DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decisions

1. In each of these three cases we confirm the decisions of the tribunal sitting at Stratford (London E15) on 28 February and 18 March 2003 (made under references U/42/249/2001/00904, U/42/249/2002/00588 and U/42/249/2001/02624) to refuse claims for any widow's benefit.

2. In the case of U/42/249/2001/00904 (CP/3114/2003) we remit to the Secretary of State the claim for retirement pension which has not yet been determined.

Background and Procedure

3. Leave to appeal having been granted by the chairman of the tribunal in each case we held an oral hearing of these appeals on 26 and 27 April 2005. The claimants did not attend in person but were represented by James Maurici of Counsel, instructed by Tower Hamlets Law Centre. The Secretary of State was represented by Thomas de la Mare of Counsel, instructed by the Solicitor to the Department for Work and Pensions. Following the oral hearing before us, the House of Lords delivered its judgments in 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, [2005] 2 WLR 1369. This necessitated further written submissions. We are grateful to Counsel for their assistance throughout this case.

4. The following facts were agreed. In all three cases all parties to the relevant marriages were born and all the marriages took place in what later became Bangladesh. All of the first marriages of the men were potentially polygamous and all of the second marriages of the men (to the claimants) were actually polygamous. All of the parties were domiciled in the place where the marriages took place and all of the marriages were legally recognised in the place of domicile. In each case the deceased husband had worked and had paid relevant national insurance contributions in the United Kingdom and, at the time of claiming, each claimant was resident in the United Kingdom.

5. In CP/3114/2003 the claimant was born on 20 July 1935. On 18 February 1955 she married a man who had been born on 7 September or 20 October 1912 and had previously married a different woman. The man was still married to both women when he died on 29 October 1983. On 18 February 1995 his first wife died. On 20 July 1995 the claimant attained pensionable age and on 11 January 2001 she claimed widow's benefit. The Secretary of State decided to treat this claim as also being a claim for retirement pension, but no decision was ever made on the retirement pension claim. On 15 February 2001 the Secretary of State refused to make any award on the claim for widow's benefit and on 15 March 2001 the claimant appealed to the tribunal against that decision of the Secretary of State.

6. In CG/3118/2003 the claimant was born on 8 February 1942. On 8 February 1964 she married a man who had been born on 1 June 1923 and had previously married a different woman. The man was still married to both women when he died on 29 April 1995. On 5 June 2001 his first wife died. On 1 August 2001 the claimant claimed widow's benefit. On 23 September 2001 the Secretary of State refused to make any award of widow's benefit and on 5 November 2001 the claimant appealed to the tribunal against that decision of the Secretary of State.

7. In CG/3122/2003 the claimant was born on 9 June 1962. On 9 June 1980 she married a man who had been born on 1 January 1937 and had previously married a different woman on 5 March 1958. The man was still married to both women when he died on 26 March 2001. As far as is known, his first wife is still alive. On 9 April 2001 the claimant claimed widow's benefit. On 15 July 2001 the Secretary of State refused to make any award of widow's benefit and on 20 August the claimant appealed to the tribunal against that decision of the Secretary of State.

8. All three appeals were heard by the same tribunal, CP/3114/03 and CG/3122/03 on 28 February and CG 3118/03 on 18 March 2003. All were dismissed on the grounds that in each case the claimant was polygamously married to her husband, that the marriages were recognised in English law, and that each marriage was actually polygamous at the date of the death of the husband in respect of whose contributions the claim to benefit had been made. On 26 June 2003 the chairman of the tribunal granted to each claimant leave to appeal to the Commissioner against the decision of the tribunal. On 13 November 2003 the Legal Officer directed that the three appeals be considered together. On 11 February 2005 the Chief Commissioner directed that, as they raised issues of special legal difficulty, they be dealt with by a Tribunal of Commissioners.

The Structure and Conditions of Entitlement - Husband's Death pre- 9 April 2001

9. The structure of entitlement changed with effect from 9 April 2001, but until then the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") provided three categories of widow's benefit, all of which were stated to be based on the national insurance contributions of her "late husband".

Widow's Payment

10. Section 36(1) provided for "a woman who has been widowed" to be entitled to a lump sum widow's payment on the fulfilment of certain conditions with which we need not be concerned. However, by virtue of regulation 19(2) and (3)(g) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987 No 1968 as amended) a claim for widow's benefit must be made within three months of "any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned". In the case of a weekly entitlement, this provision operated to limit backdating to three months. In the case of the one-off widow's payment, this meant that a claim had to be made within three months of the husband's death. Clearly that did not happen in any of the three cases before us and there was no entitlement to widow's payment as at the dates of claim.

Widowed Mother's Allowance

11. Subject to other conditions, section 37 of the 1992 Act provided for "a woman who has been widowed" to be entitled to a weekly widowed mother's allowance if she was entitled to child benefit. It is likely that the claimants in CG/3118/2003 and CG/3122/2003 were entitled to child benefit.

Widow's Pension

12. Section 38 of the 1992 Act provided that, subject to other conditions, "a woman who has been widowed shall be entitled to a widow's pension…". This was a weekly benefit available to a widow who was aged over 45 but under 65 at the date of either husband's death or the cessation of entitlement to widowed mother's allowance. The claimant in CP/3114/2003 was 53 when her husband died.

The Structure and Conditions of Entitlement – Husband's Death on or after 9 April 2001

13. The benefits referred to above were replaced by new benefits in cases of a spouse dying on or after 9 April 2001 and in respect of a civil partner dying after the implementation of the Civil Partnership Act 2004. The new benefits are not available to the claimants in the present case but they are referred to here because entitlement will be affected by our decision.

14. The new benefits are set out in the amended 1992 Act and are bereavement payment (section 36), widowed parent's allowance (section 39A) and bereavement allowance (section 39B).

15. Leaving aside the position of civil partners, in each case the benefit is payable to "a person whose spouse dies" if the deceased "spouse satisfied the contribution conditions".

Category A Pensions

16. Subject to certain conditions, section 48 of the 1992 Act provides for account to be taken of "the contributions of his former spouse" in calculating entitlement to a category A retirement pension.

17. Section 48 (3) provides:

> "Where a person has been married more than once this section applies only to the last marriage and the reference to his marriage and his former spouse shall be construed accordingly."

Statutory Definitions

18. There is no explicit definition in the 1992 Act of the terms "widow", "spouse" or "married". The Secretary of State submits that section 48(3) "obviously and exclusively works on the premise of serial monogamous marriage as permitted by death and divorce". That conclusion might well be correct but the terms of section 48(3), taken alone, could also apply to polygamous marriages.

19. Similarly, section 122 states that, unless the context otherwise requires, "late husband, in relation to a woman who has been more than once married, means her last husband".

Polygamy and English Law - General

20. To be valid in English law a marriage must be monogamous in the sense that neither party is married to another person at the date of the marriage and both parties explicitly or implicitly recognise the obligation not to marry another person during the currency of that marriage. This is enforced by criminal sanctions under section 57 of the Offences Against the Person Act 1861.

21. It is well established that a woman cannot be a man's widow unless she was married to him at the time of his death. Drawing on the authority of Hyde v Hyde and Woodmansee (1886) LR 1 P&D 130, a Tribunal of Commissioners decided many years ago in R(G) 18/52 that, for the purposes of entitlement to widow's benefit, a widow is a woman who was:

> "... married to her husband by a marriage in the sense in which that term is used in the law of Great Britain, that is to say - "the voluntary union for life of one man and one woman to the exclusion of all others"...".

22. Although there has been subsequent statutory provision in relation to potentially polygamous marriages (with which we deal below) that is the basic principle which has always been accepted by the Commissioners and the courts (see R(G) 18/52 paragraph 19 and e.g. R(G) 1/70 paragraph 7).

23. However, for family law purposes, English law does recognise the validity of a marriage which takes place outside the United Kingdom under a system of law permitting polygamy (a) so long as neither spouse is already party to a subsisting marriage, or (b) where both parties are domiciled elsewhere than in the United Kingdom.

The Recognition by English Law (for Social Security Purposes) of Polygamous Marriages - Case Law

24. In Baindail v Baindail [1946] P 122 the Court of Appeal held that a polygamous Hindu marriage between two people domiciled in India should be recognised as valid for the purposes of enabling a decree of nullity to be granted to a woman with whom the man subsequently went through a form of marriage in a register office in England.

25. Iman Din v National Assistance Board [1967] 2 QB 213 concerned action taken by the Board against a man for failure to maintain his wife and children in accordance with the provisions of section 42(1) of the National Assistance Act 1948. The wife in question was the man's polygamously married second wife and the man argued that therefore she was not his wife for these purposes. The Divisional Court (the Lord Chief Justice, Salmon LJ and Widgery J) found against the man. Salmon LJ, giving the judgment of the Court, said (at pages 218-9):

> "When a question arises of recognising a foreign marriage or of construing the word "wife" in a statute, everything depends upon the purpose for which the marriage is to be recognised and upon the objects of the statute. I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognised as his wife and children for the purposes of the National Assistance Act 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognised.
>
> ... Hyde v Hyde... and the long stream of authority that flows from it are in my judgment no help to the appellant. All that it lays down is that parties to a polygamous marriage by their personal law and by the law of the country in which it was celebrated, cannot obtain matrimonial relief against each other in the courts of this country".

26. However, the general rule in Hyde v Hyde was applied in (Fuljan) Bibi v Chief Adjudication Officer [1998] 1 FLR 375. The Court of Appeal was considering a claim for widowed mother's allowance (then under section 25 of the Social Security Act 1975) made in England by the first wife of a man who also had another wife in Bangladesh. The man was a British citizen and both marriages had taken place in Bangladesh. The Court upheld the refusal of benefit. Staughton LJ said (at page 382):

"On all days in which the marriage is not in fact monogamous the marriage is not to be treated, for social security purposes, as having the same consequences as a monogamous marriage."

The Recognition by English Law (for Social Security Purposes) of Polygamous Marriages - Statute and Regulations

27. Section 121(1)(b) of the 1992 Act (as amended by paragraph 4(2) of the Schedule to the Private International Law (Miscellaneous Provisions) Act 1995) provides that in relation to Parts I to VI (i.e. sections 1 to 122) of the Act and to regulations made under it:

> "Regulations made by the Treasury with the concurrence of the Secretary of State may provide... as to the circumstances in which, for the purposes of the enactments to which this section applies, a marriage during the subsistence of which the party to it is at any time married to more than one person is to be treated as having, or as not having, the same consequences as any other marriage."

28. The parties are agreed that this provision confers wide regulation making powers. We also observe that it treats a polygamous marriage as a marriage and acknowledges that, for these purposes, a person can be "married" to more than one person at a time.

29. Section 175 (3) provides:

> "Except... insofar as this Act otherwise provides, any power under this Act to make regulations or an order may be exercised –
>
> (a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;
>
> (b) so as to make, as respects the cases in relation to which it is exercised –
>
> (i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
>
> (ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class for different purposes of this Act,
>
> (iii) any such provision either unconditionally or subject to any specified decision;
>
> and where such a power is expressed to be exercisable for alternative purposes it may be exercised in relation to the same case for any or all of those purposes; and powers to make regulations or any order for the purposes of any one provision of this Act are without prejudice to powers to make regulations or an order for the purposes of any other provision."

30. The Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975 No 561) were made under section 162 of the Social Security Act 1975 (the predecessor provision to section 121). So far as is relevant they provide as follows:

> "1(2) In these regulations, unless the context otherwise requires –

...

"polygamous marriage" means a marriage celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy;

"monogamous marriage" means a marriage celebrated under a law which does not permit polygamy, and "in fact monogamous" is to be construed in accordance with regulations 2(2) below; ...

2(1) ...a polygamous marriage shall, for the purposes of [the relevant legislation] be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous.

2(2) In this ... regulation –

(a) a polygamous marriage is referred to as being in fact monogamous when neither party to it has any spouse additional to the other; and

(b) the day on which a polygamous marriage is contracted, or on which it terminates for any reason, shall be treated as a day throughout which that marriage was in fact monogamous if at all times on that day after which it was contracted, or as the case may be, before it terminated, it was in fact monogamous."

Conclusions on English Law Prior to the Human Rights Act 1998

31. The parties are agreed, Mr Maurici specifically conceding on behalf of the claimants, that "absent any argument" under the Human Rights Act 1998 (Fuljan) Bibi v Chief Adjudication Officer is binding as to the construction of section 37 and must have a similar effect on the construction of section 38 and the pre-April 2001 version of section 36. This agreement and concession accord with our understanding of the position.

The Human Rights Act 1998 - General

32. It is agreed that the real issue in these cases relates to the position under the Human Rights Act 1998 and the Convention for the Protection of Human Rights and Fundamental Freedoms agreed at the Council of Europe at Rome on 4 November 1950 ("the Convention").

33. The Human Rights Act 1998 came fully into force on 2 October 2000. Amongst other matters, it provides for direct application of the Convention in UK domestic law. The main relevant provisions of the Human Rights Act 1998 are as follows:

"3(1) So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights.

...

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

6(2) Subsection (1) does not apply to an act [of a public authority] if –

(a) as a result of one or more provisions of primary legislation the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights the authority was acting so as to give effect to or enforce those provisions.

6(3) In this section "public authority" includes –

(a) a court or tribunal

...

7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

(a) ...

(b) rely on the Convention right or rights concerned in any legal proceedings."

34. Article 8 of the Convention provides:

"8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.

8.2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others."

35. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this 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."

36. Article 1 of the First Protocol to the Convention provides:

"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."

The Human Rights Act 1998 - Agreement Between the Parties

37. In the cases before us, the Secretary of State has conceded that for the purposes of our decisions, the benefits in question concern family planning and dependency and family life within Article 8, which is engaged. He reserves the right to reopen this point in the Court of Appeal, which in the light of existing authority he considers to be the appropriate tier for argument.

38. For the claimants Mr Maurici, who did not allege any direct breach of any article taken in isolation from Article 14, also accepted that it is not necessary to consider Article 1 of the First Protocol, although at an earlier stage the claimants had sought to argue that the facts fell within this provision. Presumably, this concession is conditional on it being accepted that Article 8 is engaged. The Secretary of State has indicated that no concessions are made on Article 1 of the First Protocol but agrees that in view of cases pending before higher courts, the Commissioners should not consider this matter.

39. We accept that these concessions are all properly made. The result is that our decisions in these cases turn on the sole question argued before us, whether there has been a breach of Article 14 in the context of Article 8 being engaged.

The Proper Approach to Article 14

40. Claims that assert a breach of Article 14 can arise in a wide variety of diverse circumstances. In an attempt to structure and make consistent the approach to such claims, in Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 at paragraph 20 Brooke LJ formulated a series of questions, as follows:

> "(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions.... (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification?"

41. As we understand the judgment, these questions were never intended to provide a rigid framework to be scrupulously and sequentially applied in every case in which an Article 14 claim was made. Brooke LJ himself made clear that the approach he had suggested would not be appropriate in every case. In Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557 at paragraph 134, Baroness Hale said this:

> "In my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based upon a proscribed ground and whether it had an objective justification. If situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigid formulaic approach is to be avoided."

42. But, in many cases, such a rigid approach was adopted, with each question in sequence being worried at by parties with reference to what other Courts had decided in relation to the same question but often in very different circumstances. In the hearing before us (which of course took place before the House of Lords had decided Carson), detailed debate took place over two days in respect of each of the questions. Over 40 cases were cited to us. There was the greatest difficulty in approaching this case rigidly on the basis of the Michalak questions because, in this case, there was very considerable overlap between the questions as had been identified by Baroness Hale in Ghaidan. Therefore, whilst the House of Lords opinions in Carson unfortunately delayed this decision (to allow the parties further time to make submissions), they came as a relief to us - relief from attempts to formulate our reasons on the basis of the questions posed in Michalak which in this case would have resulted in a considerable amount of intellectual gymnastics and artificiality.

43. In Carson, the House of Lords advocated a very different approach. Lord Nicholls said (at paragraph3);

> "... I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve that aim is appropriate and not disproportionate in its adverse impact."

44. Lord Rodger and Lord Walker expressly endorsed this approach (see, e.g., paragraphs 43 and 64), as in substance did Lord Hoffmann (with whom all of their Lordships, except Lord Carswell on the conclusion in the Carson case itself, agreed).

45. The principle of equal treatment of all human beings in the protection afforded by the Convention rights does not of course require that all people must be guaranteed equal possessions, or given the same social security benefits regardless of factual differences between different cases. Some differences in treatment are justified. As Lord Hoffmann notes (in paragraph 14) and as has long been recognised in Strasbourg jurisprudence, it is not every difference in treatment that constitutes discrimination within the meaning of Article 14:

> "Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different.... There is discrimination only if the cases are not sufficiently different to justify the difference in treatment...."

As Lord Hoffmann goes on to say (in paragraph 15), whether cases are sufficiently different to justify the difference in treatment is partly a matter of values and partly a question of rationality. It is implicit in Lord Hoffmann's judgment that this can only be determined empirically from time-to-time, since the values and notions of acceptable human conduct underlying the living Convention provisions may change.

46. However, Lord Hoffmann draws an important distinction (paragraphs 14 and 15):

> "[T]he Strasbourg court has given [Article 14] a wide interpretation... and it is therefore necessary ... to distinguish between those grounds of discrimination which prima facie offend our notions of respect due to the individual and those which merely require some form of rational justification....
>
> There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, e.g. that it is rational to prefer to employ men rather than women because more women give up their employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (e.g. on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest.

> Secondly, 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."

While this resonates with the same themes as in the Michalak questions, with great respect, we consider the approach formulated by Lord Hoffmann to be far more helpful in the case before us.

47. Therefore, following Carson, in respect of an alleged violation of Article 14, if the alleged discrimination is in connection with another Convention right and is on one of the grounds relating to status stated in Article 14, then the focus of the relevant court or tribunal is on *why* the complainant has been treated as he or she has. Once this reason is identified, the focus turns to consider whether this reason accounts for and justifies the difference in treatment accorded. If it does, then there is no discrimination contrary to Article 14.

The Application of the *Carson* Approach to these Appeals

48. We consider it to be clear in the light of Carson that, although a sequential analysis is to be avoided, the question whether unlawful discrimination contrary to Article 14 is established in any particular case may have several different facets, and as Lord Nicholls points out, those which should be the focus of the court's scrutiny will depend on the individual facts and circumstances of the particular case.

49. We are all agreed that those facets of particular relevance in the cases before us are whether the alleged discrimination is in connection with a Convention right (which is conceded); whether the difference in treatment complained of amounts in terms of Article 14 to discrimination on a ground covered by that article; and whether if so it has been shown to be justified in terms of a legitimate aim and means proportionate to that aim. We are also unanimous in the result that in none of these cases is discrimination contravening Article 14 established. However, our reasons for this conclusion differ to some extent and are therefore set out separately below: those of the Chief Commissioner and Mr Howell in paragraphs 50-62 and those of Mr Levenson in paragraphs 63-80.

Reasons of the Chief Commissioner and Mr Howell

50. The only question argued before us was whether the domestic law rule that prevents these claimants getting widow's benefits was in breach of Article 14 in conjunction with Article 8, the right to respect for family life. It was not contended on behalf of the claimants that there was any direct breach of Article 8 itself or (on the authority currently binding us) that any other primary article was in point. Conversely it was conceded on behalf of the Secretary of State for the purposes of argument at this level that Article 8 was sufficiently "engaged" to bring Article 14 into play.

51. All of their Lordships in Carson agreed that a rigid step by step division of Article 14 issues into separate questions is to be avoided, and a court or tribunal should normally just concentrate on identifying *why* the complainant has been treated as she was, and address in broad and simple terms whether this is discriminatory; a principal aspect being whether it reflects enough of a "relevant difference" in the facts between her situation and others to account for and justify different treatment (Lord Walker citing Lord Nicholls at paragraphs 63-64; Lord Nicholls himself at paragraph 3; Lord Hoffmann at paragraph 31; Lord Rodger at

paragraph 43; and Lord Carswell, who agreed on the principle, at paragraph 97). If it does, there is no discrimination. As Lord Hoffmann notes in paragraph 14 and as has long been recognised in Strasbourg jurisprudence, it is not every difference in treatment that constitutes discrimination within the meaning of Article 14: the principle of equal treatment of all human beings in the protection afforded to their Convention rights does not of course require that all people must be guaranteed equal possessions, or given the same social security benefits regardless of factual differences between their different cases.

52. What factual differences can count as "relevant" (i.e. non-discriminatory) in this context is, as Lord Hoffmann says in paragraph 15, partly a matter of values and partly a question of rationality; and, as he acknowledges there and in paragraph 17, is something that can only be determined empirically and from time to time, since the values and notions of acceptable human conduct underlying the living Convention provisions may change. It must follow that the concept cannot (and should not) be given any more precise definition than the rather circular one of a rational and material basis for making a difference in the particular case, not based on picking out individuals or groups by sex, race or other characteristics in ways that violate current generally accepted notions of common human dignity and equal respect for all members of humanity, or otherwise infringe the principle of equal treatment before the law for all manner of people in the protection of their Convention rights.

53. The facts are that each of the claimants before us is a surviving partner of a legal union recognised in English law as a valid marriage under a foreign system of law permitting polygamy; and in each case immediately after her late husband's death (the relevant time under the domestic law rules for determining whether she qualifies for entitlement to the benefits claimed) there was also another such surviving partner of another similar legal union to the same man. The situation of each claimant is thus similar to that of a widow under English law in that she is recognised as the survivor of a lawful marriage to her husband subsisting at the date of his death; it is dissimilar in that she was not the only one.

54. That latter factual difference is the sole basis for the difference in treatment accorded by the domestic social security legislation. If a woman married as these claimants were had been the only survivor of such a union to her late husband, she would have been entitled to exactly the same benefits as the widow under an English marriage; regardless of her marital status being derived from a foreign law which allowed polygamy, and even if her own marriage had in fact been polygamous at some previous time before his death.

55. Having identified the one reason for her being treated differently, and assuming (but not deciding, which is unnecessary) that each claimant's marital status as the survivor of a lawful foreign marriage to her late husband, alternatively the fact that she was not the only survivor of such a marriage to him, can be a sufficient "personal characteristic" to invoke Article 14, it seems to us that the question whether she has suffered any discrimination contrary to that article can be simply answered, applying a similar process of reasoning to that of Lord Hoffmann at paragraph 33.

56. Point 1: There is no question in these cases of discrimination against the claimants merely on the ground of that marital status, since if each of them had been the only wife to survive her husband at his death she would have been treated just the same as one whose status derived from an English marriage. Nor as Mr Maurici made clear is there any suggestion of discrimination based on race, religion or other established "suspect grounds" apart from the question of marital status.

57. Point 2: We do not accept that the factual difference of not having been the only surviving widow of a man should itself be treated as a fresh "suspect ground", or that failure

to accord each claimant the same benefit in respect of her late husband as if she had been his sole widow raises any question of offending common human dignity and respect for the individual or the equal protection of Convention rights so as to require that factual difference to be excluded as "irrelevant" for Article 14. On the contrary it seems to us entirely rational, and not in any way inconsistent with any currently accepted notion of those principles, for a social security system which has only ever provided one sole widow's benefit per contributor to recognise and treat as different in this context the two obviously differing factual situations where a man dies leaving only one wife surviving him, and where he dies leaving two or more.

58. The fundamental nature of the difference is underlined by asking what remedy is sought for polygamous widows if the claimants are entitled to succeed. Whatever answer one gives must involve the possibility of multiple claims for widow's benefits having to be dealt with in respect of the death of the same man, which means forcing the system to do not the same as it does in the case of a sole English or foreign law widow, but something different. The objective factual difference between the two situations shows why they are not "relevantly analogous" in the context of survivor's benefits and this in our view is sufficient to account for and justify their being treated differently.

59. We do not for our part think it necessary or helpful to debate whether this factual difference should be described as one of "status". In one sense no doubt it can, though the existence of another wife is not a personal characteristic of the claimant, and Mr Maurici expressly confirmed on instructions that the legal status of these claimants under the relevant foreign marriage law was unaffected by whether another wife was alive or not. However it is clear from the majority judgments in Carson that at least outside the suspect categories, a relevant difference of fact (in that case, living in a different part of the world) will prevent the case being one of discrimination under Article 14 even assuming that the same factual difference may also be regarded as a personal characteristic of the complainant: see Lord Hoffmann at paragraph 13, Lord Walker at paragraph 58. In our judgment the factual difference that means the claimants before us do not get the benefit for which a man's sole widow qualifies is of a similar kind. The recognition of the two situations as factually different for benefit purposes is simply not the kind of "discrimination on any ground such as sex, race, colour,... birth or other status" in the protection afforded to Convention rights that Article 14 is talking about.

60. Point 3: If the failure to treat two situations alike is not discrimination because they are relevantly different, it must follow that no further justification or judicial evaluation of *how* differently the domestic law system happens to treat them is appropriate. The extent to which any alternative survivors' benefits ought to be provided instead of a sole widow's benefit in such cases as these is a matter not for judicial but for legislative decision. It may seem harsh that no benefit at all is currently provided instead of, say, some system of allocation or division of a single ration of benefit among co-survivors of lawful polygamous marriage, but it is not irrational, and once the rational and factual basis for treating such cases as "relevantly different" from that of a sole widow is established no deeper or more detailed justification has to be provided to a court or tribunal: the questions of policy and practical expediency that must affect any choice of alternative provision in the social security system are for social and political judgment, not legal.

61. Insofar as the argument on this was pursued as a separate point, we were not persuaded that the link of the qualifying conditions for benefit to the date of the spouse's death (which is what prevents the survivor of two widows claiming even after she becomes the only one on the death of the first) raised any question of discrimination on personal characteristics within Article 14 at all, since it applies generally to all widow's benefit claims. But in any case the

drawing of such a line for the purpose of determining claims to entitlement is exactly the kind of practical decision for the sake of legal certainty that is likewise to be left to the legislature: see the decision in relation to the 25-year age condition in Reynolds, reported with *Carson,* e.g. per Lord Hoffmann at paragraph 41, Lord Walker at 91; cf also R (Hooper) v Secretary of State [2005] 1 WLR 1681 per Lord Hoffmann at paragraphs 64-67 and Lord Scott at paragraphs 97-98. It was (rightly) not contended that the link was irrational and in our view it provides no ground for a claim based on Article 14.

62. For those reasons we consider that none of these claims succeeds.

Reasons of Mr Levenson

Is There a "Status" Within the Meaning of Article 14?

63. The allegedly victimised group in the cases before us is that of surviving widows of marriages that were actually polygamous at the date of the death of the husband. The other group by comparison with which Mr Maurici says they had been victims of discrimination is that of surviving widows of marriages that were actually monogamous at the date of the death of the husband. The latter group would include widow of marriages that were celebrated under English law and other marriages that were only ever intended to be monogamous, as well as marriages that had been potentially or actually polygamous, but were not in fact polygamous at the date of the husband's death.

64. Mr de la Mare argued that marriage is a special form of status which is entirely voluntary and entails acceptance of a bundle of "symmetrical" rights and obligations, and that those with one voluntary status cannot properly or sensibly complain that those with another voluntary status receive better treatment.

65. On this point I am not persuaded by Mr de la Mare. Article 14 prohibits discrimination "on any ground such as ... property ... or other status". "Property" is a legal status, even if the other grounds in Article 14 relate to more personal characteristics. Other statuses specified in Article 14 are voluntary - "religion, political or other opinion ...". (See also *Lindsay v United Kingdom* 9 EHRR 555).

66. For the purposes of our decisions marriage is a legal status and marital status is a personal characteristic. We are not concerned with religious or other kinds of recognition of relationships. Assuming that actual entry into marriage is voluntary, the legal terms on which parties enter into marriage are not necessarily voluntary. If people wish to be married, on the whole the law prescribes the bundle of rights and obligations. This is equally true of monogamous marriages, actually polygamous marriages, and potentially polygamous but actually monogamous marriages. Different treatment under the law is obviously capable of amounting to discrimination contrary to the Convention. There was some discussion before us about whether the existence of a first wife at the date of the death of the husband is part of the status of the second wife, and as to whether status can be affected by an event, such as the death of a husband. The answer is that the existence of another wife, and the event of the death of the husband, are relevant to status because the law provides that they are - the same law that created the status in the first place.

67. Members of the two groups are treated differently, and that difference of treatment is based on status. Whether the difference in treatment amounts to discrimination for the purposes of Article 14 is a different issue.

Are There Suspect Grounds of Discrimination?

68. Mr Maurici argues that discrimination on grounds of marital status is to be considered a suspect ground of discrimination. This is because it is based on personal characteristics which an individual cannot change and is a ground of discrimination which offends notions of the respect due to the individual. I am not persuaded by this, in view of the kind of suspect grounds enumerated by the House of Lords.

Discrimination and Justification

69. If a person is treated differently from another because of status, there is discrimination for the purposes of Article 14 if the difference in treatment does not pursue a legitimate aim or is disproportionate to the aim pursued. In Belgian Linguistics *(No 2)* (1979-80) 1 EHRR 252 at 284 the European Court of Human Rights said:

> " ... Article 14 does not forbid every difference of treatment in the exercise of the rights and freedoms recognised ...
>
> ... [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles that normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aims sought to be realised".

70. This has been reiterated on many occasions. For example, in the admissibility decision of the European Court of Human Rights in Joanna Shackell v United Kingdom (application no 4851/99). In Shackell the surviving woman (unmarried but long term cohabiting) partner of a deceased man had been refused widow's benefit on the grounds that they had not been married. Declaring the application inadmissible, the Court said:

> " ... [M]arriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow".... In any event... 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 between the means employed and the aim sought to be realised .... Further, the Court reiterates that "States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law...". The Court again notes that marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment by Article 12 of the Convention. The Court considers that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government".

71. I also bear in mind the comments of Sedley LJ in M v Secretary of State for Work and Pensions; Langley v Bradford Metropolitan District Council and Another [2005] 2 WLR 740 at pages 759-760:

> "The fact that an otherwise unjustifiable anomaly is endemic in the system may explain and perhaps even excuse, but it cannot logically justify it. Were it otherwise, the more entrenched the discrimination, the more justified it would be" (paragraph 59).

> "... [N]one of the jurisprudence supports the proposition that otherwise unjustified breaches of the Convention can be justified by the difficulties of setting them right" (paragraph 63).

72. Mr de la Mare argued that the present case concerns an area of social policy in which the State has a wide margin of appreciation, that there is no common European standard from which the United Kingdom is out of line (although in my view the proper question relates to "principles that normally prevail in democratic societies"), that moral and social issues are also important and that the financial context should also be considered. In principle this is unobjectionable, although on this last point, he tended to conflate or confuse the question of justification with the question of remedy. I deal below with the issues relevant to the "financial context". The essence of his justification was "the practice of polygamy being deemed unacceptable to the majority of the population". In declaring the application inadmissible in RB v United Kingdom (application no 19628/92) an immigration dispute in which Article 8 was invoked, the European Commission of Human Rights said:

> "... [I]n establishing an immigration policy on the basis of family ties, a Contracting State 'cannot be required to give full recognition to polygamous marriages which are in conflict with their own legal order'.... In this connection the Commission notes that for centuries it has been an offence in the United Kingdom, by virtue of the criminal law on bigamy, to contract a marriage with more than one woman at a time on United Kingdom territory".

The quoted words are from the decision of the Commission in El Abasse v Netherlands (application 14501/89).

73. Mr Maurici argued that for the purposes of Article 14, the Commission's approach had been that it was adequate justification that some recognition had been given to actually polygamous marriages. There was no jurisprudence to the effect that it was permissible to give no recognition. That might not be the case in relation to Article 8. The operating domestic rules in the cases did not pursue a legitimate aim, or if they did, they did not provide proportional means of pursuing that aim. This was because none of the claimants was entitled to receive any widow's benefit, notwithstanding the facts that one of them was the only surviving widow at the date of claim and that all of the deceased had paid appropriate contributions.

Financial Context

74. Mr de la Mare argues that the financial impact of treating the two groups alike would be "significant", that there would be considerable scope for unfair advantage, that polygamous marriages had not been taken into account in the actuarial mix against which benefits are structured, and that the Law Commission had been unable to find any other solution (in Law Com No 42 of February 1971 and Law Comm No 146 of August 1985). In these circumstances the Secretary of State was entitled to decide to preserve the existing proportionate solution. In Iman Din v National Assistance Board [1967] 2 QB 213 at 221, referring to various decisions on polygamous marriages, Salmon LJ said:

> "The ground for those decisions was that as a man paid only one lot of contributions, calculated on the basis of one wife at a time, the Acts applied only in case of monogamous marriages. It would clearly be wrong for a man paying contributions on the basis indicated to reap benefits in respect of perhaps three or four current wives."

75. However, I agree with Mr Maurici that this explanation by Salmon LJ does not "stack up". Contributions are not based on this assumption. They are payable by those who never marry as well as by those who marry several times. "A man who marries at age 16 or the day before he dies will have paid the same contributions as a man who has never married, even though the former will have a widow who can claim on the fund". Further, the effect of domestic law is that none of the widows can benefit, either by apportionment or by payment of benefit to one widow in respect of each contributor.

76. It seems to me that the payment of contributions in the United Kingdom is part of a system of insurance against certain risks - including retirement, unemployment, incapacity to work, injury at work, and (at the time relevant to the cases before us) dying leaving one widow. In this sense the question is whether it is justified to exclude from these risks the risk of dying and leaving (as at the date of death) more than one widow.

Conclusion

77. Ultimately, the questions to be decided are whether it is legitimate for the United Kingdom to enshrine in law a set of rules that favour legally and actually monogamous marriages over polygamous marriages, and whether this has been done in a way that is proportionate to that aim.

78. Certainly, any justification for the differences in treatment does not rest in the administrative or legal difficulties of equating polygamous marriage with monogamous marriage. If it were State policy to provide pensions or other payments to widows of deceased men to whom they had been actually polygamously married, such difficulties could and would be overcome. I am more impressed by Mr de la Mare's argument that polygamous families can, broadly speaking, be expected to have different familial structures, networks of support, reliance of dependency and patterns of cohabitation.

79. There is no doubt that the cultural and social history of the United Kingdom and its constituent countries has favoured monogamy over polygamy and that much social and cultural life has been based on the assumption that people will live in a monogamous or para-monogamous relationship. In recent years this has been breaking down and I acknowledge that the answers given today might not be appropriate in the future. Meanwhile, I am of the view that it is legitimate for the State in a democratic society to pursue this aim. The methods chosen to do so are proportionate and, in fact, domestic law has gone quite a long way to accommodate polygamous marriages in a manner that is reasonable and consistent with this legitimate aim. Ultimately, the justification for the differences in treatment is that the State is entitled to favour one over the other in the manner that it does. It is also legitimate to define the nature of the marriage as at the date of death, which relates to the risk in respect of which contributions are paid. For that reason, there is no difference between the cases of the three claimants before us.

80. For these reasons, I too consider that none of these claims succeeds.

The Unanimous Result

81. For the foregoing reasons the claimants are not entitled to the widow's benefits they have claimed. We consequently dismiss their appeals, and confirm the decisions of the Secretary of State to that effect. In CP/3114/2003, as we indicate above (paragraph 5) the claim for retirement pension appears never to have been decided by the Secretary of State, and we remit that claim to him to make a determination.

His Honour Judge Gary Hickinbottom
Chief Commissioner

P L Howell
Commissioner

H Levenson
Commissioner

25 November 2005