Strasbourg challenge to UK overseas pension rules

John Kernick reports on a challenge to UK pension rules and the evidence provided by Australian and Canadian governments to support the discrimination claim.

A number of United Kingdom expatriates and a returned Australian in receipt of UK state pensions have commenced proceedings in the European Court of Human Rights ('ECHR') alleging discrimination in the level of pensions they receive.[1] The proceedings follow the rejection of an appeal to the House of Lords by a South African-based pensioner in *R (Carson) v Secretary of State for Work and Pensions* [2005] 2 WLR 1369; [2005] UKHL 37 in which Ms Carson alleged that providing indexation of pensions to residents of certain countries but not others contravened the European Convention on Human Rights.

UK state retirement pensions are payable according to the extent of National Insurance contributions made during a person's working life. Recipients who are resident in the European Economic Area and certain countries where reciprocal agreements exist, including the USA, Turkey, Israel and Jamaica, have their pensions 'uprated' (indexed) in line with cost of living increases in the UK. Residents of other countries, including Australia, New Zealand, Canada, South Africa and Trinidad and Tobago, receive their pensions at the level applicable in the UK at the time of their retirement but the pension is frozen at that level for as long as they remain in a 'frozen' country. If they return to the UK or move to an 'unfrozen' country they receive benefits at the indexed level current while they remain there but on returning to a 'frozen' country their pension reverts to its former level.

Ms Carson unsuccessfully argued before the UK courts that freezing the level of her pension entitlement amounted to unlawful discrimination under the European Convention on Human Rights. The current proceedings before the ECHR in Strasbourg are brought by 13 applicants seeking a declaration of unlawful discrimination and compensation. The applicants include Ms Carson as well as a retired Sydney solicitor, Penelope Hill, and a number of other applicants resident in Australia and Canada. The applicants' case is being coordinated from Canada with the assistance of a Canadian law firm acting on a pro bono basis.[2] London counsel have been retained and they have prepared submissions to the ECHR on behalf of the applicants.

The lead applicant, Bernard Jackson, spent 50 years working in the UK and served in the RAF in the Second World War. He emigrated to Canada in 1986. He became eligible for a UK pension in 1987. His basic weekly state pension was then £39.50 and it remains fixed at that level. Had he received the benefit of indexation his pension would now be worth £82.05.

Mrs Hill was born in Australia and between 1963 and 1982 she lived and worked in the UK, during which time she paid applicable National Insurance contributions. She returned to Australia in 1982 but made further voluntary National Insurance contributions for the tax years 1992-1999 so that her basic pension would be greater. She became entitled to a basic state pension in 2000. Between August 2002 and December 2004 she spent periods living in London. During those periods her pension was increased to take account of indexation but when she returned to Australia the pension reverted to its previous level.

The Australian Government's evidence is that nearly all of 220,000 Australian residents in receipt of UK pensions are disadvantaged by the UK government's approach. The applicants' submissions suggest that more than 400,000 former residents of the UK overall are affected by the issues in the case.

Discrimination under the convention

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in the following terms:

> 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.

As noted in the House of Lords by Lord Walker of Gestingthorpe in *Carson* at [51]-[52]:

> It is common ground that this prohibition…is not a free-standing prohibition of all discrimination. It prohibits discrimination in the enjoyment of Convention rights.…Its enumeration of grounds does not in terms include residence (the ground of complaint [by] Mrs Carson) or age....The residual group, 'or other status' (in the French text, *toute autre situation*), is far from precise. The respondent secretary of state does not contend that the grounds of residence and age cannot be included within the scope of article 14. But it is clear from the jurisprudence of the Strasbourg Court that the possible grounds of discrimination under article 14 are not wholly unlimited; nor are all possible grounds of equal efficacy in establishing unlawful discrimination.

As to the convention rights, Article 1 of Protocol 1 to the convention ('1P1') provides, in relation to possessions:

> Every natural or legal person is entitled to the peaceful enjoyment of his (sic) 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.

It was accepted for the purposes of the House of Lords decision in *Carson* that an entitlement to a contributory pension was a 'possession' within the meaning of 1P1.

Article 8 of the convention (which was not relied on in *Carson*) provides protection in relation to private and family life in the following terms:

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

2 There shall be no interference by a public authority with the exercise of this right except such as is 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 and freedoms of others.

The House of Lords decision

Ms Carson had been unsuccessful at first instance (where the Australian Government intervened in support of her case)[3] and before the Court of Appeal[4] in asserting a breach of the convention as applied by *Human Rights Act 1998* (UK). Her appeal to the House of Lords was dismissed by a 4-1 majority. Lord Hoffman (in the majority) said that discrimination means a failure to treat like cases alike. He held that there was sufficient difference in the case of residents of the UK and of other countries where uprating was applied from those in the 'frozen' countries to justify different treatment. He said that Ms Carson had been under no obligation to move to South Africa but that in doing so she put herself beyond the primary scope of the UK social security system, which was to provide a basic standard of living for inhabitants of the UK. There was no obligation on the UK to pay pensions to persons outside the UK and parliament did not have to justify why it paid one sum rather than another: 'Generosity does not have to have a logical explanation.'[5] He also made the point that uprating was referable to the cost of living in the UK and that, although not means tested, pensions paid in the UK were subject to income tax. The comparison with treaty countries also failed as it was a matter for the government to enter into reciprocal arrangements and this constituted a rational basis for differences in treatment.

Lord Walker found that Ms Carson's situation was not sufficiently analogous to that of a pensioner resident in the UK or in a country which had the benefit of a bilateral agreement. At all events the government's position was justified as the issue was one of macro-economic policy within the province of the legislature and the executive.

Lord Carswell, in dissent, described, at [95], the matters in issue between the parties as '(i) whether the difference in treatment of pensioners residing in different countries amounted to discrimination, and (ii) if so, whether it was objectively justifiable.' He found, on the basis of the common factor between recipients of the contributory basis of the pension entitlement, that there was discrimination for the purposes of Article 14. Moreover, on the basis of a government memorandum that made it clear that containment of cost was the reason for not extending indexation, Lord Carswell found that the discrimination was not justified, stating, at [99]:

> I do not find it possible to regard the selection of this class for less favourable treatment as a matter of high state policy or an exercise in macro-economics. It has the appearance rather of the selection of a convenient target for saving money.

The applicants' case in the ECHR

All of the applicants in the case before the ECHR contend that the UK Government is in breach of Article 14 of the convention taken with 1P1 and of 1P1 standing alone. They argue that there is unlawful discrimination on grounds of both residence and age, with differences in pensions based on the age of individual pensioners (by reference to the level applicable when they reached retirement age) and the value of the pension in a 'frozen' country eroding with age as compared with that paid to a comparable resident in the UK or an 'unfrozen' country. The submissions cite a recent speech in the parliamentary chamber of the House of Lords in which Lord Goodhart, Vice President of the International Commission of Jurists, said of Lord Hoffman's observation that the primary function of the social security system was to provide benefits to inhabitants of the UK:

> That is only partly true of retirement pensions because, by working in this country and by contributing to the economy, people deprive themselves of the chance of acquiring benefits in other countries. They have rights to UK pensions, which they should be able to take with them when they leave this country….The government could of course say that no pensions should be payable to anybody resident abroad. There are good reasons why the government do not say that. They would not get overseas workers to come here if they did. It would be an intolerable restriction on the rights of older people to move abroad. Instead they give the full pension that has been earned by the contributors at pension age and then slice a little bit off year by year. It is death by a thousand cuts….

Additionally, a number of the applicants argue that in relation to them there is also a violation of Article 8 taken with Article 14 in that they migrated to a 'frozen' country in order to join family members.

The applicants have filed witness statements in support of their case, including from the Australian and Canadian governments. The submissions cite UK government material to the effect that reciprocal agreements are not necessary for the purpose of uprating increases to pensioners living abroad and that there is no logical or consistent pattern in the selection of countries with which bilateral agreements have been made. They contend that the result is anomalous and a matter of historical accident retained solely on the ground of cost. In support, they cite evidence that Canada and Australia have each unilaterally provided for indexation of benefits to their expatriate pensioners in the UK and that there has been an unwillingness on the part of the UK government to enter into agreements with them for reciprocal uprating of UK pensions. The submissions argue that the significance of uprating is not simply to reflect cost of living increases in the UK but also to preserve the value of a pension in the currency in which it is paid. Any cost containment measures considered necessary should be applied in a fair and reasonable way that is not discriminatory.

The submissions contrast the treatment of expatriates resident in the (unfrozen) USA with those in economically comparable adjoining Canada. Similarly, they point out that a nurse originating from Trinidad/Tobago and returning there after a working life spent in the UK would receive a frozen pension whereas a person in similar circumstances returning to neighbouring Jamaica (both countries being members of the Commonwealth) would have the benefit of an indexed pension. It is contended that the resulting inequity involves an interference with freedom of movement and that this represents a significant obstacle to the UK Government on any question of justification.[6]

Further conduct of the proceedings

No early result in the Strasbourg proceedings can be anticipated – at least if there is to be the potential for a successful outcome for the applicants. The court's workload has increased with expansion of the Council of Europe to include former Soviet bloc countries. The ECHR in 2004 received 44,100 new applications. Although most applications to the court are ruled inadmissible or otherwise struck out at a preliminary stage, as at late 2005 the court had 82,100 cases pending, with this number projected to increase to 250,000 by 2010.[7]

The court nominally comprises one judge from each member state of the Council of Europe (currently 46 members) and sits in committees of three judges, in chambers of seven judges and in a Grand Chamber of seventeen judges, including the president, vice presidents and section presidents. When an application is lodged it is assigned to a rapporteur who refers it to a committee or a chamber. An application can be disposed of at a preliminary stage by being ruled inadmissible on grounds laid down by Article 35 of the convention, including that it is manifestly ill-founded. Such a ruling can be made by unanimous decision of a committee or the majority decision of a chamber[8]. If this does not occur the application is dealt with on the merits by a chamber, subject to referral in appropriate cases to the Grand Chamber if no party objects.[9] There is a right of appeal by way of referral from a chamber to the Grand Chamber within three months of a judgment, subject to acceptance of suitability of the case by a panel of the Grand Chamber.[10]

The submissions of the applicants in *Jackson* assert admissibility and address three earlier rulings against admissibility of applications in relation to the lack of indexation of UK pensions paid overseas.[11] Those decisions were made by the then European Commission on Human Rights, which exercised jurisdiction in relation to questions of admissibility prior to the ECHR being established as a full-time court in November 1998. The reasons given by the commission for the decisions in the three cases reflect a broadly similar approach to that of the majority in the House of Lords in *Carson*. The submissions of the applicants in *Jackson* argue variously that those decisions are distinguishable, wrong in principle and that the court's case law has developed significantly since they were decided, with the issue never having proceeded to the stage of an examination of the merits.[12] They also cite the far-reaching importance of the issue in the number of people affected and the evidence of the concerned governments of Australia and Canada to the effect that they consider the UK government's approach to be discriminatory, in support of the case proceeding to a condsideration of the merits.

1 *Jackson and Others v United Kingdom* Application No 42184/05

2 The proceedings are backed by a Canadian pensioner organisation with support from similar organisations in other countries involved. In Australia the supporting organisation is British Pensions in Australia Inc: www.bpia.org.au; jimtilley@bigpond.com.

3 *Carson, R (on the application of) v Secretary of State for Work and Pensions & Anor* [2002] EWHC 978 (Admin).

4 *Carson & Anor v Secretary of State for Work and Pensions* [2003] EWCA Civ 797. The Australian Government was not a party in the appeal proceedings.

5 At [26]

6 The UK has signed but not ratified Article 2 of the Fourth Protocol to the convention, concerned with freedom of movement. It is also a signatory to the International Convention on Civil and Political Rights, Article 12 of which makes similar provision.

7 *Report into Working Methods of the European Court of Human Rights*, December 2005, by Lord Woolf (former Lord Chief Justice of England and Wales): http://www.echr.coe.int/Eng/Press/2005/Dec/LORDWOOLFSREVIEWONWORKINGMETHODS2.pdf. Proposals under consideration to deal with the court's workload include the creation of a 'backlog secretariat': Woolf Report at 50.

8 An amended process for dealing with admissibility is provided for in Protocol 14 to the convention but there is uncertainty as to when this will be implemented: Woolf Report at 13.

9 Article 30 of the convention

10 Article 43 of the convention

11 *JW and EW v United Kingdom* Application No. 9776/82; *Corner v United Kingdom* Application No. 11272/84; and *Havard v United Kingdom* Application No. 38882/97.

12 Hearings are held in only a minority of cases: see,e.g., http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/