Bulletin 171

Commissioner's case no: CP/5084/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Introduction

1. This is an appeal by the Claimant, brought with the leave of the Regional Chairman, against a decision of the Liverpool Appeal Tribunal made on 25 September 2001. For the reasons set out below I dismiss the appeal.

2. I held an oral hearing of the appeal at which the Claimant was represented by Ms. Ann Williams of the Heswall Citizens Advice Bureau, and the Secretary of State was represented by Ms. Julie Anderson of counsel.

3. The issue in the appeal, very broadly stated, is whether the reduction of the Claimant's retirement pension during the period after she had been in hospital for 6 weeks was contrary to Article 1 of Protocol 1, or to Article 14 in conjunction with Article 1 of Protocol 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

4. The Claimant is a woman who attained the age of 60 on 6 May 1998 and was awarded the basic element of a category A retirement pension (i.e. a pension based on her own contributions but not including any additional element under SERPS) from that date.

5. On 2 March 1991 she was admitted to hospital, where she remained until 11 May 2001. By a decision made on 26 April 2001, purportedly in accordance with the statutory provisions referred to below, the amount of the Claimant's retirement pension was reduced from £67.39 per week to £52.89 per week from 16 April 2001, that date being the first payday after she had been in hospital for 42 days. The pension was increased to the previous amount of £67.39 following her discharge.

6. Following an appeal by the Claimant against that decision it was realised that the reduction which had been applied was that (of 20%) applicable to a person with a dependant, rather than the 40% reduction which applied to a person (such as the Claimant) without a dependant. Accordingly on 13 June 2001 a revised decision was made that the Claimant's pension between 16 April 2001 and 13 May 2001 was £39.09. The Claimant's appeal continued as an appeal against the decision as revised. The appeal was on the basis that the provision for reduction of pension after 6 weeks in hospital was contrary to the provisions of the Convention which I referred to above. The Tribunal rejected those contentions and dismissed the appeal.

Legislative background

7. The Claimant was entitled to the basic element of a category A retirement pension because she satisfied the contribution conditions set out in s.21(1) and (2) of and Schedule 3, part I, para. 5 to the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). There are two such contribution conditions. First, the person must have paid in any one tax year national insurance contributions of at

least a specified amount. Secondly, the person must have paid or been credited with contributions of at least a specified amount for each of the requisite number of years .The requisite number of years depends on the length of the person's working life, as defined. (If less than the full number of qualifying years have been achieved, a reduced rate basic pension can be payable).

8. The National Insurance Fund, from which retirement pensions and other contributory benefits are financed, is not a fund consisting of contributions built up over the years. It is operated on a pay as you go basis: current income received annually funds expenditure in that same year. The income is provided mainly by national insurance contributions paid by the employers, employees and the self-employed. However, the National Insurance Fund also receives funds from general taxation when necessary.[1]

9. S.113(2) of the 1992 Act gives the Secretary of State power to make regulations for suspending payment of any contributory or non-contributory benefit payable under the Act to a person during any period in which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution.

10. By Regs. 4 and 5 of the Social Security (Hospital In-Patients) Regulations 1975 ("the In-Patients Regulations")(which are treated as having been made under the 1992 Act) the weekly rate of the benefits specified in Schedule 2 to the Regulations, which includes any category of retirement pension, is reduced where the claimant has received free in-patient treatment for more than 6 weeks. Until the claimant has been in hospital more than 1 year the amount of the reduction is 20% of the rate of the basic pension if the claimant has a dependant, and (at the date relevant to this decision) was 40% if the claimant had no dependant. A more complex scheme of reduction applies after a year in hospital.

The case under Article 1 of Protocol 1

11. Article 1 of Protocol 1 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.
>
> 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."

12. It is clear that social security benefits, entitlement to which is linked to the payment of contributions, are "possessions" for the purpose of Article 1 of Protocol 1: *Carson v. Secretary of State for Work and Pensions* [2002] EWHC 978, applying jurisprudence of the European Court of Human Rights (ECHR) very recently confirmed by that Court in para. 32 of *Willis v. United Kingdom* [2002]

[1] For further details, see paras. 25 and 26 of the judgment of Stanley Burnton J. in *Carson v. Secretary of State for Work and Pensions* [2002] EWHC 978.

ECHR 36042/97. The Claimant's entitlement to retirement pension is therefore a "possession."

Deprivation

13. However, the Secretary of State's first submission in opposition to this appeal is that the reduction of the Claimant's retirement pension did not result in the Claimant being "deprived" of that possession or any part of it, because the provision for reduction is simply one of the provisions which determine what the amount of the pension is – i.e. which define the nature and amount of the "possession."

14. As Stanley Burnton J said in para. 47 of Carson:

> "I entirely agree with Moses J., in paragraph 50 of his judgment in [*Hooper v. Secretary of State for Work and Pensions]*, that a pecuniary right protected by Article 1 is defined by the domestic legislation that created it. I refer in particular to the decision of the Court in *Bellet,* in which the Court stated:
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> > "while no right to the grant of a pension is, as such, guaranteed by the Convention, compulsory contributions to a retirement fund may give rise, in certain cases, to a right of ownership over part of the funds ..... However, it is still necessary, in order for such a right to accrue, that the persons concerned should fulfil the conditions laid down by national law."

15. The distinction between a legislative provision which defines (i.e. sets the conditions of entitlement for) a right created by that legislation and one which deprives the owner of part of that right is capable of being elusive. That is illustrated by two admissibility decisions of the now defunct European Commission of Human Rights. In the decision in *Szrabjer and Clarke v. United Kingdom* (23 October 1997) it was said that the provision in s.113(1) of the 1992 Act for suspension of social security benefits during imprisonment, when applied to the earnings-related element of state retirement pension, was a deprivation of possessions for the purposes of Article 1 of Protocol 1. In *Carlin v. United Kingdom* (3 December 1997), on the other hand, it was said that if entitlement to disablement benefit was capable of being a "possession", the application of that same provision for suspension did not constitute a deprivation of possessions, because it was necessary "in order for such a right [i.e. to disablement benefit] to be established, that the person concerned should have satisfied domestic legal requirements governing the right."

16. The authorities, both domestic and of the Commission and ECHR, in my judgment indicate that the following factors will be material in determining which side of the line a particular provision falls:

    (a) Whether the provision has the effect of reducing a benefit previously in payment, as opposed simply to preventing an entitlement to a larger payment arising or not providing for a larger payment in the claimant's circumstances[2];

[2] So the claimant in *Carson* was held not to have been deprived of the uprating in her pension with which the legislation did not and had never provided her: para. 48.

(b) Whether the provision was in force throughout the time when the claimant was paying the contributions which entitled him to the contributory benefit. If it was, it is much less likely to have deprived him of the benefit for which payment of the contributions qualified him, since they can be considered to have been paid on the footing that the benefit would be reduced in the specified circumstances.[3]

(c) The closeness of the link between the benefit and payment of contributions[4]

(d) The amount of the reduction in the benefit.[5]

17. In my judgment the reduction of the Claimant's pension in the present case was not a consequence of a provision depriving her of that benefit, but rather of a provision defining and quantifying the benefit. In my judgment the most important factor leading to that conclusion is that a provision for reduction after a period as an in-patient has been in force throughout the time when the Claimant was paying the contributions which have qualified her for the pension, so that the contributions can be said always to have been paid on the basis that there would be a reduction in benefit after a period in hospital[6]. I rely additionally on the fact that there is not a total suspension of the pension, but rather a reduction of 40%.

Public interest

18. If that were wrong, however, it would be necessary to go on to consider the Secretary of State's alternative submission that the deprivation is not contrary to Article 1 of Protocol 1 because it falls within the exceptions provided for in that Article. It is submitted that provision for reduction of pension during hospitalisation is "in the public interest", and further is a provision considered by the state to be "necessary to control the use of property in accordance with the general interest." Plainly, if there were no provision for reduction, the money required to pay the unreduced pensions would have to be found from somewhere.

19. Reliance is placed by the Secretary of State on the following statement of the ECHR in *James v. United Kingdom* (1986) 8 EHRR 123, (albeit in the very different context of a contention that enfranchisement under the Leasehold Reform Act 1967 deprived the landlord of his possessions contrary to Article 1 of Protocol 1):

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[3] *Reynolds v. Secretary of State for Work and Pensions* [2002] EWHC 426, applying the reasoning of the Commission in *Muller v. Austria* (1975) 3 D & R 25; See also the decision of the Commission in *X v. Austria* (7624/76), especially at para. 4.

[4] This may account for the distinction in this respect between the decisions in *Szrabjer* and *Carlin* (see para. 15 above). In the latter the link between payment of contributions and entitlement to disablement benefit was merely that that benefit is payable only to persons suffering injury or contracting disease in the course of employment, and thus was a very indirect link.

[5] In *Muller v Austria* the difference was only 3%, but it was said at para. 32 that "a substantial reducing of the amount of the pension could be regarded as affecting the very substance of the right to retain the benefit of the old age insurance system." In *X v. Austria* a difference of between 2.3 and 14.4% was held, in combination with factor (b), not to amount to a deprivation.

[6] The provisions for reduction of benefit whilst in hospital were introduced by the National Insurance (Hospital In-Patients) Regulations 1949.

> "The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.

20. I think it important, however, to note also the next sentence from that decision:

> " In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol 1 and, in so doing, to make an inquiry of the facts with reference to which the national authorities acted."

21. Further, in a number of recent decisions in the High Court[7] concerning challenges to provisions of social security legislation based on either or both the Articles relied on in the present case, reliance has been placed on the following similar statement by Lord Hope of Craighead in *R v. DPP ex parte Kebilene* [2000] 2 AC 326 at 381B-D

> "In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention... The area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment". It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

22. In para. 68 of *Carson* Stanley Burnton J prefaced such reliance by saying:

> "On this issue, it is important to take into account that the Court is concerned with two areas of government in which it is clear that the judicial arm must give the greatest deference to the legislature and to the elected executive. The first concerns the allocation of resources: how much is to be raised by the Government, by taxation or otherwise, and how the moneys available for expenditure by the Government are to be spent."

23. The rationale for the reduction in benefits whilst in hospital is clear. It was summarised as follows by the National Insurance Advisory Committee in its report[8] on the original preliminary draft regulations in 1949:

> "The broad purpose of insurance benefits is to provide a basic contribution towards ordinary needs, including maintenance, at times when earnings are interrupted or, as in the case of retirement pensions, cease. Where another public social service, the national health service, is at such times providing maintenance, in addition to treatment, we consider it right that the insurance benefits should be reduced on account of the maintenance of the beneficiary provided under the other service

[7] For example, *Reynolds* and *Carson*.
[8] House of Commons Paper 241 of Session 1948-49.

....."

The reduction is therefore not intended to represent a charge for hospital services (which are of course provided free to other users), but is intended to reflect savings in home expenditure which are likely to be made by a person in hospital. It is based on the principle that state funds should not make double provision for the same needs.[9]

24. The primary contention on behalf of the Claimant in response is that there are some claimants whose living costs will not be reduced, and indeed will be increased, by an extended stay in hospital, owing to the need, for example, to pay others to maintain the claimant's property and to look after pets. Additional costs may also be incurred, it is asserted, by reason of the reduction in the cover likely to be provided by a home insurance policy after a period of absence. Ms. Williams also referred to the fact that if a claimant does not like or wishes to supplement the hospital diet, it will be expensive to buy additional items in the hospital shop. (As to that particular argument, however, I should have thought that I am required to assume that hospital food is reasonably nutricious). It is submitted on behalf of the Claimant that it cannot be in the public interest or proportionate to make a blanket reduction without reference to the circumstances of the individual case. Reliance is also placed on the fact that in announcing the proposed amendment to the current legislation in the State Pension Credit Bill, whereby the period in hospital before certain benefits are reduced would be increased from 6 to 13 weeks, the Minister said:

> "over 97% of people who go into hospital are not affected by the current rules – but I want to do something more to ease the worry and disruption for the other three per cent. People have ongoing fixed commitments, such as housing costs and utility bills while they are in hospital and we have decided to be more generous ..... I am convinced this is the right thing to do."

25. However, in my judgment the Secretary of State has demonstrated the basis on which the legislature has in fact acted in including and retaining the provision for reduction after a period as an in-patient. The legislature's view that such a provision is justified in the public interest cannot in my judgment possibly be said to be "manifestly without reasonable foundation." The fact that such a provision has been in existence throughout the period when the Claimant has been paying contributions is in my judgment also relevant here. Matters such as the precise amount of the reduction, the time in hospital before it should come into effect, and the extent to which provison should be made for the varied circumstances of individual claimants, are, in my view, precisely the sort of matters which the judiciary must recognise as being within the discretionary area of judgment of those framing legislation in areas of distribution of resources and social policy. In my judgment, therefore, if (contrary to my view) the Claimant was deprived of her possessions when her pension was reduced, such deprivation was justified in the public interest and so was not in breach of Article 1 of Protocol 1.

[9] Indeed, in the first set of draft regulations in 1948 these provisions were included in the Overlapping Benefits Regulations.

The case under Article 14 in conjunction with Article 1 of Protocol 1

26. 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, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

27. The ECHR has summarised its case law on Art. 14 as follows[10]:

> "Art. 14 .... complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of art. 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them. ... A difference of treatment is discriminatory for the purposes of art. 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 of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

28. Approaching the matter in the structured way recommended by the Court of Appeal[11], the following questions fall to be answered:

(i) **Do the facts fall within the ambit of a substantive Convention provision?**

Plainly yes. The Claimant's retirement pension is a "possession" within Article 1 of Protocol 1. It was submitted on behalf of the Secretary of State, both in written submissions and at the hearing, that Art. 14 cannot be engaged unless there was a breach of Article 1 of Protocol 1. That submission is plainly unsustainable.

(ii) **Is there any different treatment as respects that right between The Claimant and her chosen comparators?**

The case is put in two ways on behalf of the Claimant. The Claimant's primary case is to compare the position of the Claimant with that of a person in hospital who does not have any form of state benefit (and in particular with a person entitled to a pension under a private occupational scheme). Such a person does not make any form of payment for the hospital services. The alternative case is to compare the Claimant's position with that of a person entitled to state retirement pension who is not in hospital, and whose pension is therefore not reduced. In both cases the answer to this second question is in my judgment "yes".

(iii)(a) **Is the basis for the different treatment of the Claimant and the chosen comparators a ground within the scope of Article 14?**

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[10] See paras. 29 and 39 of *Willis v. United Kingdom [2002] ECHR 36042/97.*

[11] See Brooke L.J. in *Michalak v. London Borough of Wandsworth [2002] EWCA Civ 271*, as slightly modified in para. 52 of *Carson.*

On the Claimant's first way of putting the case, it is not easy to identify the alleged ground for the difference in treatment. It is contended that it is either "age" or "status". The only relevant "status" would seem to be the Claimant's status as a state pensioner. However, applying the actual wording of Art. 14, it is at first sight questionable whether it is permissible to argue that the Claimant has been subject to discrimination in respect of her enjoyment of her pension on the ground of her status as a person entitled to a state pension. I think that this illustrates that this first way of putting the case may be an impermissible one, in that the complaint may on a proper analysis be one of discrimination in relation to the terms of provision of hospital services, rather than in respect of her enjoyment of her pension. However, I proceed on the footing that this first way of putting the case may allege a relevant ground of discrimination.[12] On the Claimant's second way of putting the case, the alleged basis of the different treatment is the Claimant's state of health, or status as a person in hospital, both of which I am prepared to assume may be grounds within the scope of Article 14.

(b) **Are the chosen comparators in an analogous situation to the Claimant's?**

In my judgment persons in hospital who do not have social security benefits, and in particular persons in hospital who have a pension under a private occupational pension scheme, are not in an analogous situation. The justification for the reduction in the state retirement pension, namely that the state should not make double provision for the same needs, simply does not apply to a person who has no state benefits. Neither, in my judgment, are persons in receipt of state retirement pension who are not in hospital in an analogous position: such persons are not having part of their living costs (and in particular food and heating costs) provided for by the hospital.

(iv) **Is there an objective and reasonable justification?**

This involves very much the same considerations as those which arose under the "public interest" exception to Article 1 of Protocol 1, which I have dealt with in detail in paragraphs 22 to 25 above. For the reasons which I there set out, there is in my judgment an objective and reasonable justification for the reduction. The Claimant relies in addition, under Article 14, on the fact that not all social security benefits are subject to some form of reduction after a period in hospital. There is no reduction in respect of statutory sick pay, statutory maternity pay, maternity allowance or industrial injuries benefits. However, that fact cannot in my judgment prevent what is otherwise an objective and reasonable justification for the reduction of retirement pension from being such.

29. Accordingly, for the reasons given in the answers to questions (iii)(b) and (iv) above, which I think both involve very similar considerations, the Claimant's case under Article 14 must also fail.

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[12] It appears to have been accepted by the Commission in *Szrabjer* and *Clarke* that the claimant, whose pension under SERPS was suspended whilst in prison, could allege a relevant ground of discrimination under Art. 14 by seeking to compare his position, not merely with those entitled to such a pension who were not in prison (i.e. alleged discrimination on the ground of status as a prisoner), but with prisoners entitled to a guaranteed minimum pension under a contracted-out scheme (i.e. discrimination on the ground, presumably, of status as a person entitled to a pension under SERPS).

30. I record that, even if I had been satisfied that the reduction of the Claimant's pension involved a breach of the Convention, questions would have arisen as to what, if any, remedy I could have granted under the Human Rights Act 1998. The difficulty would have arisen because (a) Regs. 4 and 5 of the In-patients Regulations are in the clearest possible terms, so that there is no possible means of avoiding the reduction by a process of construction pursuant to s.3 of the 1998 Act and (b) those Regulations were made long before the coming into force of the 1998 Act, so that the making of them clearly did not at that time constitute an unlawful act within s.6 of the 1998 Act. In view of my above conclusions, I do not need to discuss these difficulties further.[13]

(Signed) Charles Turnbull
(Commissioner)

(Date) 8 August 2002

[13] 3 possible routes to providing a remedy are discussed in an illuminating article by Dan Squires: "Challenging Subordinate Legislation under the Human Rights Act" in [2000] E.H.R.L.R. p.116.