Social Security Law Practitioners Association
Minutes of meeting held on
7th December 2005

Present

Desmond Rutledge	Garden Court (Chair)
S Yorke	CVAL
Finola O'Neill	Wandsworth and Merton Law Centre
Lily Devic	Infopreneur
James Arnold	OSSCSC
Miranda Bayless	OSSCSC
Harry McNeilly	Camden CABx Service
Joanie Wilkinson	Camden Law Centre
Joanna Newth	Enfield/Barnet Law Centre
Stefan Kezyzewski	TJSK Ltd
D Francis	NTA
Chiburo Chukuemera	Duncan Lewis and Co Solicitors
M Sharma	Duncan Lewis and Co Solicitors
Jayne Okacha	Duncan Lewis and Co Solicitors
Emma Baldwin	FRU
Darins A'Zami	FRU
Nadine Clarkson	Ole Hansen & Partners
Polly Glynn	Pierce Glynn Solicitors
Sue Willman	Pierce Glynn Solicitors
David Watkinson	Garden Court Chambers

Apologies

Jo Silcox	FRU
Ranjiv Khubber	6 Kings Bench Walk

Guest Speaker: Helen Mountfield
Talk: *The Ruling in Stec – Benefits as Possessions*

The guest speaker set the scene by explaining the Byzantine complexity surrounding the rules to restrict Reduced Earning Allowance ("REA").[1] In the past, REA had continued to be paid after retirement age and was paid concurrently with the State Pension. The government decided that it was an anomaly to continue to pay a benefit in respect of loss of earning capacity during years in which, but for the industrial accident or disease, the recipient of REA would in any event have ceased work (hence also earning). A number of methods were employed to reduce eligibility.[2]

[1] REA is payable to employees who have suffered an accident at work or an occupational disease. Its purpose is to compensate the claimant for the reduction in their earning capacity due to the injury or disease. The weekly amount is based on a comparison between the claimant's earnings prior to the accident or disease and those in any actual or notional alternative employment still considered suitable despite the disability, subject to a maximum weekly award.

[2] See *R(I) 2/99 - Plummer and Anor v. Chief Adjudication Officer* a domestic challenge to the change in the rules.

Between 1986 and 1989, a series of changes were introduced to the payment of REA, some of which had the effect of disadvantaging men relatively to women of the same age, and others of which had the effect of disadvantaging women relatively to men of the same age. The reason for this was that the various changes (first, freezing REA for those above retirement age, then replacing REA with a Retirement Allowance ("RA") for those above pension age, except those who were in receipt of "frozen" REA) as stages in limiting or cutting off entitlement to REA, were all imposed by reference to the ages used by the statutory old-age pension scheme. All REA recipients who, before 10 April 1989, had reached retirement age (currently 70/65, if a man, or 60/65, if a woman) would receive a frozen rate of REA for life. All other REA recipients would cease to receive REA, and would instead receive RA on reaching retirement or on giving up employment (currently 70/65 if a man, 60/65 if a woman). Entitlement to REA would therefore equalise only gradually, as with pension ages being equal only by 2020, whereas before the changes there had been no discrimination on grounds of sex in relation to REA entitlement.

The claimants in ***Hepple and others v Adjudication Officer*** **C-196/98 [2000] ECR 1-3701 (reported as *R(I) 2/99*)** challenged these rules relying on the equal treatment Directive - Council Directive 79/7/EEC. The European Court of Justice dismissed the application ruling that the age conditions fell within the exception in Article 7(1)(a) of the Council Directive 79/7/EEC, namely that it was necessary in order to preserve coherence between the rules on REA and the rules on old age pension. This was an odd result, not least because earlier cases such as *Commission v Italy* and *Marshall v Southampton and South-West Health Authority* had established that women cannot be required to end their working lives earlier than men, and also because the government had conceded (and the Social Security Commissioner had found as a fact) that this link was not necessary for the financial coherence of the social security scheme.

However, what amounts to justification for sex discrimination under Directive 79/7 is not necessarily the end of the story – the European Court of Human Rights in Strasbourg will decide for itself whether discrimination, contrary to Article 14, is justified if the discrimination in question falls within the ambit of another right contained in the European Convention of Human Rights.

The Claimants in *Hepple* therefore started a case in Strasbourg (now known by the name of *Stec,* because Mrs Hepple dropped out before the claim reached the court). The issues were whether REA fell within the scope of Article 1 Protocol 1 of the Convention, i.e. was it a property right for these purposes, even though the benefit was a "hybrid" benefit, not clearly contributory and if so, was the discrimination justified? The first of these questions had been discussed in the cases of ***Gaygusuz v Austria***[3] and ***Poirrez v France,***[4] but the law on them was not entirely clear.

The property right issue in *Stec* has now been determined, though the issue of justification under Article 14 has not. It has been established that statutory social security entitlements are within the ambit of the property right in Article 1 Protocol 1 whether or not the benefit in question is contributory.

---

[3] No 5849/72
[4] *no. 40892/98*

Before the claim reached the European Court of Human Rights, another case reached the court in Strasbourg which was relevant to this issue. In ***Willis v United Kingdom*** (2002) 35 EHRR 547, the ECtHR ruled that discrimination against widowers in the payment of Widowed Mother's Allowance and Widow's Payment infringed the rights inherent in Article 1 of Protocol 1 of the Convention ("A1P1").

The Stec case awaited the outcome of *Willis,* and jurisdiction was ceded to the Grand Chamber because of the Europe-wide importance of the point. It was finally heard in March 2005, and is reported under the name ***Stec and others – v- United Kingdom*** (Application Nos 65731/01 and 65900/01), July 6, 2005.

The Government submitted that REA was not within the scope of A1 P1 because it was contribution based. Secondly, even if it was within the scope there was no discrimination as there was no detriment. The Government referred to the fact that men who retired at 70 could elect to retire at 65. The Government also relied on administrative convenience, i.e. the same reasons given in the ECJ case.

The ECtHR ruled on the preliminary point – did REA need to be contribution based to come within the scope of A1P1? Previous case law pointed both ways. There were cases in which the contributory element was held to be important (*Gaygusuz v Austria* and cases where a welfare benefit in a non-contributory scheme could constitute a possession for the purposes of A1 of P1 (*Koua Poirrez v. France).* The Court noted that the funding mechanism for benefits varied. It should make no difference whether the funding was by way of general taxation or contributions or a mixture of both. REA was a good example of this as it was originally funded out of the national insurance fund but since 1990 has been financed by general taxation. The time had come to say - do you have a statutory right? The main conclusions are set out in paras 53-55 of *Stec.*

> "53. In conclusion, therefore, if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction.
>
> 54 It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopecky v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, which apply generally in cases under Article 1 of Protocol No. 1, are equally relevant when it comes to welfare benefits. In particular, the Article does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme (see, *mutatis mutandis, Kopecky* [GC], § 35(d)). If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (*ibid.*).
>
> 55 In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see *Gaygusuz*, and *Willis*, also cited above, § 34). Although Protocol No. 1 does not include the right to receive a

> social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14."

The Guest Speaker drew attention to the way the Court emphasised that A1 of P1 was aimed at preventing the State from taking things away rather than requiring the State to provide more. A1P1 is a qualified right and the courts have gone out of their way to point out that the margin of appreciation is wider in some areas rather than others. There are some areas, such as the issues involving questions of social or economic policy,[5] where the Court is very unlikely to interfere as the judgment is a political one. *Stec* therefore maintains the traditional doctrine that A1P1 cannot be used to argue that an individual should be awarded a welfare benefit or that benefit should be paid at a particular level or that there should be no "bright lines" defining entitlement within the scheme. But A1P1 does open the door to arguments about discrimination within the scheme. It is no longer necessary to trace how the benefit is funded to decide whether it is within scope of A1P1. If the benefit is within A1PA then Article 14 kicks in. As a result of the ruling in *Stec*, there are no longer certain threshold arguments that need to be overcome before you can run Article 14.

The Guest Speaker said that Article 14 does not just apply to race or sexual discrimination. It is potentially much wider and applies to any authorised "status". The Government can have bright lines within a statutory scheme but if those bright lines discriminate you can ask why do you have *that* bright line? Thus, even in areas of economic/social policy where previously courts (applying a "Wednesbury" doctrine) would have hesitated to interfere with decisions as to the scope of benefits, there may now be room to ask them to investigate more rigorously if there may be discrimination within the ambit of the rules.

For example, there have been two examples where the rule discriminated against same-sex couples. ***Secretary of State for Work and Pensions v M***[6], concerned a rule in the Child Support Scheme which reduced liability where the claimant was the member of a couple with housing costs. Neuberger LJ decided that the facts came within the ambit of A1P1, (paras 103-107).[7] This claim has now been appealed to the House of Lords – judgment is awaited.

In the housing context a right of succession to a protected tenancy is laid down in the Rent Act 1997 and excluded same-sex couples. This would, on a traditional approach, appear to be an area where the courts would adopt a 'hands-off' approach. But ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 557, 604, showed that the courts were willing to interfere where a rule is discriminatory even in such an area – see particularly the speech of Lord Nicolls at para 19.

Perhaps the most graphic illustration of how the concept of discrimination will allow the courts to intervene in what had previously been considered political judgments is

---

[5] *Waite v London Borough of Hammersmith and Fulham and the Secretary of State for Social Security* (21 March 2002) [2002] EWCA Civ 482.

[6] [2004] EWCA Civ 1343, currently on appeal to the House of Lords.

[7] See also *Department for Social Development –v- MacGeagh (1) and MacGreagh (2)* [2005] NICA 28(2), June 9, 2005 (to be reported as *R 2/05(CS)* held that Article 1 of the First Protocol was not engaged (Nicholson LJ dissenting) as the child support scheme did not take away from an individual what was rightfully his; it was concerned with the enforcement of a legal duty on the part of a parent to maintain his offspring.

the "Belmarsh Case".[8] The Court was careful to say that assessment of the risk of a terrorist attack was political in character and that the court should not second guess the judgment of Parliament in matters concerning national security. But the scheme for detaining and deporting suspected terrorists was held to be unlawful because it was discriminatory. It applied to non-nationals but not to UK nationals (who could not be deported).

However, there is a difference between "suspect classes" of discrimination and those which the courts regard as requiring less anxious scrutiny. Recent case law has drawn a distinction between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification.[9] The first category concerns characteristics such as race, caste, noble birth, membership of a political party and more recently, gender. These are "suspect" grounds of discrimination which will always be subject to close scrutiny by the courts (para. 55). The second category involves differences in treatment on grounds of ability, education, wealth, occupation and usually depends upon considerations of the general public interest. Lord Hoffman at paras 16 & 17 of his opinion said: -

> 16. "...while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.
>
> 17. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on these matters. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy.

Where a provision is not compatible with ECHR then an individual is able to question a bright line rule based on discrimination. ***Carson and Reynolds*** shows that residence and age are less easy to invoke as a "status" than race and sex. The Guest Speaker also added a note of caution. Even when a case does concern a "suspect class" if something else just comes in as a status, such as property, residence or age, which requires less scrutiny then this will render the rule less offensive. In the EU context see Cases 63/91 and 64/91 ***Jackson and Cresswell*** [1992] ECR-4973 and Case 243/90 ***Smithson*** [1992] ECR-1-467 where Income Support and Housing Benefit were held not to come within the scope of EU Directives on equal treatment due to the presence of other factors.

B –v- Secretary of State for Work and Pensions[10] concerned a liability for an overpayment where the claimant had learning difficulties. In addition to the main arguments over the obligation to report a change of circumstances the case contains an

---

[8] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] AC 68.

[9] R v. Secretary of State for Work and Pensions ex parte Carson and R v. Secretary of State for Work and Pensions ex parte Reynolds [2005] UKHL 37 – though NB Carson is now going to Strasbourg under the name Jackson & Others v UK.

[10] [2005] EWCA Civ 929, CPAG have applied for leave to the House of Lords.

argument based on A1P1 and the recovery of the overpayment from Mrs B's existing entitlement to benefit. It was argued that Mrs B's current entitlement to benefit was a "possession" within the scope of A1P1 and that the state's interference with her possessions, i.e. the deductions to recover the overpayment in the past, discriminated unjustifiably between people who are unable to report facts because they are not aware of them and people who, like the claimant, are unable to report them for some other reason. Sedley LJ ruled that the facts did not come within the scope of A1PA. He held that as there had been an overpayment, the benefit was not a "possession". The claimant had never been entitled to it in the first place. It had never been her "property." The Guest Speaker added, that In terms of *Stec*, the judgment was saying that receipt of benefit did not generate "a proprietary interest" (see para 54). Whilst she was at pains to point out that the judgment in *Stec* made it clear that there was no right to acquire a particular possession in the first place, it might be seen that what was at issue was actually a rule depriving a person of a benefit. The Guest Speaker thus accepted, in response to a question, that this approach will need to be reconsidered in the light of *Stec*. A1P1 may hold the key to mounting a challenge to the rules governing recovery based on an innocent mistake.

In ***R (Kehoe) v Secretary of State for Work and Pensions*** [2005] UKHL 48, the House of Lords, by a majority, held that Mrs Kehoe (or her children) did not have any right to maintenance payments under the Child Support Scheme such as to engage Article 6. The Guest Speaker suggested that a parent in the position of Mrs Kehoe may still have a claim against the State for its failure to enforce the maintenance payments under *Stec*.

The Guest Speaker drew attention to the problem of reconciling the UK doctrine of precedent with the need to take a decision of ECtHR into account. This is the subject of an outstanding appeal to the House of Lords in the case of **R(Price) v Leeds City Council** [2005] EWCA Civ 289. The Court of Appeal in that case said that all courts below the House of Lords must continue to apply the doctrine of precedent even if there is inconsistent Strasbourg authority. The House of Lords has heard the appeal from that decision, but judgment is awaited.

The Court of Appeal in *Carson and Reynolds* [11] ruled that Income Support did not come within the scope of A1P1 because it was not a contributory benefit (see Laws LJ's analysis para. 17-23). The House of Lords declined to rule on the issue, pending the outcome in *Hepple* (para. 12).[12]

There is a possibility therefore that advisers may have a problem in asking Tribunals and Commissioners to apply *Stec* in the case of Income Support, given the Court of Appeal's decision in *Reynolds*.[13]

[11] R v. Secretary of State for Work and Pensions ex parte Carson and Reynolds [2003] EWCA Civ 797
[12] But see Lord Scott's reservations expressed in para. 89 of *Hooper* regarding the discrimination ruling in *Willis* based on A1P1 and Article 14.
[13] See discussion in CH/4574/2003.

Questions and Answers – Discussion

Sue Willman referred to a passage in ***Adams*** *(formerly known as Limbuela),* [14] concerning the refusal of support to asylum seekers, where the Court said "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3." (para. 7). Nonetheless, given the unique position of asylum seekers, namely no right to work and no alternative sources of support, meaning that they were being treated differently to others who were street homeless, the Court was willing to interfere. This was an echo of the Belmarsh case where the area is very political but the courts were still willing to interfere if there was a "difference in treatment".

R (Morris) v Westminster City Council[15] - a housing case based on Article 8, also raised an argument based on discrimination. It concerned a woman who is a UK citizen but whose dependent child is subject to immigration control. Her child's immigration status precluded her from establishing priority need for housing assistance by the rule in s.185(4) of the Housing Act 1996. The court took the view that the provision was aimed at those who did not have the relevant immigration status and should not apply where the applicant was a UK citizen.

There was a discussion of whether *Stec* could be extended so as to argue that other forms of welfare provision – not in the form of a direct pecuniary entitlement (such as access to health or community care services) could be regarded as "possession". The Guest Speaker thought it would be some time before courts would be prepared to view such welfare entitlements as "property rights", in particular, because it was hard to identify the content of the right. The situation might be different if such rights were funded by means of direct payments. Rights to matters such as education are not generally regarded as "property entitlements".

A1P1 deals with resources. A1P1 does not give a right to bread. But, where bread is rationed, it can be used to challenge the bases on which it is to be rationed (if discriminatory), or, if it is being withdrawn, why is there a difference in treatment as between members of different groups?

But once you concede that two groups can properly be treated differently it is very difficult to argue that the line should be drawn in one place rather than another. So in ***Reynolds*** it was conceded that there should be an age cut off. Perhaps the case would have been stronger if the Government was required to justify any age cut at all. (see paras 40/41 of Reynolds).

David Watkinson mentioned the ruling in ***Haringey LBC v Cotter*** (1997) 29 HLR 682 CA. This held that a tenant cannot bring a private law action in the county court against the housing benefit authority for a failure to determine his or her *entitlement* to HB. In contrast to the situation where HB has actually been awarded but there is delay in it being paid (***Jones v Waveney DC***)[16]. It now appeared to be arguable that the distinction between a legitimate expectation of entitlement to HB and a determination that you are entitled to HB has been blurred or broken down by the ruling in *Stec* given

[14] Adams, R (on the application of) v Secretary of State for the Home Department [2005] UKHL 66,
[15] R (Morris) v Westminster City Council and First Secretary of State; R (Badu) v Lambeth London Borough Council and First Secretary of State [2005] EWCA Civ 1184
[16] (1999) 33 HLR 3 CA

the reference to legislation "generating a proprietary interest". The Guest Speaker concurred.

During the discussion, reference was made to a client who was homeless and had lost the disability premium from their applicable amount for Income Support. Members were referred to the CPAG test case, ***R (on the Application of Mack) v Secretary of State for Work and Pensions.*** This case concerns the issue of whether the failure to award the disability premium to a homeless claimant discriminated against him in the enjoyment of his possessions under Articles 1 and 14 of the European Convention on Human Rights.

Darins A'Zami raised the possibility that the recovery provisions, including the mandatory requirement under s.71(5A), strongly suggested that there was an entitlement to benefit as-of-right until the issue of liability for any overpayment was determined. Accordingly, an overpayment is a "possession" within the scope of A1P1 as described by *Stec*. The Guest Speaker agreed that this was an arguable point.

Next meeting

To be held on 11 January 2006; topic: the Right to Reside Test; Guest Speaker Prof Robin White.

Minutes prepared by
Desmond Rutledge