the new CPR 54:

> "What matters under the CPR regime is not the mode of commencement of proceedings but whether the choice of procedure may have a material effect on the outcome."

Cases such as *Clark v University of Lincolnshire* [2000] 1 WLR 1988 (a case involving an alleged breach of contractual relationship with a public authority) are cited to support the proposition that the courts should avoid "sterile and expensive procedural disputes which may be of no practical significance to the outcome of the case" (para 3-103). There is a discussion to similar effect in the

White Book (para 54.3.2: "Distinction between public and private law").

> The problems described in those passages arose principally from cases in which private and public law principles overlapped (see *De Smith* para 3-102). I do not read them as seeking to undermine the principles that purely public acts should be challenged by judicial review, and that it is in the public interest that the legality of the formal acts of a public authority should be established without delay. The latter is confirmed by the retention in CPR 54 of the requirement that an application to bring judicial review proceedings must be made promptly, and in any event within three months. This principle is not undermined by the fact that it is subject to the general power to extend time-limits (CPR3.1(2)(a)), the exercise of which is itself governed by well-established principles (see 2010 White Book para 3.1.2, 54.5.1)."

[23] Lord Justice Carnwath went on to hold:

> "The exclusivity principle is in my view directly applicable in the present case. The service of a breach of condition notice is a purely public law act. There is strong public interest in its validity, if in issue, being established promptly, both because of its significance to the planning of the area, and because it turns what was merely unlawful into criminal conduct. It is an archetypal example of the public action which Lord Diplock would have had in mind. It does not come within any other categories identified in *Wade and Forsyth* or *De Smith* as requiring a more flexible approach."

[24] In the application before me, the defendants submit that Ms Mitchell does not enjoy any entitlement to damages in advance of a declaration of unlawful discrimination against her and that a finding that the provisions of the pension scheme infringed rights to which she was entitled to protection of under public law is a prerequisite before the plaintiff can use that finding as a "springboard" for a damages claim.

[25] The defendants argue that a proper reading of section 7(1) of the 1998 Act makes it clear that the cause of action in breach of a statutory duty only lies if the act alleged is unlawful. It follows that the unlawfulness of the public act must first be established before the cause of action can arise, it does not arise by way of allegation alone. This presents in a particularly acute form when the central focus of the litigation is an extant statutory provision. Given that primary and subordinate legislation are presumptively valid it is an essential precondition that any asserted illegality is established before a writ

action grounded on section 6 is commenced. Hence this is, classically, a public law matter.

THE PLAINTIFF'S SUBMISSIONS

[26] In response to those arguments, the plaintiff's case is that she is the victim of an act of discrimination which is rendered unlawful by section 6 of the Human Rights Act 1998 which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Accordingly, she argues that section 7 confers on her the right to proceedings for that unlawful act and section 8 entitles her to damages for it. This stand-alone cause of action was not in contemplation at the time of the decision in *O'Reilly v Mackman*. The unlawful act which the plaintiff alleges is a continuing failure to make regulations under sections 4 and 8 of the Reserve Forces Act 1996 providing for a survivor's pension for surviving cohabiting partners, given that the first defendant has made pension provision for surviving spouses and surviving civil partners. To express this plainly, the plaintiff alleges that she is being discriminated against because she and Mr Maynard chose to live together without being married.

[27] The plaintiff argues that the decades since *O'Reilly v Mackman* have seen a retreat from the general rule that case established, to a point where it has been observed, as John Alder comments in his *Constitutional and Administrative Law* (9th edition, 2013 at p 417), that "the cases drew back and there is little left of the *O'Reilly* rule today." Thus the plaintiff argues that an increased flexibility can be discerned in the jurisprudence which has followed *O'Reilly*.

[28] In support of this view, the plaintiff offers various judicial *dicta*. For example, she has referred me to *Davy v Spelthorne* [1984] AC 262 where Lord Wilberforce urged caution in the use of the then recently imported terms "private law" and "public law":

> "It is said that, in this case, the right should be denied because the claim involves consideration of a question not of "private law" but of "public law" … We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts; to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove."

[29] Another *dictum* offered by the plaintiff is from Lord Bridge in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624. The plaintiff asserts:

> "Lord Bridge noted that the decisions in *O'Reilly* and *Cocks* 'have been the subject of much academic criticism' and indicated that:
>
> > '…where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons …' "

[30] I do not regard these *dicta* as being particularly persuasive. The reason is that they have been ripped from their proper context. In *Davy v Spelthorne* Lord Wilberforce observed that the context of that case was a claim for damages for negligence which could not, in his opinion, have been pursued by way of judicial review. Similarly, a proper consideration of Lord Bridge's view in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* requires the reader to understand his larger perspective, clearly stated in the decision:

> "The decisions of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 AC 286, have been the subject of much academic criticism. Although I appreciate the cogency of some of the arguments advanced in support of that criticism, I have not been persuaded that the essential principle embodied in the decisions requires to be significantly modified, let alone overturned. But if it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits."

[31] The temptation to reach for "judicial soundbites", instead of adhering to the approach of locating and applying the *ratio decidendi* of a case, should be resisted by litigants and their counsel. In *Steponaviciene v One of the Coroners for Northern Ireland* [2018] NIQB 90 McCloskey J had cause to refer to Lord Neuberger's extra-judicial exposition of the doctrine of precedent. It bears repetition.

> "The essential feature of common law is that it is judge-made. The common law is established and developed through the

> medium of judicial decisions, which apply or adapt principles laid down in earlier cases to contemporary problems. Inherent in this is the doctrine of precedent or, to use the Latin, *stare decisis*, which is central to the common law. This is because, unless judicial decisions on issues of law are (at least in general) binding on inferior courts (and, to an extent, on court of co-ordinate jurisdiction), the notion of a corpus of law, built up in a reasonably coherent and consistent way by the judiciary, becomes a dead letter.
>
> Precedent involves rules or principles of law being made by decisions of the courts. In general, a court is bound by the essential legal reasoning, or *ratio decidendi*, of decisions made by courts superior to it, and it is either bound or normally will follow the ratio of decisions of courts of co-ordinate jurisdiction. This ensures a degree of predictability for those who give legal advice, as well as helping to enable orderly development and change in the law. It should; but it does not always do so. The arguments for and against a strong *stare decisis* rule reflect the familiar competing issues of certainty and fairness."

[32] The plaintiff submits that her litigation does not present a challenge of any kind (direct or indirect) to the validity of any primary or subordinate legislation, nor is there any challenge (direct or indirect) to the concept of parliamentary sovereignty. In particular the plaintiff submits that she is not seeking any declaration of incompatibility under section 4 of the 1998 Act.

[33] In response to the defendants' argument that the claim is a public law claim, the plaintiff has, as I have already indicated, taken the significant step of deciding no longer to pursue the remedy of a declaration. (This, nevertheless, did not satisfy the defendants who still regard it "in substance" as a public law claim which seeks declaratory relief.) The plaintiff, however, submits that her claim is essentially a private law claim brought under the provisions of the Human Rights Act 1998, albeit against a public authority. She states that it is not predicated upon a public law challenge, or on any challenge which needs to be made by way of an application for judicial review, let alone one which must be made in that way. If it is not necessary for the plaintiff to bring a judicial review challenge in order to succeed, she submits that she cannot be compelled to do so as a precondition to establishing her entitlement to damages under the Human Rights Act.

[34] The plaintiff also calls in aid academic authorities in support of her view that the defendants' application to strike out her statement of claim should not succeed and that the action ought to be allowed to continue.

Firstly, she calls in aid the views of Auburn, Moffett & Sharland in their work "*Judicial Review: Principles and Procedure*" where they say at paragraph 23.10:

> "The courts now adopt a much more flexible approach to the question of which procedure is the appropriate one for a case involving a public law challenge, with an emphasis on doing justice as between parties and in the public interest rather than on imposing draconian procedural consequences based on arid technical distinctions between different types of claim."

Secondly, the plaintiff calls in aid the views expressed in *Blackstone's Guide to the Human Rights Act 1998* (7th edition, 2015) where, in commentating on section 7 of the Act, it states that the Human Rights Act creates three ways in which Convention rights can be directly enforced against public authorities. The first of these is as a statutory cause of action for breach of human rights where a public authority has not acted compatibly with the Convention.

OTHER ISSUES RAISED

[35] In addition to the principal legal issue of whether the plaintiff had breached the Exclusivity Rule established by *O'Reilly and Others v Mackman*, the parties between them have raised a number of other legal issues which I shall briefly now outline.

[36] The plaintiff submits that the act which is discriminatory is the defendants' continuing failure to make regulations under sections 4 and 8 of the Reserve Forces Act 1996 and make provision for a survivor's pension for surviving cohabiting partners in circumstances where the first defendant has made such provision for surviving spouses and surviving civil partners. Her argument is that failing to make provision for cohabitating partners while simultaneously making provision for surviving spouses is unlawful because it discriminates without justification against the former.

[37] The defendants argue that the plaintiff cannot challenge the absence of legislation granting her a pension. This is because the 1998 Act specifically protects parliamentary sovereignty in section 6(6) which provides:

> "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.

Furthermore, the defendants argue that the second defendant is not a legislative body and cannot be held accountable for legislative *lacunae* and to that extent the action is misconceived.

[38] The defendants further submit that the current proceedings, aimed at an asserted failure to make statutory provision for cohabiting partners as opposed to the lawfulness of the Regulations themselves, is an entirely artificial construct. They claim that the purpose of such a formulation is to sidestep the objection that the proceedings comprise, in reality, a public law challenge to the lawfulness of the 2011 Regulations which ought to be brought by a judicial review and not by an ordinary action.

[39] The parties also entered into a long and technical argument about whether or not the Regulations made by the Defence Council pursuant to section 4 of the Reserved Forces Act 1996 fell into the category of statutory instruments identified by section 4(1) of the Statutory Instruments Act 1946. The defendant submits that the 2011 Regulations are not a Statutory Instrument as defined by section 4 of the Statutory Instruments Act 1964. On the other hand the plaintiff submits that the 1946 Act draws a clear distinction between three different kinds of statutory instruments and the Regulations made by the Defence Council under section 4 of the Reserve Forces Act 1996 fall into the first of these categories.

[40] As will shortly become apparent, however, it will not be necessary for me to dwell on these issues any further for the purpose of deciding the issue before me.

THE TEST FOR STRIKING OUT

[41] The law in respect of striking out portions from a statement of claim on the ground that it fails to disclose any reasonable cause of action or that it is an abuse of the process of the court may be briefly summarised as follows.

[42] Order 18 Rule 19 of the Rules of the Court of Judicature (N.I.) 1980 provides:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court,

> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a)."

[43] The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts.

[44] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[45] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal for Northern Ireland reviewed the authorities on the test to be applied in such applications. It held that the summary procedure for striking out pleadings was only to be used in "plain and obvious" cases; it should be confined to cases where the cause of action was "obviously and almost incontestably bad"; and that an order striking out should not be made "unless the case is unarguable".

[46] The Court of Appeal in *O'Dwyer* quoted Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 693-694, a passage approved by the House of Lords:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[47] Where the law in a particular field is not settled but rather is a new and developing field, the court should be appropriately cautious with

applications to strike out, particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the statement of claim. (*Lonrho plc v Tebbit* (1991) 4 All ER 973 and *Rush v Police Service of Northern Ireland and the Secretary of State for Northern Ireland* [2011] NIQB 28.

CONCLUSION

[48] The defendants wish, by means of this application, that the court should take a view of private and public law that these are two entirely separate and unconnected worlds and that, because of the decision in *O'Reilly v Mackman*, if Ms Mitchell is aggrieved by the Ministry of Defence's decision in respect of Mr Maynard's pension, then she may only proceed by instituting judicial review proceedings.

[49] The plaintiff on the other hand argues, in the words of John Alden, that "there is little left of the O'Reilly rule today." This quotation is, in my view, a statement which goes too far and does not reflect the true legal position. Nevertheless in the relatively recent decision of *Richards (by his deputy & litigation friend, Minihane) v Worcestershire County Council and another* [2017] EWCA Civ 1998 Lord Justice Jackson reviewed the authorities, and observed that the exceptions to the Exclusivity Principle were numerous.

[50] In their submissions to me the defendants have accepted that the exceptions to the Exclusivity Rule include claims involving the enforcement of a private law right where a collateral issue of public law arises; or where a public law issue may be raised in defence of a civil claim or of criminal proceedings. In addition, the defendants accept that in circumstances of consent, where neither party objects to the ordinary claim procedure, the Exclusivity Rule does not apply. However the defendants have gone no further than this in admitting that other exceptions may exist, or identifying them or categorising them if they do exist.

[51] An issue also arises as to whether the CPR in England and Wales has made the application of the Exclusivity Rule more flexible than it should be applied in Northern Ireland. If this is the position, then the English case law may strike an over-flexible approach that is not justified in this jurisdiction. It goes without saying that the Civil Procedure Rules 1998 which came into effect in England and Wales in 1999 do not apply in this jurisdiction. However, it is noteworthy that the Rules of the Court of Judicature here have been amended to include an overriding objective which mirrors that introduced in the Civil Procedure Rules.

[52] In *PP v Home Office and another* [2017] EWHC 663 (QB) Judge Parkes QC (sitting as a Judge of the High Court) expressed the view that *Cocks v Thanet DC* [1983] 2 AC 286

> "… was the high water mark of the procedural exclusivity rule. It has subsequently been relaxed, partly as a product of the greater procedural flexibility brought in by the CPR …"

[53] Furthermore, in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, in which a claim for breach of contract was brought against a university which the university (a statutory body with public functions) argued should have proceeded by way of judicial review. The strike out argument failed on the facts, but the Court of Appeal suggested that the introduction of the CPR had produced a new flexibility, such that the mode of commencement of proceedings was less important than whether the choice of procedure was critical to the outcome. However it important to note that Sedley LJ said in *Clark*:

> "16. … the ground has shifted considerably since 1982 when *O'Reilly v Mackman* [1983] 2 AC 237 was decided. The critical decision for present purposes was in fact not *O'Reilly v Mackman*, where the issues were purely public law ones and the problem therefore entirely procedural, but the companion case of *Cocks v Thanet District Council* [1983] 2 AC 286 which decided that where private law rights depended on prior public law decisions they too must ordinarily be litigated by judicial review. That this could not, however, be a universal rule was established not long afterwards by their Lordships' decision in *Wandsworth London Borough Council v Winder* [1985] AC 461 in relation to public law defences to private law actions, notwithstanding the availability of collateral challenge.

[54] The Court of Appeal for England and Wales has therefore said in *Hertfordshire County Council v Davies* [2018] 4 All ER 831 that the court's approach to the sort of procedural questions that concerned the court in *O'Reilly v Mackman* has become "less technical and more pragmatic."

[55] There has been no Northern Ireland authority cited to me by either party which deals with the issue of whether the Exclusivity Rule is applied differently in this jurisdiction as compared with England and Wales where the Civil Procedue Rules have had the effect of bringing about, at least in part, its relaxation.

[56] I am, however, aware of the decision of Carswell J (as he then was) in *In Re Carroll's Application* [1988] NI 152. This was a case where the applicant, who was employed by the Western Health and Social Services Board as Director of Health and Social Services, applied for judicial review of the Board's decision to adopt a disciplinary procedure and take disciplinary action against the applicant. Carswell J stated:

> "There is a strong current of modern authority in favour of the proposition that remedies for infringements of public law are to be sought only by an application for judicial review. The *fons et origo* of this doctrine is the decision of the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237, which crystallised the distinction between public law and private law channels of procedure. The effect of the decision is that public law remedies must be pursued by the avenue of judicial review, and as a general rule cannot be claimed in ordinary actions commenced in the Queen's Bench Division or Chancery Division. … It should be observed, first, that the definition of rights protected by public law, and kindred expressions, has already given the courts considerable difficulty, and secondly, that Lord Diplock admitted the possibility of exceptions to the general rule, giving as one instance the case where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law."

[57] It is, of course, important to note that Carswell J was speaking a decade prior to the introduction of the Human Rights Act with its new statutory cause of action provided by section 8.

[58] The defendants' position on this issue is that they urge me to approach the *dicta* and commentaries on the English Civil Procedure Rules with caution given that the Rules of the Court of Judicature provide a somewhat different framework in this jurisdiction. The plaintiff has not adopted any position on this particular issue. I agree with the defendants that it is necessary to approach the post-1998 English case law with caution.

[59] As I have indicated, the initial inclusion for the relief of a declaration in the plaintiff's statement of claim made a challenge to the proceedings on the basis of the Exclusivity Rule much more likely because it gave the appearance that her claim had trespassed into judicial review territory. One cannot fail to note that a conspicuous number of those cases where a claim has been struck out on the basis that they have breached the Exclusivity Rule have been cases where the plaintiff has sought a declaration. However the plaintiff has now adopted the position that the declaration sought in the statement of claim is not a necessary part of the plaintiff's claim. It is clear that the plaintiff hopes that this retreat avoids the danger of having her action being labelled "judicial review proceedings in disguise". Had Ms Mitchell not abandoned her claim for a declaration during this application, the defendants' argument would have been significantly stronger than it is now. However Ms Mitchell not only no longer seeks a declaration, she also emphasises that she does not seek any of the traditional remedies which applicants usually seek in judicial review proceedings. In particular, she does not seek the reversal of the decision not to

grant her a pension. She simply seeks an award of damages under a statutory right granted under the 1998 Act.

[60] Following the abandonment of her claim for a declaration, a number of the authorities on which the defendants rely lose their effectiveness. For example, the defendants refer to Lewis' *Judicial Remedies in Public Law*, 5th Edition, 2015 which states:

> "It is an abuse of the process of the court to seek a declaration or an injunction by ordinary claim in a public law case where the claim should proceed by judicial review. The court may therefore exercise its powers under CPR Pt 3.4, or its inherent jurisdiction, to strike out the claim. …. Cases where the claim is based solely on substantive principles of public law, and where the only remedy which could be sought is one to quash or set aside the consequences of the decision (and in this sense constitutes a public law remedy) are clearly within the rule."

[61] Likewise the authority of *Carter Commercial Developments Ltd v Bedford Borough Council and another* [2001] EWHC 669 a case where the plaintiff simply sought two declarations relating to the period during which planning appeals could be accepted (after its appeal had been rejected on the grounds of lateness) loses any value it might have had for the defendants' argument once the plaintiff abandoned her claim for a declaration.

[62] Another evolution of the plaintiff's case has been in terms of any broader impact of this litigation. The defendants correctly pointed out that, in the pre-action correspondence, the remedy being sought was cast in over-broad terms. Correspondence from the plaintiff to the defendants dated 18 March 2018 stated:

> "In the circumstances the Ministry is requested, within three weeks of the date hereof, to acknowledge that the statutory exclusion of stable cohabiting partners such as Ms Mitchell from entitlement to a survivor's pension under the Scheme should be disapplied, and that accordingly, Ms Mitchell is entitled to a survivor's pension under the Scheme. Failing that you are asked to note that proceedings may be commenced in the Northern Ireland High Court on behalf of Ms Mitchell with the support of the NIHRC, without further notice, to establish such entitlement."

The statement of claim which was subsequently served, however, rowed back from this position and did not purport in any way to deal with the position of stable cohabiting partners as a group. Again, I take the view that this was an important and necessary concession.

[63] I am not persuaded that the Exclusivity Rule is to be as rigidly applied as the defendants suggest. It cannot be said that the Exclusivity Rule applies in a way which can always be clearly predicted. As the Court of Appeal for England and Wales recently stated in *Mehmet Arkin (As Fixed Charge Receiver of Lodge Farm) v Gary Ronald Marshall* [2020] EWCA Civ 620:

> "The starting point is that it is acknowledged in *O' Reilly v. Mackman* itself, and has been illustrated in a string of cases since *Wandsworth London Borough Council v. Winder* [1985] AC 461, that there are circumstances in which considerations of justice and pragmatism may make it appropriate for a public law challenge – including a challenge to the validity of secondary legislation – to be determined in the context of private law proceedings."

[64] In *Richards (by his deputy & litigation friend, Minihane) v Worcestershire County Council and another* [2017] EWCA Civ 1998 Lord Justice Jackson stated that from the authorities on the Exclusivity Principle he derived two general propositions:

> "(i) The exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice requires for some other reason that the claimant should proceed by way of judicial review.
>
> (ii) The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient."

[65] Nevertheless, as invited to do so by the defendants, and as explained above, I treat both of these decisions with caution.

[66] The defendants ask me to have regard to the fact that Ms Mitchell is attempting to avoid procedural safeguards of the kind that other litigants have run aground on. In *McLaughlin's (Siobhan) Application* [2016] NIQB 11 the applicant challenged decisions of the Department for Social Development refusing her a Widowed Parent's Allowance, after the death of her partner, in accordance with the provisions of s36 and 39A of the Social Security Contributions and Benefits (NI) Act 1992. Under section 39A of the Act a widowed parent could only claim the allowance if he or she was married to, or the civil partner of, the deceased. Ms McLaughlin too, like Ms Mitchell had lived with her partner for many years, had raised a family with him, but they had not married. In that case the applicant proceeded by judicial review and sought four remedies: an order of *certiorari* to quash the decision refusing to pay her benefits; a declaration that the 1992 Act was incompatible

with the applicant's Convention rights; a declaration that there has been an unlawful interference with the applicant's Convention rights; and damages. Treacy J made a declaration that section 39A was incompatible with article 14 read with article 8. The Court of Appeal, however, unanimously held that the legislation was not incompatible with article 14, read with either article 8 or article 1 of the First Protocol. Ms McLaughlin therefore appealed to the Supreme Court. The Supreme Court allowed the appeal and made a declaration that section 39A was incompatible with article 14 of the ECHR read with article 8, insofar as it precluded any entitlement by a surviving unmarried partner of the deceased.

[67] It is notable that the *McLaughlin* litigation was a judicial review of the refusal of her claims for a widowed parent's allowance. It was not a claim for damages. In *McLaughlin* the applicant was successful, legally speaking, in obtaining a declaration of incompatibility Nevertheless, as the defendants observed in the case before me, she was unsuccessful in practical terms, because Parliament has taken no remedial action and Ms McLaughlin has received no payment or back-payment of the benefit in question because the original statutory scheme remains intact. The defendants therefore argue that Ms Mitchell seeks to evade the procedural protections built into the Human Rights Act by recasting her case as a private law action. This is probably true and, given the lack of practical (as opposed to legal) success experienced by Ms McLaughlin, who could blame Ms Mitchell for attempting a different legal route? The question, however, is whether it is possible at this interlocutory stage to decide that she is not entitled to do so.

[68] In *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham said, *inter alia* that where the legal viability of a cause of action is unclear, perhaps because the law is in a state of transition, or in any way sensitive to the facts, an order to strike out should not be made. In my view this is one of those cases.

[69] Certainly there are hurdles to overcome if Ms Mitchell is to be successful. Nevertheless, as Keegan J observed in *O'Halloran v The Chief Constable of the Police Service of Northern Ireland* [2020] NIQB 30, it is not enough for a court to say that the case is weak and may have difficulties in succeeding. Likewise, as Gillen J (as he then was) said in *Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland* [2011] NIQB 28:

> "So long as the statement of claim or the particulars disclose some cause of action, or raise some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[70] The plaintiff submits that the Exclusivity Rule was considered in the decision of *BES Commercial Ltd and other Companies v Cheshire West and*

Chester Borough Council [2019] EWHC 748 (QB) where Turner J indicated that the plaintiff's Human Rights Act claim should not be regarded as unarguably justiciable in the public law arena. The court had heard an appeal from a decision of Master Davison who had struck out certain parts of the plaintiffs' claim and given summary judgment to the defendants. The claimants *inter alia* relied upon their rights under article 8 and article 1, Protocol 1, of the European Convention on Human Rights. In short, the claimants contended that the defendant acted in breach of those rights in instigating the application for search warrants on flawed grounds. In this regard, they sought satisfaction from the defendant pursuant to section 8 of the Human Rights Act 1998. The defendants successfully persuaded the Master that the claimants' HRA allegations, to the effect that the defendant had obtained and executed search warrants unlawfully, could not be pursued unless and until the warrants had been quashed. The defendant contended that it followed that the only basis upon which the claimants would have been entitled to proceed would be by way of judicial review following the procedure laid down in CPR Part 54. In support of this proposition, the defendant relied upon the case of *O'Reilly v Mackman*.

[71] Turner J held:

> "Reminding myself, once more, of the relatively low threshold which any party must surmount in order to frustrate an application for summary judgment or striking out, I am satisfied that the Master was wrong to categorise the HRA claims as being unarguably exclusively justiciable in the public law arena. My adjudication on this issue does not, of course, preclude the defendant from continuing to rely upon this point. I am not, after all, determining a preliminary issue. There is, however, sufficient merit in the claimants' contentions to render it inappropriate to resolve matters summarily. One option would be to resolve the question by way of a preliminary issue but that is a case management decision for another court to make."

[72] Of course, as Lord Steyn famously said in *Regina v Secretary Of State for the Home Department, Ex Parte Daly* [2001] UKHL 26, in law context is everything. The weight to be accorded to the decision in *BES Commercial Ltd and Other Companies v Cheshire West and Chester Borough Council* is limited by the very different context of the claim put forward by Ms Mitchell. In the former case, the claimants themselves pointed out that any adjudication upon the status of the search warrants would be ineluctably dependent upon the resolution of issues of fact and that judicial review proceedings were not a context for a fact-finding exercise. That factor appears to have weighed heavily in Turner J's decision.

[73] Another factor which renders the decision in *BES Commercial Ltd and other Companies v Cheshire West and Chester Borough Council* less useful than the plaintiff suggests is the test which the court had to apply. Turner J reminded himself:

> "The power to strike out a statement of case under CPR Part 3.4, in so far as is material to this appeal, arises when "the statement of case discloses no reasonable grounds for bringing or defending the claim". As the Court of Appeal observed in *Hughes v Colin Richards & **Co*** [2004] EWCA Civ. 266, an application to strike out should not be granted unless the court is certain that the claim is bound to fail."

The test applied by Turner J in *BES Commercial Ltd and Other Companies v Cheshire West and Chester Borough Council* therefore differs somewhat from that which I must apply in this case.

[74] The core principle of *O'Reilly v Mackman* is as set out by Lord Slynn in *Mercury Communications Limited v The Director General of Telecommunications and Others* [1996] 1 WLR 48:

> "The basis of Lord Diplock's speech in *O'Reilly v. Mackman*, as I read it, was that in view of the procedural changes introduced into an application for judicial review, which removed the disadvantages to the applicant in respect of, e.g., lack of discovery, of interrogatories and of the calling of oral evidence, it was wrong that public authorities should lose the protection of a time limit, of the need for the applicant to obtain leave to proceed and of the need for him to support his application by affidavit. These forms of protection were available to public authorities in proceedings by way of judicial review but were not available to such authorities in proceedings begun by writ or originating summons. ,,,,, He recognised, however, that the legislature had not prescribed that Order 53 was to be an exclusive procedure available by which the remedy of a declaration or injunction might be obtained for me infringement of rights that are entitled to protection under public law and he was "content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse". He specifically recognised that there may be exceptions, "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons." He added "Whether mere should be

> other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case by case basis." ”

In the light of *O'Reilly* and the various cases which followed it, Lord Slynn said :

> “The recognition by Lord Diplock that exceptions exist to the general rule may introduce some uncertainty but it is a small price to pay to avoid the over rigid demarcation between procedures reminiscent of earlier disputes as to the forms of action and of disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between public and private law has been recognised. It is of particular importance, as I see it, to retain some flexibility as the precise limits of what is called "public law" and what is called "private law" are by no means worked out. The experience of other countries seems to show that me working out of this distinction is not always an easy matter. In. the absence of a single procedure allowing all remedies - quashing, injunctive and declaratory relief, damages - some flexibility as to the use of different procedures is necessary.”

[75] The claim which the plaintiff seeks to make in her litigation is not without significant difficulties. For example, I do not consider that the plaintiff has persuaded me that the correct position is as stated in Clayton and Tomlinson's “The Law of Human Rights” (2nd edition , 2009). Speaking of the impact of the overriding objective and the English Civil Procedure Rules, they wrote:

> “… a rather different approach needs to be taken; and the CPR therefore seeks to end the old wholly unproductive demarcation disputes. It is therefore suggested that the rule of 'procedural exclusivity' does not apply to proceedings under the HRA.”

[76] The same textbook notes that *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 “laid down procedural rules for bringing claims for damages under the Human Rights Act, stating that in such claims damages should be sought in the Administrative Court rather than by ordinary claim, particularly where a damages claim is combined with, for example, a claim in negligence.” However a reading of that case might suggest that the scope of the principles articulated by the court might be limited to where the plaintiff alleges that damages are being sought for breach of human rights caused by maladministration. For example, the Lord Chief Justice, giving the judgment of the court, stated:

> "The courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court."

[77] Maladministration is defined in the Oxford Dictionary as "inefficient or dishonest administration; mismanagement". In my view Ms Mitchells' action does not allege, however, a case of maladministration. Rather it is an action aimed at a policy decision.

[78] The plaintiff argues that sections 7 and 8 of the Human Rights Act create a statutory cause of action analogous to that of a statutory tort. In order to succeed a claimant would have to prove that the public authority had acted in a way that was unlawful because it was incompatible with a Convention right and that he or she was a victim of that unlawful act. Assuming this was proved, the court would be in a position to find that the act had been unlawful and to grant a remedy under section 8. The plaintiff submits, as support for this view, that this was precisely what happened in *DSD and NBV v The Commissioners of Police of the Metropolis* [2014] EWHC 436 (QB). Again the context of the decision is ignored by Ms Mitchell in her submissions. That decision of Green J concerns a claim for declarations and for damages under section 7 and 8 of the Human Rights Act 1998 brought by two victims of the now convicted "black cab rapist", John Worboys, who over the course of 2002–2008 committed well in excess of 100 rapes and sexual assaults on women whom he was carrying in his cab. However in Green J's written judgment his findings of fact are covered in paragraphs 15-137 and, following that, he applies the relevant case law to those facts in paragraphs 243-313. This was clearly a case which was always unsuited to judicial review proceedings and was inevitably and necessarily brought as an ordinary civil action because of the need for extensive judicial fact-finding. The defendants submitted that, properly considered, *DSD* is not an authority in support of the contention that the Exclusivity Rule is inapplicable in a case relying on the Human Rights Act and, for the reasons I have set out, I agree with that particular assertion.

[79] Somewhat more persuasively, however, the plaintiff argues that a claim for damages can in effect only be brought in judicial review proceedings where one of the five judicial review remedies is being sought and there can be no free-standing application for judicial review in which the only remedy being sought is damages. At the time that this particular argument was being made, the plaintiff was still seeking a declaration but regarded it as merely collateral to the claim for damages. The concession to abandon the claim for a declaration strengthens the plaintiff's argument in this regard.

[80] I conclude, in the light of the case law which the parties have referred me to, that this is not an action which I should strike out at an interlocutory stage. Though *O'Reilly v Mackman* remains good law, there also remains the judicial discretion spoken of by Lord Slynn to allow cases which do not

amount to an abuse of process to proceed. I accordingly reject the contention that Ms Mitchell's claims can only be ventilated by way of an application for judicial review. In my view this action does not reach the position of being "unarguable or almost incontestably bad" and it is not an abuse of process. Where the law in a particular field is not settled but rather is a new and developing field, the court must be appropriately cautious with applications to strike out.

[81] When I consider the two general principles articulated by Lord Justice Jackson in *Richards (by his deputy & litigation friend, Minihane) v Worcestershire County Council and another* I conclude, firstly, that Ms Mitchell's claim does not affect the public generally. If she is successful then she receives damages for discrimination. Neither she nor any member of the public receives a pension. Any change in pension rights would only flow from a change of government policy and thereafter the passing of the necessary legislation by Parliament. Secondly, I conclude that it is at least arguable that it is not appropriate in the circumstances of Ms Mitchell's action to let the Exclusivity Rule become a general barrier to her bringing a private law claim in which the breach of a public law duty is one ingredient.

[82] Furthermore, as I have noted, Lord Justice Jackson expressed the view in *Richards (by his deputy & litigation friend, Minihane) v Worcestershire County Council and another* [2017] EWCA Civ 1998 that the exceptions to the Exclusivity Principle were "numerous". He then stated that "the exclusivity principle established in *O'Reilly*, together with its complex web of exceptions, has survived into the present century". In my view it is difficult for a defendant to be successful in application to strike out a plaintiff's claim where the defendant does not clearly identify to the court what those exceptions are and why a plaintiff does not fall within any of them. I am by no mean satisfied, or indeed close to being satisfied, that the plaintiff does not have an arguable case that she falls within one of those exceptions.

[83] In summary therefore I conclude:

> (i) The decision in *O'Reilly v Mackman* remains good law and it is inaccurate to say that there remains little left of it today.
>
> (ii) Because the point as to whether the CPR in England and Wales has made the application of the Exclusivity Rule more flexible than in Northern Ireland was not argued sufficiently before me by either party, I have been unable to reach a conclusion as to whether much of the post-CPR English case law may be regarded as being persuasive or binding in this jurisdiction. This alone makes it difficult for the defendants to satisfy me that the plaintiff's case is unarguable or almost incontestably bad.

(iii) The burden of proof in an application such as this requires the defendant to satisfy me that the plaintiff is not entitled to sue by way of ordinary action because of the Exclusivity Principle referred to by Lord Diplock in *O'Reilly v Mackman*. I do not consider that the defendants have clearly identified the exceptions to *O'Reilly v Mackman* to me, nor have they persuaded me that the plaintiff's action does not fall within any of them. Hence the defendants cannot succeed in their application to strike out the plaintiff's claim is unarguable or almost incontestably bad.

[84] I am therefore unpersuaded that the plaintiff's case is unarguable or almost incontestably bad or that it is vexatious or an abuse of process and thus I decline to strike out the plaintiff's statement of claim.

[85] Given the complexity of the issues involved in this application I hereby extend the period during which an appeal against it may be made to 14 days.

[86] I shall hear counsel on the subject of costs via Webex at their convenience. Their solicitors should arrange a suitable date with the Masters' Office.