GRAND CHAMBER

CASE OF STEC AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 65731/01 and 65900/01)

JUDGMENT

STRASBOURG

12 April 2006

This judgment is final but may be subject to editorial revision.

In the case of Stec and Others v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr B.M. ZUPANČIČ,
Mr L. LOUCAIDES,
Mr J. CASADEVALL,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr A. KOVLER,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mr D. SPIELMANN,
Mr E. MYJER, *judges*
and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 9 March and 6 July 2005, and on 15 March 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 65731/01 and 65900/01) 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 five United Kingdom nationals on 20 November 2000 and 30 January 2001 respectively. The first applicant, Regina Hepple, was born in 1933 and lives in Wakefield. The second applicant, Anna **Stec**, was born in 1933 and lives in Stoke-on-Trent. The third applicant, Patrick Lunn, was born in 1923 and lives in Stockton-on-Tees. The fourth applicant, Sybil Spencer, was born in 1926 and lives in Bury. The fifth applicant, Oliver Kimber, was born in 1924 and lives in Pevensey.

2. The first, second, third and fourth applicants were represented by Ms J. Starling, and the fifth applicant was represented by Mr J. Clinch, both solicitors practising in London. The respondent Government were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the case was assigned to a Chamber composed of Judges Pellonpää, Bratza, Casadevall, Maruste, Pavlovschi, Garlicki and Borrego Borrego, together with the Section Registrar, Mr M. O'Boyle. On 5 March 2002 the Chamber decided to join the two applications, and on 24 August 2004 it decided to relinquish jurisdiction in favour of the Grand Chamber with immediate effect, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Judges Costa and Baka were prevented from sitting in the case at the time of the adoption of the admissibility decision. They were replaced by the first and second substitute judges, Judges Loucaides and Hedigan (Rule 24 § 3).

5. In accordance with the provisions of Article 29 § 3 of the Convention and Rule 54A § 3, the Court decided to examine jointly the issues of the admissibility and merits of the applications.

6. The applicants and the Government each filed written observations on the admissibility and merits of the case.

7. By a letter dated 25 February 2005, the first applicant, Mrs Hepple, informed the Court through her representative that, for personal reasons, she no longer wished to continue with the case.

Her representative later confirmed Mrs Hepple's withdrawal in response to a letter from the Court.

8. A hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 9 March 2005 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government
Mr Derek WALTON, *Agent;*
Mr David PANNICK, Q.C.,
Ms Claire WEIR *Counsel;*
Ms Elisabeth HAGGETT,
Mr Jeremy HEATH,
Ms Kath WILSON,
Mr Andrew FEARN, *Advisers;*

(b) *for the applicant*
Mr Richard DRABBLE, Q.C.,
Ms Helen MOUNTFIELD, *Counsel;*
Mr John CLINCH,
Ms Jacky STARLING, *Solicitors.*

The Court heard addresses by Mr Pannick Q.C. and Mr Drabble Q.C., as well as their answers to questions put by Judges Bratza and Maruste.

9. On the same day, since it had been confirmed that Mrs Hepple did not intend to pursue her application (see paragraph 7 above), and considering that respect for human rights did not require it to continue examining it, the Court decided to strike-out Mrs Hepple's application (Article 37 § 1 (a)).

10. By a letter dated 13 April 2005, Mrs Hepple, through her representative, informed the Court that she had changed her mind and now wished to proceed with her application.

11. On 6 July 2005 the Court decided to disapply Article 29 § 3 (see paragraph 5 above) and to consider the admissibility and merits separately. It further decided, unanimously, not to restore Mrs Hepple's application to the list and, by a majority, to join to the merits the Government's objections concerning the victim status of the third applicant, Mr Lunn, the fourth applicant, Mrs Spencer, and the fifth applicant, Mr Kimber. Finally, again by a majority, it declared admissible, the applications of the second, third, fourth and fifth applicants.

12. On 5 September 2005 the Court asked the parties for further observations on the merits, which it received on 11 November 2005.

13. The Government had requested a further hearing on the merits, but on 13 December 2005 the President decided that it would not be necessary to hold a further hearing on the merits. On 15 March 2006 the Grand Chamber confirmed the decision not to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

14. The facts of the case, as submitted by the parties, may be summarised as follows:

A. Mrs Stec

15. On 18 January 1989 Mrs **Stec** injured her back at work and was unable to continue working. She was awarded reduced earnings allowance ("REA": see paragraph 26 below) from 24 January 1990. On 13 March 1993 she reached the age of 60 and as from 31 March 1996 her award of REA was replaced by an award of retirement allowance ("RA": see paragraph 30 below).

16. The applicant appealed against this decision on the basis of sex discrimination to the Trent Social Security Appeals Tribunal ("SSAT"). The SSAT allowed her appeal on 4 October 1996, and the adjudication officer subsequently appealed to the Social Security Commissioner ("the Commissioner").

17. The Commissioner joined Mrs **Stec**'s case to those of the other three present applicants, and also to that of Mrs Hepple. Having heard arguments on 11 and 12 December 1987, the Commissioner decided on 8 May 1998 to refer the following questions to the European Court of Justice ("ECJ"):

> "1. Does Article 7 of Council Directive 79/7/EEC permit a Member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory old-age pension scheme, on entitlement to a benefit having the characteristics of Reduced Earnings Allowance under a statutory occupational accident and disease scheme, so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:
>
> (a) is not necessary for any financial reason connected with either scheme; and
>
> (b) never having been imposed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the Directive to be given full effect under Article 8?
>
> 2. If the answer to Question 1 is Yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988 to 1989 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?
>
> 3. ... "

18. In his order of reference the Commissioner observed that:

> "On the main issue, it is apparent from the information before me (and the adjudication officers so concede) that the imposition after 1986 of unequal age conditions on REA for the first time was not necessary to maintain the financial equilibrium or coherence (insofar as that word is understood in a financial sense) of the UK social security schemes.
>
> It is also apparent (and on the information before me I so decide as a fact) that such imposition was not necessary to enable the United Kingdom to retain the different pension ages under its old-age scheme. That difference had co-existed with the Industrial Injuries Scheme ... for nearly 40 years from 1948 without it, and Rea could simply have been left as it was, or a non-discriminatory cut-off age adopted, without upsetting the pension system as it had always operated.
>
> The real question therefore is the more difficult one of whether a government which considers it a costly anomaly to go on paying a benefit such as REA to people too old to work is permitted to impose a new cut-off at unequal ages, claiming the benefit of the exclusion in Article 7 for the 'possible consequences for other benefits' having regard to what was said in the [ECJ's] judgment in *Graham*, on the ground that the ages selected are the same as those for the pension, and ... the government take the view as a matter of policy that the income-replacement functions of REA should be performed after pension age by the pension, plus the very much smaller 'retirement allowance' instead."

19. The ECJ gave judgment on 23 May 2000 (see paragraph 41 below). On 31 July 2000 the Commissioner, following the ECJ's ruling, struck out the applicants' cases where they were the appellants before him and allowed the appeals where the adjudication officers had been the appellants.

B. Mr Lunn

20. On 11 November 1973 Mr Lunn suffered a work-related injury to his right hand, as a result of which he had to stop working. From 12 May 1974 he received special hardship allowance, which was converted to REA from 1 October 1986. On 19 May 1988 he reached the age of 65 and from 17 May 1993, when he turned 70, he received a statutory retirement pension. On 26 March 1996 an adjudication officer reviewed the award of REA and decided that, with effect from 31 March 1996, it should be replaced by an award of RA, paid at approximately 25% of the REA rate.

21. The applicant appealed on the ground that a woman in the same circumstances would have been treated as having retired on or before 19 May 1988 and would have been entitled to a frozen rate of REA for life, a more valuable benefit. On 24 September 1996 the Stockport SSAT dismissed his appeal, and Mr Lunn appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 17-19 above).

C. Mrs Spencer

22. Mrs Spencer suffered a work-related injury to her neck on 17 July 1966. She was awarded special hardship allowance from 15 January 1967 and from 1 October 1986 this was converted to an award of REA. Her sixtieth birthday was on 11 December 1986 and she received a retirement pension from 23 December 1986. It was decided on 10 May 1993, with effect from 11 April 1988, to freeze for life her award of REA at GBP 25.28 per week.

23. The applicant appealed to the Bolton SSAT on the basis that, had she been a man, she would have continued to receive unfrozen REA. The SSAT allowed her appeal on 30 November 1994, and the adjudication officer appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 17-19 above).

D. Mr Kimber

24. On 12 March 1982 Mr Kimber injured his back at work and was unable to continue working. He was awarded special hardship allowance from 15 September 1982, converted to REA from 1 October 1986. He reached the age of 65 on 30 September 1989 and received a retirement pension from 29 September 1994. On 29 April 1996 an adjudication officer reviewed his award of REA and decided that with effect from 31 March 1996 it should be replaced by an award of RA.

25. The applicant appealed to the Eastbourne SSAT, on the basis that a woman in his circumstances could have chosen to have been treated as retired from 10 April 1989, and so would have been entitled to frozen REA for life, a more valuable benefit than RA. The SSAT allowed his appeal on 2 October 1996 and the adjudication officer appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 17-19 above).

II. RELEVANT NON-CONVENTION MATERIAL

A. Benefits for industrial injury and disease in the United Kingdom

26. Reduced earnings allowance ("REA") is an earnings-related additional benefit under the statutory occupational accident and disease scheme which was put in place in 1948. Originally the benefit was known as "special hardship allowance", but it was recast and renamed by the Social Security Act 1986. At the time of the introduction of these applications, the relevant legislation was Part V of the Social Security Contributions and Benefits Act 1992.

27. REA has, since 1990, been funded by general taxation rather than the National Insurance Scheme. It is payable to employees or former employees who have suffered an accident at work or an occupational disease, with the purpose of compensating for an impairment in earning capacity. 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 of GBP 40. It is a non-contributory benefit, in that eligibility is not conditional on any or a certain number of contributions having been made to the National Insurance Fund.

28. Under more recent legislation the benefit is being phased out altogether and no fresh right to REA can arise from an accident incurred or a disease contracted on or after 1 October 1990. In addition, a succession of legislative measures after 1986 attempted to remove or reduce it for claimants no longer of working age, in respect of whom the Government considered any comparison of "earnings" to be artificial. Before these changes, there had been a continued right to REA notwithstanding the attainment of retirement age and REA had been payable concurrently with the State pension.

29. The method chosen to reduce eligibility was to impose cut-off or limiting conditions by reference to the ages used by the statutory old-age pension scheme, namely 65 for men and 60 for women until 1996, then tapering up to eventual equality at 65 in 2020 (Part II of the Social Security Contributions and Benefits Act 1992, as amended by the Pensions Act 1995: see paragraphs 31-35

below).

30. Under the new provisions (Social Security Contributions and Benefits Act 1992), all REA recipients who, before 10 April 1989, had reached either (1) 70, if a man, or 65, if a woman, or (2) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman, would receive a frozen rate of REA for life. All other REA recipients would cease to receive REA, and would instead receive retirement allowance ("RA") either on reaching (1) 70, if a man, or 65, if a woman, or (2) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman or on giving up employment at 65 for a man or 60 for a woman.

B. State pensionable age in the United Kingdom

31. State retirement pensions are funded entirely from the National Insurance fund, to which all employers and the majority of the working population, whether employed or self-employed, are liable to pay compulsory contributions. The individual's liability for such contributions ceases at "pensionable age".

32. Men and women born before 6 April 1950 attain pensionable age at 65 and 60 respectively (Schedule 4 to the Pensions Act 1995). The present pension age for women was introduced in 1940 by the Old Age and Widows' Pensions Act. Prior to that, State pension age was 65 for both men and women. According to the Government's Green and White Papers ("Options for Equality in State Pension Age", Cm 1723, December 1991 and "Equality in State Pension Age", Cm 2420, December 1993), the lower age for women was introduced in response to a campaign by unmarried women, many of whom spent much of their lives caring for dependent relatives, and also as part of a package to enable married couples, where the wife was usually younger than the husband and financially dependent on him, to receive a pension at the couples' rate when the husband reached 65.

33. In the 1993 White Paper, the Government pointed out that while, historically, women's entitlement to State pension was frequently reduced because their traditional role of caring for the family in the home led to fragmented employment records, the number of women in employment had greatly increased in recent years: in 1967, 37% of employees were women, compared with 50% in 1992 (although the statistics did not differentiate, for example, between full- and part-time workers). Moreover, Home Responsibilities Provision, introduced in 1978, now assisted those whose working life was shortened because of time spent caring for a child or sick or disabled person to build up entitlement to a basic pension, and the concession which allowed married women to pay reduced rate National Insurance contributions, leaving them reliant on their husbands' contributions, was withdrawn in 1977. The Sex Discrimination Act 1986 had amended the Sex Discrimination Act 1975 to make it unlawful for an employer to have different retirement ages for men and women. The view of the Government, expressed in the White Paper, was that the preferential pension age for women had no place in modern society and it was proposed to equalise pensionable age for men and women.

34. It was decided to equalise at 65, rather than a lower age, because people were living longer and healthier lives and because the proportion of pensioners in the population was set to increase. It was estimated that any move towards paying male State retirement pensions earlier than 65 would cost in the order of GBP 9.8 billion per year gross (representing additional pension payments to men between 60 and 65 and lost income from National Insurance contributions from these men) or a net sum of GBP 7.5 billion per year (when account was taken of savings on payment of other, non-National Insurance Fund benefits to such men). It was decided to introduce the change gradually to ensure that women affected by the change and their employers had ample time to adjust their expectations and arrange their financial affairs accordingly.

35. In order to bring male and female pensionable age into line with each other, therefore, section 126 of the Pensions Act 1995, together with Schedule 4, provide for the pensionable age of women born between 6 April 1950 and 5 April 1955 to increase progressively. With effect from 2010, the pensionable age of men and women in the United Kingdom will begin to equalise, and by 2020 both sexes will attain pensionable age at 65.

C. Pensionable age in other European countries

36. According to information provided by the Government in December 2004, men and women became eligible to receive an old age pension at the same age in Andorra, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Monaco, The Netherlands, Norway, Portugal, San Marino, Slovakia, Spain and Sweden.

37. Women were entitled to receive a pension at a younger age than men in Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Lithuania, Malta, Moldova, Poland, Romania, the Russian Federation, Serbia and Montenegro, Slovenia, Switzerland, the Former Yugoslav Republic of Macedonia, and Ukraine. Many of these countries were phasing in equalisation of pensionable age. This was to take place in Austria between 2024-33; in Azerbaijan by 2012; in Belgium between 1997 and 2009; in Estonia before 2016; in Hungary by 2009; in Latvia by 2008; and in Lithuania by 2006.

D. European Union Directive on Equal Treatment in Social Security

38. Council Directive 79/7/EEC of 19 December 1978 ("the Directive") concerns the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 4(1) of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits. Such discrimination can be justified only under Article 7(1)(a), which provides that the Directive is to be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. Under Article 7(2), "Member States shall periodically examine matters excluded under paragraph (1) in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned."

E. ECJ consideration of Article 7(1)(a) of the Directive

39. In the case of C-9/91 *R v Secretary of State for Social Security,* ex parte *Equal Opportunities Commission* ["*EOC*"] [1992] ECR I-4297, the ECJ found that Article 7(1)(a) must be interpreted not only as authorising the retention of a statutory pensionable age which differed according to sex, but also forms of discrimination affecting access to certain benefits which were "necessarily linked" to the difference in pensionable age. Inequality between men and women, with respect to the contribution periods required in order to obtain a pension of an identical amount, constituted such discrimination where, having regard to the financial equilibrium of the national pension system in the context of which it appeared, it could not be disassociated from the difference in pensionable age.

40. In C-328/91 *Secretary of State for Social Security v Thomas* [1993] ECR I-1247, the ECJ held that the reasoning from the *EOC* decision extended to benefits linked to differential State retirement ages where "such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes."

41. In the present applicants' case, C-196/98, *Hepple v Chief Adjudication Officer* [2000] ECR I-3701, the ECJ applied the reasoning of *Thomas* to find, first, that "removal of the discrimination at issue ... would have no effect on the financial equilibrium of the social-security system of the United Kingdom as a whole" (§ 29). However, it went on to hold that it had been objectively necessary to introduce different age conditions based on sex in order to maintain coherence between the State retirement pension scheme and other benefit schemes, since (§§ 31-34):

> "... the principal aim of the successive legislative amendments ... was to discontinue payment of REA—an allowance designed to compensate for an impairment of earning capacity following an accident at work or occupational disease—to persons no longer of working age by imposing conditions based on the statutory retirement age.
>
> Thus, as a result of those legislative amendments, there is coherence between REA, which is designed to compensate for a decrease in earnings, and the old-age pension scheme. It follows that maintenance of the rules at issue in the main proceedings is objectively necessary to preserve such coherence.
>
> That conclusion is not invalidated by the fact that REA is replaced, when the beneficiary reaches retirement age

and stops working, by RA, the rate of which is 25% of REA, since RA is designed to compensate for the reduction in pension entitlement resulting from a decrease in earnings following an accident at work or occupational disease.

It follows that discrimination of the kind at issue in the main proceedings is objectively and necessarily linked to the difference between the retirement age for men and that for women, so that it is covered by the derogation for which Article 7(1)(a) of the Directive provides."

THE LAW

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

42. The applicants claimed that the scheme of reduced earnings allowance ("REA": see paragraph 26 above) and retirement allowance ("RA": see paragraph 30 above), as it applied to each of them, was discriminatory, in breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1. The latter provision reads:

"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."

Article 14 provides:

"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."

43. In its admissibility decision of 6 July 2005 the Court held that the applicants' interests fell within the scope of Article 1 of Protocol No. 1, and that Article 14 of the Convention was therefore applicable. It must now consider whether there has been a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

A. The arguments of the parties

1. The applicants

44. The applicants did not deny that it had been reasonable for the Government to seek to address the anomaly whereby industrial injury earnings-replacement benefits continued to be paid to workers after the age when they would, in any event, have ceased paid employment. There was, however, no justification for introducing sex-based discrimination into the scheme by linking the cut-off date to pension age. The same objective could have been achieved, without unacceptable financial consequences, by adopting a common age-limit for men and women and/or by the use of overlapping benefit regulations, ensuring that any State pension received was off-set against REA. Other age-related benefits, such as winter fuel payment, prescription charges and bus passes were paid with a common age threshold.

45. It was important to note that the Commissioner, in his reference to the European Court of Justice ("ECJ": see paragraphs 17-18 above), had found that the introduction after 1986 of unequal age conditions on REA had not been necessary to maintain the financial equilibrium of either the REA or the pension scheme. Although the ECJ had decided against them, the applicants emphasised that it had been adjudicating on a different question, namely whether the amendments fell within the scope of the Article 7 exception to the non-discrimination provisions of the Directive. In particular, the ECJ did not have to decide whether there was a proportionate justification for the discrimination, but was instead construing the phrase "the possible consequences thereof for other benefits" in Article 7. The applicants did not consider that a finding in their favour would have wider

implications for the case-law of the ECJ under Article 7, since the impact would be limited to other cases where there was no financial necessity to maintain the link between the benefit in question and pensionable age, and no compelling reason to do so. Moreover, the mere fact that a measure which discriminated on grounds of sex nonetheless fell outside the European Union's limited restrictions upon social security discrimination did not prevent this Court from examining for itself the issue of justification.

46. The applicants' core submission was that there was a fundamental difference in the level of justification required for a progressive move to eradicate existing sex discrimination in the pension system and the introduction, from 1986, of new discrimination in relation to industrial injury benefits which had existed on equal terms for men and women for almost 40 years. The labour market had already changed by 1986, and ten years earlier the Sex Discrimination Act 1976 and the European Community's Equal Treatment Directive 76/207/EEC had rendered discrimination in the field of employment unlawful. The assumption that a woman's working life would be five years shorter than a man's was therefore entirely illegitimate.

2. The Government

47. The Government emphasised that REA was designed to compensate those who had suffered an industrial injury for their loss of earning capacity, and was therefore a benefit linked intrinsically to work. By stopping it at State pensionable age, Parliament had acted in an objectively justified manner by ensuring that a person, whether male or female, would not both be eligible for a State retirement pension and for a benefit for loss of earnings capacity. Using pensionable age promoted, in a manner that could easily be understood and administered, and was proportionate, the objective of discontinuing REA for those who were no longer a regular part of the working and earning sector of the population. The Government estimated that if, following an adverse judgment, they were required to reform the REA and RA scheme to reimburse for lost benefits all claimants in the same position as the four applicants, this would cost in the region of GBP 83 million, together with a further GBP one million administrative costs and GBP 17 million in estimated future payments.

48. The justification for linking social security benefits to pensionable age had been recognised by Article 7 of the Directive (see paragraph 38 above). In May 2000 the ECJ had considered and rejected the contention raised by the present applicants that they had been unlawfully discriminated against on the ground of their sex in breach of the Directive (see paragraph 41 above). The case-law of the ECJ (see extracts in paragraphs 39-41 above) showed this to be a dynamic and evolving area of law in which the ECJ, and the domestic courts bound by its jurisprudence and the Directive, applied a close, proportionality-based analysis to test the continued objective justification for the use of differential ages in access to both State retirement pensions and linked benefits. If the Court were to find a violation in the present case, it would create considerable confusion: the domestic legislation would be lawful under a Directive specifically concerned with sex discrimination in social security, but unlawful under the more general provisions of the Convention.

49. Finally, the social, historical and economic basis for the provision of State retirement pensions at the age of 65 for men, and 60 for women, as well as the decision to equalise pensionable age for men and women progressively from 2010-2020, involved complex economic and social judgments, in respect of which the Government enjoyed a broad margin of appreciation. Before deciding to set the new equal State retirement pension age at 65 years, the Government had considered several options, summarised in the 1993 White Paper (see paragraphs 32-34 above) and a full public consultation exercise had been carried out. The clear conclusion reached was that 65 years was the correct common State retirement pension age for the United Kingdom. In 1995, Parliament had decided to implement the reform in stages because moving towards equality had enormous financial implications both for the State and for individuals, particularly women who had long been expecting to receive a State retirement pension at 60 (see paragraphs 34-35 above). Several Contracting States retained different pension ages for men and women, and a number had chosen to implement a gradual equalisation of those ages (see paragraphs 36-37 above). Moreover, the European Community had accepted that its Member States must be allowed a period of transition in which to plan and implement the move to equal ages for men and women in relation to State pensionable age (see paragraph 38 above).

B. The Court's assessment

1. General principles

50. The applicants complain of a difference in treatment on the basis of sex, which falls within the non-exhaustive list of prohibited grounds of discrimination in Article 14.

51. Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article (see *"Case relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits),* judgment of 23 July 1968, Series A no. 6, § 10 and *Thlimmenos v. Greece*, no. 34369/97, § 44, ECHR 2000-IV). A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, 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 State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, § 39).

52. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, § 38). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Van Raalte*, cited above, § 39, and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 67). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 46; *National and Provincial Building Society and Others v. the United Kingdom*, judgment of 23 October 1997, *Reports* 1997-VII, § 80). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (ibid.).

53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include 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. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in the present case, §§ 54-55, ECHR 2005-...).

2. Application of these principles to the present case

54. The Court recalls that REA is an earnings-related benefit designed to compensate employees or former employees for an impairment of earning capacity due to an accident at work or work-related illness. In or around 1986 it was decided, as a matter of policy, that REA should no longer be paid to claimants who had reached an age at which, even if they had not suffered injury or disease, they would no longer be in paid employment (see paragraphs 26-30 above). The applicants concede that it was reasonable to aim to stop paying REA to workers after the age when they would, in any event, have retired, and the Court agrees, since the benefit in question is designed to replace or supplement earnings, and is therefore closely connected to employment and working life.

55. The applicants do not accept, however, that in order to achieve this aim it was necessary to adopt as the upper limit the age at which a man or woman becomes entitled to the State retirement pension, since State pensionable age is at present different for men and women. They suggest that a single cut-off age and/or overlapping benefit regulations could have been used instead.

56. The Court observes, though, that a single cut-off age would not have achieved the same level of consistency with the State pension scheme, which is based upon a notional "end of working life" at 60 for women and 65 for men. The benefits to which the applicants refer as having the same

starting age for men and women—winter fuel payment, prescription charges and bus passes (see paragraph 44 above)—are not inextricably linked to the concept of paid employment or "working life" in the way that REA is. Overlapping benefit regulations, to ensure that any REA received was deducted from the State retirement pension would, moreover, have maintained the impugned difference of treatment, since women would still have become entitled to their pensions and liable to start receiving reduced-rate REA five years before men.

57. The Government, for their part, have explained that the use of the State pension age as the cut-off point for REA made the scheme easy to understand and administer (see paragraph 48 above). The Court considers that such questions of administrative economy and coherence are generally matters falling within the margin of appreciation referred to in paragraph 52 above.

58. Moreover it finds it significant that, in the present applicants' case, the ECJ found that since REA was intended to compensate people of working age for loss of earning capacity due to an accident at work or occupational disease, it was necessary, in order to preserve coherence with the old-age pension scheme, to link the age-limits (see paragraph 41 above). While it is true that Article 7(1)(a) of the Directive provides an express exception to the general prohibition on discrimination in social security (see paragraph 38 above), the ECJ was called upon, in deciding whether the case fell within the Article 7 exception, to make a judgment as to whether the discrimination in the REA scheme arising from the link to differential pensionable age was objectively necessary in order to ensure consistency with the pension scheme. In reaching a conclusion on this issue which, while not determinative of the issue under Article 14 of the Convention, is nonetheless of central importance, particular regard should be had to the strong persuasive value of the ECJ's finding on this point.

59. The Court considers, therefore, for the above reasons, that both the policy decision to stop paying REA to persons who would otherwise have retired from paid employment, and the decision to achieve this aim by linking the cut-off age for REA to the notional "end of working life", or State pensionable age, pursued a legitimate aim and were reasonably and objectively justified.

60. It remains to be examined whether or not the underlying difference in treatment between men and women in the State pension scheme was acceptable under Article 14.

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.

3. Conclusion

66. In conclusion, the Court finds that the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time that social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field (see paragraph 52 above). Similarly, the decision to link eligibility for REA to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person's working life. There has not, therefore, been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 in this case.

67. The above finding further renders it unnecessary for the Court to consider separately the issues relating to the victim status of the third, fourth and fifth applicants' complaints (see paragraph 11 above).

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

2. *Holds* by sixteen votes to one that it is unnecessary to consider separately the issues relating to the victim status of the third, fourth and fifth applicants.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 April 2006.

Luzius WILDHABER
President
T.L. EARLY
Deputy to the Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Mr Borrego-Borrego and Mr L. Loucaides are annexed to this judgment.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGE BORREGO BORREGO

(Translation)

I voted with the majority of the Chamber in finding that there had been no violation of the Convention; in my case, however, this was based on the belief that the applicants could not be considered to have "possessions" within the meaning of Article 1 of Protocol No. 1, which guarantees the protection of property.

In its decision of 23 January 2002 in *Slivenko v. Latvia* ([GC], no. 48321/99, § 121, ECHR 2002-II), the Court stated on the subject of that provision: "An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions relate to his or her 'possessions'... 'Possessions' can be 'existing possessions' or assets, including claims by virtue of which the applicant can argue that he or she has at least a 'legitimate expectation' of acquiring effective enjoyment of a property right."

In the matter of entitlement to benefits, a distinction was established by the Commission, and taken up by the Court, between contributory and non-contributory benefits, the latter being considered not to constitute "possessions".

However, in paragraph 54 of its decision of 6 July 2005 on the admissibility of the present application, the Court, after examining the case-law on the subject – which, admittedly, is not entirely free of ambiguity – stated: "If ... 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."

Hence, the notion of "possessions" is widened here to include "interests", and applies to all individuals, including those who "for all or part of their lives, [are] completely dependent for survival on social security and welfare benefits" (*ibid.*, paragraph 51). This is far removed from the notion of property as the right of the citizen to "dispose at his pleasure of his goods, income, and of the fruits of his labour and his skill" (Article 16 of the Declaration of the Rights of Man of 23 June 1793).

If we accept that the protection of property extends to protecting property owners, the Court's new interpretation has an undeniable attraction! Without any need for a revolution, all Europe's citizens have become property owners, protected by Article 1 of Protocol No. 1. Everyone, from a billionaire right down to the poorest person subsisting on social security, has become a property owner.

This widening of the notion of "possessions" stems, in my view, from the way in which this case was presented, in that it sought to establish a close link between Protocol No. 1 and Article 14 of the Convention.

Hence, paragraph 55 of the admissibility decision, to which paragraph 53 of the judgment refers, reads: "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 "prohibition of discrimination" element proved so compelling – all the more so since the case related to discrimination based on sex – that the Court, overlooking the fact that Article 14 is secondary to the other substantive guarantees and has no independent existence, found that there had been no "violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1", thereby placing a clear emphasis on the discrimination rather than the property aspect.

I remember the *Kopecký v. Slovakia* case, in which the applicant claimed the restitution under an Extra-Judicial Rehabilitations Act of items of property which had been taken away from his father. He had proved that the items in question had belonged to his father and had been confiscated and deposited in the offices of the Regional Administration of the Ministry of the Interior in 1958. However, as the Act required the applicant to indicate the exact location of the items (gold and silver coins of numismatic value), almost fifty years after they had been confiscated, and he had been unable to do so, the Court held that "the applicant had no 'possession' within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 60, ECHR 2004-IX).

In truth, I consider the gold and silver coins belonging to Mr Kopecký's father to be much closer to the notion of "possessions" than the benefits claimed by the applicants in the present case. In *Kopecký*, however, the link with the prohibition of discrimination was absent.

I feel that the Court's interpretation of Article 1 of Protocol No. 1 in the present case goes somewhat too far and serves only to heighten the confusion that already exists in this sphere. Ultimately, however, I can live with it.

I should like, nevertheless, to express my concern regarding one very specific aspect of this new approach to the notion of "possessions".

In paragraph 48 of the admissibility decision, the Court found that "[t]he Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions."

I quite agree. However, in my opinion, the Court may not, in interpreting the Convention (see Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969), frustrate the sovereign intentions of a Contracting Party.

As I see it, the way in which "Article 14 taken in conjunction with Article 1 of Protocol No. 1" is construed in this judgment implies, purely and simply, the entry into force of Protocol No. 12 in a very important sphere (social-security benefits), in respect of a Contracting Party which has not even signed Protocol No. 12.

Paragraph 34 of the admissibility decision summed up the Government's argument in that regard as follows: "The applicants were seeking to widen the concept of a 'possession' to include claims which had no basis in domestic law, in order to bring a general complaint of discrimination of the type which would be covered by the new Protocol No. 12 but not by Article 14."

It is my belief that we cannot bring into force, even in part, a Protocol in respect of a State which has not yet signed it.

DISSENTING OPINION OF JUDGE LOUCAIDES

While I am in agreement with the finding of the majority that both the policy decision to stop paying REA to persons who would otherwise have retired from paid employment, and the decision to achieve this aim by linking the cut-off age for REA to the notional "end of working life", or State pensionable age, pursued a legitimate aim and were reasonably and objectively justified, I am unable to share the view of the majority that there has not been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 in this case.

The issue before us was whether the difference in treatment between men and women as regards State pensionable age, which was at the root of the difference in their treatment as regards the operation of the REA scheme, was acceptable under Article 14 of the Convention at the time of the decisions about which the applicants complain, that is to say, was reasonably and objectively justified.

I fully agree with the opinion of the majority that it is "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" (see paragraph 62 of the judgment). That, however, is not the question. The important issue to determine is whether this shift may or may not have occurred before the decisions complained of by the applicants in the present case.

In 1986 an Act was passed in the United Kingdom amending the Sex Discrimination Act 1975 so as to make it unlawful for an employer to have different retirement ages for men and women (see paragraph 33 of the judgment). Until then the difference in pensionable ages had been acceptable as a means of mitigating 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 (see paragraph 61 of the judgment). However, after 1986 such justification of the difference in pensionable age became manifestly untenable because of the amendment in question, which implies clearly that the previous "factual inequalities" between men and women were no longer a factor and that social conditions had changed so that women were not substantially prejudiced because of a shorter working life. The considerations and assumptions on which the overall structure of pensions and benefits had been based over the previous decades could not be relied on any more to justify differences on grounds of sex.

Therefore, I find that at the time of the decisions about which the applicants complain, and indeed at any time after 1986, the different treatment of men and women as regards State pensionable age had no objective and reasonable justification. It follows that it was incompatible with Article 14 of the Convention, as was in turn the different treatment of men and women as regards entitlement to REA.

It is significant that the Government concentrated their arguments on the margin of appreciation to which they were allegedly entitled in setting the timetable for the reform intended to put an end to this unequal treatment, which was no longer justified. These arguments are summarised as follows in paragraph 49 of the judgment:

> "Finally, the social, historical and economic basis for the provision of State retirement pensions at the age of 65 for men, and 60 for women, as well as the decision to equalise pensionable age for men and women progressively from 2010-2020, involved complex economic and social judgments, in respect of which the Government enjoyed a broad margin of appreciation. ... In 1995, Parliament had decided to implement the reform in stages because moving towards equality had enormous financial implications both for the State and for individuals, particularly women who had long been expecting to receive a State retirement pension at 60 ... Several Contracting States retained different pension ages for men and women, and a number had chosen to implement a gradual equalisation of those ages ... Moreover, the European Community had accepted that its Member States must be allowed a period of transition in which to plan and implement the move to equal ages for men and women in relation to State pensionable age ..."

These arguments by the Government evidently persuaded the majority, who expressed the following view in paragraphs 64 and 65 of the judgment:

> "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 ... the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age.
>
> 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."

These considerations by the Court call for the following observations on my part.

First, I consider that new social legislation, however well-balanced it may be, cannot be invoked under the doctrine of the margin of appreciation as an excuse for not having acted in due time to avoid an instance of discrimination clearly lacking reasonable and objective justification. Moreover it is clear that remedial legislation intended to equalise the position in the future will not do so with sufficient speed as to remedy the position of these applicants (see, *mutatis mutandis*, *Walden v. Liechtenstein* (dec.), no. 33916/96, 16 March 2000).

Furthermore, I consider that "the absence of a common standard amongst the Contracting States" (see paragraph 64 of the judgment) and the fact 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 63) are of no relevance. I cannot see how the fact that discrimination between men and women regarding pensionable age exists in many other Contracting States could legitimise unjustified discrimination in any particular case brought before the Court. Therefore the majority are, I believe, wrong in invoking such an argument, particularly taking into account that no finding has been made by the Court that in those other Contracting States which maintain the differential treatment of men and women as regards retirement pensions, such treatment is based on the same factual background as the one under examination in the present case. The factual inequalities which ceased to exist in the United Kingdom in or before 1986, and which supported the original justification of discrimination, may still exist in some or all those Contracting Parties. More importantly it should be recalled that because all High Contracting Parties have accepted the obligations of the Convention they have a duty to bring their legal systems into line with the standards of the Convention. The finding of a general failure to do so does not prevent the Court from holding any individual State from being held responsible for a specific violation of the Convention.

Finally, I must state that I do not find the judgment of the European Court of Justice in the present case an obstacle to my approach. That judgment examined the question of discrimination in a

different legal context and in any case it is not binding on us.

Given that I consider that there has been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 in this case, it would normally have been necessary to consider the issues relating to the victim status of the third, fourth and fifth applicants. However, since the majority found no violation I confine myself to stating that I would find a violation of the same Articles in respect of the said applicants, assuming that they could claim to be victims.