

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought with my permission, against a decision of the Nottingham Appeal Tribunal made on 26 June 2002. For the reasons set out below I dismiss the appeal.

2. On 24 August 1994 the claimant attained the age of 60 and was awarded a Category A retirement pension, based on her own contributions, from that date. Her contribution record was not sufficient to qualify her for a full pension.

3. On 24 October 1999 her husband attained the age of 65 and was also awarded a category A retirement pension. The claimant then became entitled, under s.43(3) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"), to elect whether to receive (a) a category B retirement pension under s.48A of the 1992 Act by reference solely to her husband's contributions or (b) a category A retirement pension, but increased under s.51A of the 1992 Act by reference to her husband's contributions.

4. However, by virtue of s.1(1) of the Social Security Administration Act 1992 it is (with certain exceptions not applicable here) a condition of entitlement to any social security benefit that a claim is made for it in the manner and within the time prescribed in relation to it by regulations.

5. A person in the position of the claimant (i.e. whose husband becomes entitled to a state retirement pension after she has been awarded a category A retirement pension) cannot be awarded either a category B pension or an increase in her Category A pension by reference to her husband's contributions unless a separate claim is made. The claim which the claimant made for her Category A pension when she was 60 did not, on the face of the statutory provisions, suffice to enable her to be awarded either the Category B pension, or the increase in her category A pension. That is because (i) Category A and Category B pensions are separate benefits (ii) the option to elect for an increased Category A pension only arises where there is notional entitlement to a Category B pension (see s.51A(1) of the 1992 Act) and (iii) once an award had been made on the claimant's original claim for her Category A pension that claim ceased to subsist "and accordingly the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time": see s.8(2) of the Social Security Act 1998. The law as set out in this paragraph appears from the decision of the Court of Appeal in *Secretary of State v. Nelligan* (R(P) 1/03), applied in my decision in CP/271/2005.

6. Under reg. 19(2) of the Social Security (Claims and Payments) Regulations 1987 (taking effect as if made under s.1 of the Social Security Administration Act 1992) the prescribed time for claiming retirement pension of any category is 3 months beginning with any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the retirement pension.

7. The claimant did not claim pension based on her husband's contributions until 25 October 2001. The claimant was awarded an increased category A retirement pension from 25 July 2001, the earliest date from which, on the face of the legislation, she was entitled to it.

Had she claimed within 3 months from 24 October 1999 she would have been entitled to it from that date.

8. The Claimant appealed against the decision awarding increased pension only from 25 July 2001. She mentioned in her grounds of appeal that she had not been given any information when her husband retired about the possibility of claiming an increased pension and that she had telephoned the DSS in 2000 to check whether her pension should be higher, and was told that the amount which she was receiving was correct. The tribunal dismissed the appeal, rightly holding that the facts relied upon by the claimant could make no difference to her benefit entitlement.

9. The grounds for seeking permission to appeal to me were prepared by the claimant's representative, and were as follows:

"It is submitted that this decision is against Article 1 of the First Protocol of the Human Rights Act, which gives rights of property.

It has long been established that Social Security Benefits can be considered a property right.

In limiting the period of backdating, I respectfully submit that Regulation 19 of the Claims and Payments Regulations provisions is at odds with my rights under the Human Rights Act.

As I could not have claimed this additional pension until my husband attained the age of 65, I further submit that by not advising me of my rights, the decision also contravenes Article 14 of the same Act."

10. I gave permission to appeal so that a reasoned decision on the claimant's submissions based on the Human Rights Act could be given. The Secretary of State's submission opposing the appeal relied heavily on the decision of the Court of Appeal in the cases of *Carson* and *Reynolds* [2003] 3 All ER 577. I therefore stayed this appeal pending the decision of the House of Lords [2005] UKHL 37 in those cases, which was given on 26 May 2005.

Article 1 of the First Protocol taken on its own

11. Article 1 of the First Protocol to the European Convention on Human Rights provides as follows:

"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 ...."

12. However, in his judgment in the Court of Appeal in the *Carson* and *Reynolds* cases ([2003] 3 All ER at pages 587-90), Laws LJ., with whom Rix and Simon Brown LJJs agreed, applied the consistent Strasbourg jurisprudence that Article 1 of the First Protocol does not apply where the reason why the claimant was not entitled to a pension was that he did not satisfy the conditions of entitlement under domestic law. Thus, in *X v. Italy* (1977) 11 DR 114 the European Commission on Human Rights rejected as manifestly ill-founded a claim of

infringement of Article 1 of the First Protocol because the applicant had not satisfied the requirements under his domestic law for payment of a pension. In the House of Lords in *Carson and Reynolds* the case of the claimants based on Article 1 of the First Protocol alone (as opposed to Article 14 in conjunction with it) was not pursued, and the decision of the House of Lords therefore adds nothing to the decision of the Court of Appeal in this respect.

13. The reason why the claimant in the present case was not entitled to an increased Category A retirement pension for the period before 25 July 2001 was that she did not satisfy one of the requirement of domestic law, namely that of having made a claim. The claimant's entitlement (once claimed) to an increase in her retirement pension, by reference to her husband's national insurance contributions, may be a "possession" for the purposes of Article 1 of the First Protocol. However, it is in my judgment clear that the claimant cannot successfully contend that the provisions of domestic law that it is a condition of entitlement that a claim be made, and that when a claim is made it will have effect for a period of up to 3 months before the date of claim, constitute a deprivation of her possessions within the meaning of that Article.

Article 14 in conjunction with Article 1 of Protocol 1

14. The contention on behalf of the claimant appears to be that there was discrimination, for the purposes of Article 14, because the claimant was not advised of her entitlement to claim an increased pension. However, there is no evidence that the claimant was not informed of this right as the result of any form of discrimination which could found the basis of a complaint under Article 14. (Further, even if there had been such evidence, it is difficult to see what remedy I could have granted under the Human Rights Act 1998).

(signed on the original)

**Charles Turnbull**  
**Commissioner**  
**20 June 2005**

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