FOURTH SECTION

CASE OF BARROW v. THE UNITED KINGDOM

(Application no. 42735/02)

JUDGMENT

STRASBOURG

22 August 2006

FINAL

22/11/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Barrow v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 27 April 2004 and 11 July 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 42735/02) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mrs Joyce **Barrow** ("the applicant"), on 22 November 2002.

2. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office, London.

3. The applicant alleged that as a woman she was unable to receive invalidity benefit after the age of 60, whereas a man could receive such benefit until the age of 65. The case raised issues under Article 14 in conjunction with Article 1 of Protocol No. 1.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 27 April 2004, the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. Following the judgment of the Grand Chamber in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12 April 2006), the Government, but not the applicant, submitted further observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1943 and lives in Wrexham.

9. In August 2003 the applicant turned 60 years of age. Prior to that date she was in receipt of long-term incapacity benefit (IB), a benefit payable to people incapable of work who satisfy the eligibility criteria. She had qualified for the rate of 81.85 pounds sterling (GBP) per week. She was also paid GBP 39.95 per week in disability living allowance (DLA) and GBP 15.15 in DLA care. At age 60, which is the date of entitlement to the State pension for women, she ceased to be eligible for IB. In its place she became entitled to draw her state retirement pension which, based upon her contribution record, entitled her to GBP 57.81 per week (about 62% of the maximum rate as she had only contributed for 24 years out of 39). She continued to draw DLA. As a result, the applicant claimed that she was some GBP 24.04 per week worse off as a result of her transition from IB to the State pension.

10. The applicant complained to the Department of Work and Pensions concerning the differential treatment but was informed that nothing could be done.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. National Insurance

11. The National Insurance Act 1946, which first established the basis for the national social security scheme in the United Kingdom, set out a system of funding under which all employers and the majority of the working population, whether employed or self-employed, are liable to pay compulsory national insurance ("NI") contributions into the National Insurance Fund (NIF). This legislation has since been replaced, most recently, by the consolidating provisions of the Social Security Contributions and Benefits Act 1992 ("SSCBA 1992") and the Social Security Administration Act 1992.

12. Section 1(2) of the SSCBA sets out the various classes of NI contribution. Of these, the largest category is Class 1 contributions which consist of earnings-related contributions paid by employers and employees. Such contributions are levied as a percentage of earnings which varies according to the employee's earnings band. The NI scheme is financed on a "pay as you go" basis, that is, current NI contributions fund current benefits: thus an individual's contributions fund not his or her own benefits but those of others (*R. (Carson) v. Secretary of State for Work and Pensions* [2002] 3 All ER paras. 25-26).

13. Primary Class 1 contributions to NI cease to be payable on attainment of the State retirement age (section 6(3) of the SSCBA).

14. The NIF is currently the sole source of funding for payment of state retirement pensions as well as a number of other benefits, including IB. Topping up into the fund by way of Treasury Grant is possible in times of shortfall but has not occurred since 1997/1998.

2. Invalidity Benefit (IB)

15. The Social Security (Incapacity for work) Act 1994 amended the 1992 Act so as to include provision for the payment of IB from April 1995. Section 1 provides, as relevant:

> "... (1) Subject to the following provisions of this section, a person who satisfies either of the following conditions is entitled to short-term incapacity benefit in respect of any day of incapacity for work which forms part of a period of incapacity for work.
>
> (2) The conditions are that -
>
> (a) he is under pensionable age on the day in question and satisfies the contribution conditions specified for short-term incapacity benefit in Schedule 3, Part 1, paragraph 2;
>
> ...
>
> (4) In any period of incapacity for work a person is not entitled to short-term incapacity benefit for more than 364 days.
>
> (5) Where a person ceases by virtue of subsection (4) above to be entitled to short-term incapacity benefit, he is entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age."

16. IB is a contributory benefit funded out of NI contributions, designed to compensate a person for financial loss as a result of their inability to work due to ill-health or disability. It is therefore available throughout the assumed working life. As a result the period of entitlement is directly linked, for men and women, to the period of entitlement (if any) to receive the State retirement pension. When an individual reaches State pension age any entitlement to such a pension takes the place of IB. A full basic retirement pension pays GBP 77.45 per week, while the standard rate of IB is GBP 72.15.

3. State retirement pension

17. At the relevant time, section 122 of the Social Security Contributions and Benefits Act 1992 defined "pensionable age" as:

> "(a) the age of 65, in the case of a man; and
>
> (b) the age of 60, in the case of a woman".

18. Women in the United Kingdom therefore become eligible for a State pension at the age of 60,

whereas men are not eligible until 65.

19. Section 126 of the Pensions Act 1995 provides for the equalisation of State pension ages for men and women to the age of 65. The State pension age for women will increase gradually from 2010 and the equalisation will be complete in 2020. At the same time, the age until which women are liable to pay national insurance contributions will gradually increase in line with the increase in the State pension age.

C. European Union law

20. Council Directive 79/7/EEC of 19 December 1978 provides for the progressive implementation of the principle of equal treatment for men and women in matters of social security. However, in Article 7(1)(a) the Directive provides for derogation in the matter of "the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits".

21. In its judgment in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, the European Court of Justice (ECJ) ruled that where, pursuant to Article 7(1)(a), a Member State prescribed different pensionable ages for men and women for the purpose of granting old-age and retirement pensions the scope of the permitted derogation defined by the words "possible consequences thereof for other benefits" was limited to the forms of discrimination existing under other benefits schemes which were necessarily and objectively linked to the difference in pensionable age. That was the position where such forms of discrimination were objectively necessary to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes.

22. In Case C-92/94 *Secretary of State for Social Security v. Graham* [1999] ECR I-2521, the ECJ considered the predecessor of IB, namely invalidity allowance and invalidity pension (both contributory benefits paid from NI contributions until pensionable age or until the cessation of any deferment in pension). It found that the measures were justified by both considerations of financial equilibrium and overall coherence and that the discrimination was necessarily linked to the difference in pensionable age for men and women, *inter alia* as invalidity benefit was designed to replace income from occupational activity and was replaced by a retirement pension at the age at which the recipients would in any event stop working.

23. The derogation was not however held to justify pension-aged linked discrimination in a number of benefits *e.g.* in *R. v. Secretary of State for Social Security, ex parte Taylor* [1999] ECR I-8955, the ECJ held that the provision of winter fuel allowances for the elderly was not necessarily linked to the difference in the statutory age of retirement for men and women and in *R. v. Secretary of State for Health ex parte Richardson* [1995] ECR I-3407, the ECJ found that the discrimination in age entitlement to free prescriptions was not objectively justified to ensure coherence between the retirement pension system and the regulations concerning prescriptions and was not necessarily linked to the difference between pensionable ages for men and women.

24. In Case C-9/91 *The Queen v. Secretary of State for Social Security , ex parte Equal Opportunities Commission* [1992] ECR1-4297 ("the EOC case" concerning a reference for a preliminary ruling from the High Court relating to the differing contribution periods applicable to men and women determined according to pensionable age), the ECJ found that:

- Article 7(1)(a) had to be interpreted as authorising the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination which are necessarily linked to that difference;
- Inequality between men and women with respect to the length of contribution periods required to obtain a pension constitutes such discrimination where, having regard to the financial equilibrium of the national pension system in the context in which it appears, it cannot be dissociated from a difference in pensionable age;
- In view of the advantages allowed to women by national pension systems, in particular as regards statutory pensionable age and length of contribution periods, and the disruption that would necessarily be caused to the equilibrium of those systems if the principle of equality

between the sexes were to be applied from one day to the next in respect of those periods, the Community legislature intended to authorise the progressive implementation of that principle by the Member States and that progressive nature could not be ensured if the scope of the derogation authorised by Article 7(1)(a) were to be interpreted restrictively.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

25. The applicant complained that she had lost her entitlement to IB at age 60 whereas a man could continue to draw the benefit until age 65. The relevant provisions of the Convention provide:

Article 14 of the Convention:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

1. The applicant

26. The applicant submitted that it was grossly unfair that she was worse off than a man in her position of the same age. The difference in benefit received was of considerable importance to her. She pointed to the Government's own White Paper on the subject which referred to the difference in State pension ages as "the last glaring inequality in the Government's treatment of men and women" and to measures introduced by the European Union requiring equality of treatment in benefits. The change in the law which would take effect in 2020 would be far too late to benefit her. She disputed that the system favoured women as a whole, pointing out that men were able to enjoy a number of other benefits over the age of 60 even if in full-time employment (*e.g.* winter fuel allowance, free prescriptions). Men who were in receipt of IB over the age of 60 also had their NI contributions paid in full allowing them to contribute towards a higher State pension.

27. In so far as the level of her State pension was lower than IB due to her incomplete contributions record, the applicant pointed out that this was because she had had four children over seven years and had to look after them for a number of years. She had been unaware, as she was sure most women were, that her subsequent contributions on return to work would not allow for a full State pension.

2. The Government

28. The Government accepted that Article 1 of Protocol No. 1 applied to the case and that Article 14 was applicable to any discrimination in relation to the availability of benefits such as the IB, funded from the NIF. They submitted that the differential age for men and women had, however, an objective and reasonable justification. They emphasised that the social, historic and economic basis for the provision of the State retirement pension, as well as the decision to equalise the age progressively from 2010-2020 involved complex social and economic judgments in respect of which the Government enjoyed a broad margin of appreciation. It was not a simple case of sex discrimination but involved issues of fair balance under Article 1 of Protocol No. 1 where the Court had stated that it would respect the legislator's assessment in such matters unless it was devoid of

reasonable foundation.

29. The Government submitted that Parliament decided to implement the reform to equalise State pension ages from 2020 as the measure had enormous financial implications both for individuals and the State. In particular, sudden change would adversely affect the interests of women who had been expecting to receive a State pension at age 60 and a long transitional period gave time for people to adjust their expectations and arrange their affairs accordingly. Nor would it be economically feasible for the Government to provide all 60-year-old men with pensions pending equalisation in 2020 as it would involve the diversion of substantial resources from other State needs (an estimated cost of GBP 75 billion). After a full public consultation exercise, the Government decided to bring the age up to 65 for all based on the considerations that people lived longer and healthier lives, there would be more pensioners supported by fewer people of working age, public expenditure on pensions was set to double by 2035 and occupational schemes were predominantly equalising at the age of 65 already. They pointed out that the European Union had accepted that Member States must be allowed a period of transition to plan and implement the move to equal ages. The United Kingdom's plans were in line with other developed nations and the European Commission had never suggested that its measures were in any way deficient or disproportionate but had impliedly accepted them.

30. The Government furthermore submitted that the linkage of the IB to pensionable age was objectively justified by the needs of financial equilibrium and systemic coherence. IB was a benefit funded out of NI contributions designed to protect the recipient against loss of income due to incapacity for the duration of their presumed working life. Systemic and fiscal coherence required that working life be taken as the working life upon which State pensionable age and NI contributions were based. Thus the linkage between the availability of IB and State pensionable age was necessary and justified, as accepted by the ECJ (see paragraph 21 above). It would not be possible to change the linkage by setting all IB entitlements as lasting to age 65 as this would produce incoherent results and impact adversely, *inter alia*, on those women with more complete pension contribution records than this applicant, who would find it more advantageous to receive their pension early. The linkage was also in the interests and fair treatment of other contributors to the NIF, particularly male contributors who were generally disadvantaged by the present scheme. They also pointed out that the discrimination complained of in this case had a very narrow compass, affecting only some women between age 60 and 65. The lower State pension age and NI contribution record in the great majority of cases worked to the advantage of women and the move from IB to a pension was advantageous to women with a full or nearly full contribution record. The difference in this applicant's position was a direct reflection of her contributions record. The fact that men over 60 in receipt of IB had their NI contributions paid for a further five years did not result in any unfair advantage as male entitlement to a full State pension was set five years' higher than that applicable to women. A man with the applicant's contribution record would only receive a partial pension also, though at the rate of 66% instead of 62%.

31. The Government referred to the recent judgment in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12 April 2006, submitting that this had addressed and disposed of the material issues in the case, in particular that a linkage between benefits and the old-age pension scheme was necessary to preserve coherence, that there was a very generous margin of appreciation and that the decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed this margin.

B. The Court's assessment

32. Article 14 of the Convention has no independent existence; it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. There can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, amongst other authorities, *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, § 36). The Court notes that the Government do not contest in this case that the applicant's entitlement to IB falls within the scope of Article 1 of Protocol No. 1 and thus that Article 14 is applicable to any complaint of discrimination in that respect. Article 14 is accordingly engaged.

33. The principal issue in this case is whether the difference in treatment whereby this applicant

lost her entitlement to IB at age of 60, whereas a man of that age would not, discloses discrimination based on sex contrary to Article 14 of the Convention.

34. According to the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether or not and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons are required before the Court would regard a difference of treatment based exclusively on the grounds of sex as compatible with the Convention (see, among other authorities, *Willis v. the United Kingdom,* no. 36042/97, ECHR 2002-IV, § 39).

35. Against this must be balanced the countervailing proposition that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one (see, *inter alia*, *James v. the United Kingdom*, judgment of 21 February 1986, Series A, no. 98, § 46). This applies to systems of taxation or contributions which must inevitably differentiate between groups of tax-payers and the implementation of which unavoidably creates marginal situations. A Government may often have to strike a balance between the need to raise revenue and reflecting other social objectives in taxation policies. The national authorities are obviously in a better position than the Court to assess those needs and requirements, which in the present case involve complex concerns about the financing of pensions and benefits which impact on the community as a whole. In such an area the Court will generally respect the legislature's policy choice unless it is manifestly unreasonable (see, as the latest authority, *Stec and Others v. the United Kingdom*, cited above, § 52).

36. The Court recalls that in the afore-mentioned *Stec* case the Grand Chamber had occasion to examine the alleged inequality arising out of entitlement to the reduced earnings allowance ("REA") which was linked to the State pension. As in this case, the applicant, Mrs Stec, lost her entitlement to the benefit at the age of 60 while a man would have continued to receive it until the age of 65. Both the REA and IB were benefits designed to compensate a person for financial loss as a result of their inability to work due to ill-health or incapacity and thus connected to employment and working life. The use of the State pension age as a cut off point made, the Government argued, the scheme easy to understand and to administer and the Court accepted that such questions of administrative economy and coherence were generally matters falling within the margin of appreciation referred to above (*Stec*, § 57). Also of strong persuasive value is the ECJ's stance on the objective necessity of ensuring consistency with the pension scheme in the entitlement to such employment-linked benefits (see *Stec*, cited above, § 58, and Relevant domestic law and practice, paragraphs 21-22). As in the *Stec* case therefore, the linkage of the cut-off age of IB to the notional end of working life or State pensionable age must be regarded as pursuing a legitimate aim and as being reasonably and objectively justified (see § 59).

37. As regards the actual difference in State pension age between men and women, the Grand Chamber in *Stec* had this to say.

> "61. Differential pensionable ages were first introduced for men and women in the United Kingdom in 1940, well before the Convention had come into existence, although the disparity persists to the present day (see paragraph 32 above). It would appear that the difference in treatment was adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. At their origin, therefore, the differential pensionable ages were intended to correct 'factual inequalities' between men and women and appear therefore to have been objectively justified under Article 14 (see paragraph 51 above).
>
> 62. It follows that the difference in pensionable ages continued to be justified until such time that social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. This change, must, by its very nature, have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women. Certain indications are available to the Court. Thus, in the 1993 White Paper, the Government asserted that the number of women in paid employment had increased significantly, so that whereas in 1967 only 37% of employees were women, the proportion had increased to 50% in 1992. In addition, various reforms to the way in which pension entitlement was assessed had been introduced in 1977 and 1978, to the benefit of women who spent long periods out of paid employment. As of 1986, it was unlawful for an employer to have different retirement ages for men and women (see paragraph 33 above).

63. According to the information before the Court, the Government made a first, concrete, move towards establishing the same pensionable age for both sexes with the publication of the Green Paper in December 1991. It would, no doubt, be possible to argue that this step could, or should, have been made earlier. However, as the Court has observed, the development of parity in the working lives of men and women has been a gradual process, and one which the national authorities are better placed to assess (see paragraph 52 above). Moreover, it is significant that many of the other Contracting States still maintain a difference in the ages at which men and women become eligible for the State retirement pension (see paragraph 37 above). Within the European Union, this position is recognised by the exception contained in the Directive (see paragraph 38 above).

64. In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States (see Petrovic, cited above, §§ 36-43), the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age.

65. Having once begun the move towards equality, moreover, the Court does not consider it unreasonable of the Government to carry out a thorough process of consultation and review, nor can Parliament be condemned for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation."

38. The alleged discrimination in the present case flows from exactly the difference in ages of entitlement to the State pension discussed above. In light of the Grand Chamber's finding that the policy adopted by the legislature in deferring equalisation of the pension age for men and women until 2020 fell within the State's margin of appreciation, the Court cannot but reach the same conclusion in the present case.

39. There has, accordingly, been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 22 August 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY Josep CASADEVALL
Registrar President

BARROW v. THE UNITED KINGDOM JUDGMENT