Bulletin 191 [IS Hon?]

CP/518/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. Although I therefore allow the appeal and set aside the tribunal's decision, I nevertheless substitute a decision to the same effect, namely, that the claimant's retirement pension fell to be reduced by £28.30 per week from and including 26 November 2001 because she had been a hospital in-patient for six weeks at that date.

2. This appeal raises again the question of whether the former provisions of the Social Security (Hospital In-Patients) Regulations 1975, providing for the reduction of the retirement pensions of claimants after periods as hospital in-patients, are contrary to Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights ("the Human Rights Convention") standing alone, or Article 14 in conjunction with Article 1 of Protocol 1. I held oral hearings of the appeal on 20 November 2003 and on 24 January 2005 attended by Mr Tim Samuel of Hertfordshire County Council Money Advice Unit, on behalf of the claimant, and Mr James Maurici, of Counsel, on behalf of the Secretary of State. However, my decision has been delayed in order to give the parties an opportunity of making written observations on the decision of the House of Lords in *R (Carson) and R (Reynolds) v Secretary of State for Work and Pensions* [2005] 2 WLR 1369.

3. The facts are simple and not in dispute. The claimant, who has no dependants, has been in receipt of a reduced rate Category A basic retirement pension since 1996. On 9 October 2001, when she was aged 71, she was admitted to hospital as an in-patient. Under regulations 4 and 5 of the 1975 Regulations, in the form in which they were then in force, the claimant's retirement pension of £48.51 per week became subject to a reduction of 40% of the full basic pension after she had been an in-patient for six weeks. The full basic pension at that time was £72.50 per week, so that a reduction in accordance with the terms of the regulations would have amounted to £29.00. However, the Department's practice was to apply a standard rate of reductions, which in the case of claimants without dependants was £28.30. The claimant's pension was therefore reduced by that amount to £20.21 with effect from 26 November 2001, which was the first pay day following the expiry of the six week period.

4. On 30 January 2002 Mr Samuel appealed on the claimant's behalf against that decision. His first ground of appeal was that the former regulation 5 of the 1975 Regulations contravened Article 4(1) of Council Directive 79/7/EEC, on the progressive implementation of the principle of equal treatment for men and women in maters of social security, because it provided in effect for a flat rate of reduction of retirement pension for hospital in-patients. Since the retirement pensions paid to women are on average lower than those paid to men, Mr Samuel argued that women are proportionately disadvantaged by a flat rate reduction and that regulation 5 was therefore discriminatory against women. Mr Samuel's second ground of appeal was that the provisions of the 1975 Regulations contravened both Article 1 of Protocol 1 of the Human Rights Convention standing alone, and Article 14 read in conjunction with Article 1 of Protocol 1. The appeal was supported by statistics showing the average amounts of each category of state pension paid to men and women.

5. Following a hearing on the papers held on 24 July 2002 the tribunal, consisting of a legally qualified panel member, dismissed the appeal for the following reasons:

> **"The basis for the Appellant's arguments that she has been treated disproportionately is that the *Retirement Pension Summary of Statistics* for 31 March 2001 says "The average amount of pension entitlement at March 2001 was $67.68 per week. The average amount for men is substantially higher than for women; £82.02 per week compared with £59.29" She argues that the application of the standard 39% reduction therefore disproportionately affects women, and it is therefore discriminatory within the Council Directive and the ECHR. I do not accept that argument. While the arguments put forward by her representative are clear and forceful they are based on the false premise that the Appellant has in fact received a lower pension because she is a woman and not a man. It is not sufficient merely to show that women on average receive a lower pension than men. The relevant issue is whether the pension received by the Appellant in her circumstances will be the same as that received by a man in the circumstances. That issue has not been addressed by the Appellant. She has put no calculations before me to show that she has been treated in any way differently to the way a man would have been in the same circumstances. For those reasons I was not satisfied that the Appellant had demonstrated that either ground of appeal was sound and I dismissed the appeal."**

The claimant sought leave to appeal on the ground that the tribunal had not applied a correct test of indirect discrimination under either Directive 79/7 or Article 14 of the Human Rights Convention, and I gave leave to appeal on that ground on 25 February 2003.

5. In *CP/5084/2001* Mr Commissioner Turnbull held on facts similar to those in this case that the reduction of retirement pensions of hospital in-patients under the 1975 Regulations did not contravene either Article 1 of Protocol 1 of the Human Rights Convention read alone, or Article 14 in conjunction with Article 1 of Protocol 1. However, the Commissioner was not asked to consider any arguments under Directive 79/7. The claimant in *CP/5084/2001* sought and obtained leave to appeal to the Court of Appeal against the Commissioner's decision and in a submission dated 31 March 2003 the Secretary of State's representative, while accepting that the tribunal's decision was in error of law in the respect identified in my grant of leave to appeal, asked me to defer deciding the appeal until the outcome of the appeal in *CP/5084/2001* was known. However, in view of the claimant's opposition to that request, I declined to adjourn the appeal and subsequently directed an oral hearing.

6. At the first hearing I heard argument on Directive 79/7 and indicated that I would decide at the conclusion of the argument whether to defer giving my decision until the conclusion of the appeal in *CP/5084/2001*. However, regulation 4 of the 1975 Regulations was amended and regulation 5 was revoked with effect from 21 May 2003 and, as a result, the appeal in *CP/5084/2001* was withdrawn. I therefore directed a further oral hearing to consider the Human Rights arguments in this case in full. However, Mr Samuel informed me at that hearing that he was not pursuing the case under Directive 79/7. I was therefore ultimately concerned with the same issues as Mr Commissioner Turnbull in *CP/5084/2001*, although the discrimination arguments were put differently in each of the cases.

7. Prior to the amendments made in 2003, Regulation 4 of the 1975 Regulations provided for the weekly rate of the benefits specified in Schedule 2, which include retirement pension, to be adjusted where a claimant had received free hospital in-patient treatment continuously for a period of more than 6 weeks. By regulation 5, the amount of the reduction until the claimant

had been in hospital for more than one year was 20% of the basic pension if the claimant had a dependant and 40% if the claimant had no dependant.

8. Article 1 of Protocol 1 of the Human Rights 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."**

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."**

9. So far as Article 1 of Protocol 1 read alone is concerned, it is clear from the judgment of the Court of Appeal in *R (Carson) and R (Reynolds) v Secretary of State for Work and Pensions* [2003] 3 All ER 577 that entitlement to a retirement pension must be regarded as a "possession" for the purposes of the Article, (although the traditional distinction between contributory and non-contributory benefits for these purposes may have lost some of its significance as a result of the admissibility decision of the European Court of Human Rights in *Stec and Others v United Kingdom* (Applications Nos. 65731/01 and 659001/01), 6 July 2005. Both parties agreed that to be the case, but they did not agree on whether there was a deprivation of a possession as a result of the reduction in the claimant's retirement pension pursuant to the 1975 Regulations.

10. Mr Maurici relied principally on the judgment of Laws LJ in the Court of Appeal in *Carson and Reynolds*. He submitted that that case establishes that Article 1 of Protocol 1 applies only to a person's existing possessions, and does not guarantee a right to acquire possessions-see *Markx v Belgium* 2 EHRR 330 and *Wilson v First County Trust (No. 2)* [2004] 1 AC 816. The right under the Article is at most to any payments made by the fund in accordance with domestic legal requirements, and domestic legislation which specifies the amount of any State benefit cannot constitute an interference with the right given by Article 1 of Protocol 1. Accordingly, Mr Maurici submitted that Mr Commissioner Turnbull was correct in holding in *CP/5094/*2001 that "...the reduction of the claimant's pension...was not a consequence of a provision depriving her of that benefit, but rather of a provision defining and quantifying the benefit". In relation to the justification arguments under this Article and Article 14 read in conjunction with Article 1 of Protocol 1, Mr Maurici tendered a witness statement from an official of the Department of Work and Pensions, describing the purpose of the relevant provisions as to "...prevent double provision from public funds as the publicly funded NHS maintains people while they stay in hospital as well as providing free treatment."

10. Mr Samuel submitted that the reduction in the claimant's retirement pension constituted a substantial reduction affecting the very substance of the right to retain the benefit of an old age insurance system-see *Muller v Austria* (1975) 3 D.R. 25. In his supplementary submission he pointed out that the effect of the adjustment was to reduce the claimant's pension by 58%

of her pension, leaving her with only £2.06 more than her applicable amount for income support purposes. Since the claimant was being deprived of a proportion of her pension which was already in payment, she was not in the position of someone seeking the payment of a particular amount such as an up-rating of her pension (as in *Carson*), or a higher rate of benefit (as in *Reynolds*), or the earlier payment of a pension (as in *Smith v Secretary of State for Defence* [2004] EWHC 1797 (Admin.) In *Szrabjer and Clarke v UK* (Application Nos. 27004/95 and 27011/95) the Commission declared inadmissible a complaint that the suspension of SERPS during a term of imprisonment was contrary to Article 1 of Protocol 1 because the measure was justified as being in the public interest, and Mr Samuel submitted that Laws LJ had been wrong in *Carson* (at para. [21]) to reject the submission that the case was authority for the proposition that disqualification from receiving benefit operated as a deprivation of the claimant's possessions. In the alternative, Mr Samuels submitted that, if the claimant was claiming a particular amount, the reduction of benefit in her case was so great as to amount to a deprivation because it affected the very substance of the right-see *Muller v Austria* and *Ochensberger v Austria* (App. 27047/95).

11. In rejecting the claim to an up-rated pension under Article 1 of Protocol 1, Laws LJ in *Carson* relied on the principles set out in *JW v UK* (1983) 34 DR 153 (quoted at para. [41] of the judgment of the Court of Appeal):

> **"The Commission has considered the applicant's complaint under Article 1 of the Protocol. It first recalls that it has previously held that although this provision does not as such guarantee a right to a pension, the right to benefit from a social security system to which a person has contributed my in some circumstances be property right protected by it. However, the Commission also held that Article 1 does not guarantee a right to a pension of any particular amount, but that the right safeguarded by Article 1 consists, at most, "in being entitled as a beneficiary of the social insurance scheme to any payments made by the fund" [*Muller v Austria* (1975) 3 DR 25 at 31]. It has further held that before the right to benefit protected by Article 1 can be established, it is necessary that the interested party should have satisfied domestic legal requirements governing the right [*X v* Italy (1977) 11 DLR 114]"**

12. Although Mr Maurici submitted that the claimant in this case was claiming entitlement to a pension of a particular amount, contrary to the principles set out in *Carson* and *Reynolds*, I agree with Mr Samuel that a distinction can be drawn between this case and those cases where a claimant is seeking a *prospective* entitlement to or increase in benefit. Article 1 of Protocol 1 does not confer a right to acquire a benefit-see *Markx v Belgium*-and, although the claimants in *Carson* and *Reynolds* were already in receipt of benefit, they were claiming to be entitled to benefit at a higher rate. In *JW v UK* and *Corner v UK* App. No. 11271/84 the claimants had been in receipt of up-rated pensions, but claimed to be entitled to future up-rating after leaving the United Kingdom. In this case, however, the claimant had already acquired a right to a basic retirement pension at the rate applicable in her case. If the 'possession' protected by Article 1 of Protocol 1 was an entitlement by the claimant to continue to receive the same amount of retirement pension as she had received before being admitted to hospital, then Mr Samuel is correct in submitting that the effect of the 1975 Regulations was to deprive the claimant of that possession.

13. However, I do not consider that that is the correct way of looking at the rights possessed by the claimant in respect of her entitlement to retirement pension. As Mr Commissioner Turnbull showed in *CP/5084/2001*, the benefits paid to hospital in-patients have been subject

to reduction ever since the inception of the national insurance scheme, because it has been considered right that national insurance benefits should be reduced if a claimant is being maintained for a time by another public social service, such as the National Health Service. The most important reason for the Commissioner's conclusion that the reduction in the claimant's pension in *CP/5084/2001* was not a consequence of a provision depriving the claimant of benefit, but rather of a provision defining and quantifying benefit, was that a provision for a reduction in benefit after a period as an in-patient had been in force throughout the time when the claimant was paying the contributions which qualified her for the pension- see para. 17 of the decision.

14. For my part, I also consider that matter to be crucial in deciding the nature of the rights possessed by the claimant in respect of her retirement pension. The claimant has not acquired a right by virtue of her contributions to receive a retirement pension of any specified amount, but a right to receive a pension determined in accordance with the provisions governing entitlement to retirement pensions and their amount. In *Muller v Austria* and *Ochensberger v Austria* (App. No. 27047/95) there had been changes to the claimants' pension schemes affecting their entitlement to benefit during the period while they were making contributions. However, since regulations providing for the reduction of the pensions of claimants after periods as a hospital in-patient were in force throughout the period during which the claimant paid national insurance contributions, her rights to receive a pension during periods as a hospital in-patient have at no time been adversely affected. Just as Stanley Burnton J. held in *Carson* (at [2002] 3 All ER para. [48]) that the claimant in that case had not been deprived of a right to an up-rated pension because she had never had that right, I consider that the claimant in this case has not been deprived of any right to a full basic pension after a six week period as a hospital in-patient because no such right has ever existed. I am therefore satisfied that the claimant has not suffered the deprivation of any possession for the purposes of Article 1 of Protocol 1. Although Mr Samuel may well be correct in submitting that the decision in *Szrabjer and Clarke* must have been on the assumption that there was a deprivation of a possession in that case, my conclusion on this issue is consistent with *Carlin v UK* (App.No. 2753/1991), in which the Commission dismissed as manifestly unfounded a complaint that the suspension of industrial injuries disablement benefit involved any violation of Article 1 of Protocol 1.

15. So far as the claim of discrimination under Article 14 in conjunction with Article 1 of Protocol 1 is concerned, it must be accepted in the light of *Carson* and *Reynolds* that the facts of this case fall within the ambit of Article 1 of Protocol 1. In *CP/5084/2001* the basis of the discrimination claim was that the claimant had either been treated differently by comparison with hospital in-patients without any form of state benefit, or alternatively that she had been treated differently by comparison with persons receiving state benefit who were not hospital in-patients. In this case Mr Samuel does not make any claim of direct discrimination, but submits that the 1975 Regulations indirectly discriminate against women because they are "...intrinsically liable to affect women more harshly than men given that they disproportionately receive a lower pension." (para. 7.9 of the Appellant's skeleton argument).

16. In *R v Secretary of State for Employment ex parte Seymour-Smith* Case C-167/97 the European Court of Justice held that for the purpose of deciding whether a measure indirectly discriminates against women, the court must determine whether the statistics available indicate that there is a considerably smaller percentage of women than men who can comply with the relevant requirement. That test corresponds to the statutory concept of indirect

discrimination provided for in the Sex Discrimination Act 1975 and the Race Relations Act 1976. Mr Samuel accepted that there was no evidence that the proportion of women affected by the 1975 Regulations was significantly different from the proportion of men similarly affected, but submitted that the concept of indirect discrimination was not confined to such cases. Relying principally on *O'Flynn v Adjudication Officer* (reported as *R(IS) 4/98*), Mr Samuel submitted that indirect discrimination may exist where the proportion of one group affected by a particular provision is the same as the proportion affected by the provision in the comparator group, but the provision bears more harshly on the disadvantaged group. Mr Samuel further submitted that in cases of indirect discrimination it is inappropriate to apply the staged *Michalak* approach-see *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.

17. I do not consider that *R(IS) 4/98* assists Mr Samuel in this regard, since the basis of the finding of indirect discrimination in that case was that the condition of entitlement to a funeral payment, that the funeral took place in the United Kingdom, was more easily satisfied by national workers than migrant workers. Furthermore, it has not yet been authoritatively decided that Article 14 applies to indirect discrimination, although in *CH/5125/2002 and others* Mr Commissioner Jacobs held that it did apply in such cases. *CH/5125/2002* was followed in *CIS/1870/2003* and *CTC/1271/2002* and Mr Commissioner Jacobs' views were not doubted by the Court of Appeal in the appeals against his decisions-see *Campbell and Others v South Northamptonshire DC and Secretary of State for Work and Pensions* [2004] EWCA 409.

18. I am not prepared to exclude the possibility that Article 14 may apply to a case in which a provision affects the same proportion of persons in the claimant's group as in a comparator group, but is nevertheless more detrimental in its impact on members of the claimant's group. As Mr Commissioner Jacobs observed in *CH/5125/2002 and others*, there seems to be no reason in principle why Article 14 should not apply to "indirect discrimination as well as any other form of discrimination, whether direct, intentional, unintentional or any other form that can exist." If the effect of a provision is to accord to the members of one group less beneficial Convention rights than the members of a comparator group, then I see no reason why Article 14 should not apply, even though the proportion of members of each group affected by the provision in question is the same.

19. In this case the differential impact relied on by Mr Samuel results from the different pattern of national insurance contributions of men and women, and there is therefore a real question as to whether the provisions of the 1975 Regulations can be said to discriminate against the claimant on the grounds of her sex. However, it seems to me to be unnecessary to answer that question because it is apparent from the decision of the House of Lords in *Carson and Reynolds* that in an Article 14 case the emphasis now should be less on the mechanics of differential treatment, and more on the issue of whether such treatment is objectively justified.. Although the House of Lords applied the staged *Michalak* approach in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, *R(S) v Chief Constable of the South Yorkshire Police* [2004]1 WLR 2196 and *A(FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56, in *Carson and Reynolds* the House cast doubt on the usefulness of such a step by step approach. After reviewing the European Court of Human Rights authorities, Lord Walker of Gestingthorpe held (para. [68]:

> **"In these cases (and numerous other cases in which there is even less discussion of the meaning of "analogous situations") the European Court of Human Rights was, without any elaborate analysis or discussion of comparators, reaching an overall conclusion as to whether in the enjoyment of Convention rights there had been unfair and unjustifiable discrimination on the grounds of some personal characteristic. This assessment calls for a process of judicial evaluation which must be sensitive to the factual context. Some analogies are close, others are more distant. As Brooke L.J. recognised [2003] 1 WLR 617, 625, para 22, the evaluation process may not be assisted by setting out standard questions "as a series of hurdles, to be surmounted in turn."**

20. Accordingly, assuming in Mr Samuel's favour that there has been discrimination on the grounds of the claimant's sex, what has to be considered is whether the provision which is said to be discriminatory is unfair and unjustifiable. Since sex is a "suspect" ground of discrimination, the reasons which are said to justify the discrimination must be subjected to the "severe scrutiny" referred to by Lord Walker of Gestingthorpe in *Carson and Reynolds* (para. 57]).

21. Mr Samuel mounted a 14 point attack on the fairness of the Regulations in his written submission, which he developed in the course of the oral hearing. His argument was, in summary, that the 1975 Regulations were arbitrary and inflexible, and were therefore likely to lead to a further deterioration in the health of claimants in hospital. The Regulations did not apply to certain other categories of benefit and took no account of expenditure which a claimant continued to incur while in hospital. The effect of the Regulations was to penalise poorer long-term patients in comparison with better-off short term patients and amounted to a form of charging recipients of certain social security benefits for hospital treatment. Recipients of retirement pensions who were hospital inpatients were placed in a similar position to prisoners, who are also disqualified from receiving State benefits. Finally, Mr Samuel submitted that the legitimate aim of the Regulations could have been achieved by reducing or tapering pensions according to the liabilities of the patient or by providing for a percentage reduction of the pension which a claimant actually received.

22. For the reasons given by Mr Commissioner Turnbull in paragraphs 18 to 25 of *CP/5084/2001*, I have reached the conclusion that the former provisions of the 1975 Regulations were objectively and reasonably justified. I do not see any reason to repeat those reasons here, but would add an observation of my own in the light of the decision of the House of Lords in *Carson and Reynolds.*

23. In *Carson and Reynolds* Lord Hoffmann described social security benefits as "...part of an intricate and interlocking system of social welfare which exists to ensure certain minimum standards of living for the people of this country." (para. [18]). As Mr Commissioner Turnbull showed in *CP/5084/2001*, the purpose of the 1975 Regulations is to make adjustments to social security benefits to take account of benefits received by a claimant from another public social service. Although I accept the force of many of Mr Samuel's observations, Article 14 is concerned with the equal enjoyment of Convention rights, and does not guarantee that a social welfare system will be free from any anomalies. Although a flat-rate reduction may have a more harsh impact on women than on men, it seems to me to be rational, proportionate and reasonable to provide for a flat-rate reduction in retirement pensions in order to take account of what is in effect a flat-rate benefit which a claimant receives while in hospital as an in-patient. I am therefore satisfied that the provisions of the 1975 Regulations are objectively and reasonably justified. If I had held that those provisions

were contrary to Article 1 of Protocol 1 standing alone, I would have held for essentially the same reasons that the provisions were in the public interest.

25. The tribunal held that the relevant issue was whether the pension received by the Appellant in her circumstances would be the same as that received by a man in the same circumstances. It is agreed that that was too narrow a formulation of the issues in this case and that, accordingly, the tribunal decision's was erroneous in point of law. However, for the reasons I have given, I consider that the tribunal reached the correct conclusion, and I therefore substitute my own decision to the same effect.

26. For those reasons, my decision is as set out in paragraph 1.

(Signed) **E A L Bano**
Commissioner

(Dated) **18 November 2005**