HOUSE OF LORDS

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Judgments - Regina v. Secretary of State for Work and Pensions (Respondent) ex parte Carson (Appellant)
Regina v. Secretary of State for Work and Pensions (Respondent) ex parte Reynolds (FC) (Appellant)

HOUSE OF LORDS

SESSION 2005-06
[2005] UKHL 37
on appeal from: [2003] EWCA Civ 797

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina

v.

Secretary of State for Work and Pensions (Respondent)

ex parte Carson (Appellant)

Regina

v.

Secretary of State for Work and Pensions (Respondent)

ex parte Reynolds (FC) (Appellant)

ON

THURSDAY 26 MAY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hoffmann

Lord Rodger of Earlsferry

Lord Walker of Gestingthorpe

Lord Carswell

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

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[2005] UKHL 37

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I too would dismiss these appeals.

2. I wish to make only one observation of my own. In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, Brooke LJ set out four questions which a court might find it convenient to consider sequentially when addressing a discrimination claim under article 14 of the European Convention on Human Rights. Subsequent judicial observations have shown that the precise formulation of these questions is not without difficulty. And at first instance in the Carson appeal Stanley Burnton J suggested a fifth question should be added to the list: see *R (Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994, 1009, para 51.

3. For my part, in company with all your Lordships, 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. Sometime the answer to this question will be plain. There may be such an 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 the aim is appropriate and not disproportionate in its adverse impact.

LORD HOFFMANN

My Lords,

4. There are two appeals before your Lordships which were argued separately but in which judgments are being delivered together.

Carson v Secretary of State for Work and Pensions

Pensioners living abroad

5. Annette Carson is a writer. About 15 years ago she emigrated to South Africa. When she turned 60 on 1 September 2000 she became entitled to a United Kingdom retirement pension: £67.50 basic pension plus £32.17 SERPS and £3.95 graduated pension. She had paid all the necessary contributions, including voluntary payments made after emigration. So she started with the same pension she would have received if she had been living in the United Kingdom. On 9 April 2001, the basic pension for United Kingdom pensioners was increased to £72.50 to reflect the rise in the United Kingdom cost of living. It has been increased each year since then. But pensioners ordinarily resident abroad are not entitled to these annual increases. Ms Carson has continued to receive a basic pension of £67.50. As the law now stands, it will remain £67.50 for the rest of her life. The same applies to the other elements of her pension.

6. Ms Carson's case is typical of over 400,000 United Kingdom pensioners living abroad in countries which do not have reciprocal treaty arrangements under which cost of living increases are payable. There are such arrangements with the countries of the EEA and a number of others such as the United States ("treaty countries"). But there are no such treaties with South Africa, Australia, New Zealand and many other states.

7. Ms Carson complains that she is being unfairly treated. She says she has paid the same national insurance contributions as a United Kingdom resident and should receive the same pension. In these proceedings she claims that her treatment is incompatible with the prohibition of discrimination in article 14 of the European Convention on Human Rights. She is supported by associations of expatriate pensioners in South Africa and elsewhere. The case has generated a good deal of passion. Stanley Burnton J [2002] 3 All ER 994, 997, para 6 said that the pensioners had a "strong and understandable sense of grievance".

8. In my opinion the sense of grievance may be understandable but it is not justified. There is nothing unfair or irrational about according different treatment to people who live abroad. The primary function of social security benefits, including state retirement pensions, is to provide a basic standard of living for the inhabitants of the United Kingdom. They do so as part of an interlocking system of taxation and social welfare, including the provision of benefits in kind such as social housing and the National Health Service. The system as a whole is neither adapted nor intended to maintain the standard of living of inhabitants of other countries, even if they have past connections with the United Kingdom. The rules relating to some benefits do, exceptionally, provide limited recognition of the claims of expatriates such as Ms Carson on the ground of their past contributions to United Kingdom public funds. But they are in a different position from United Kingdom residents whose participation in those same benefits is integrated with the system as a whole. They therefore have no claim to be treated in the same way.

9. The general rule, subject to limited exceptions, has always been that social security benefits are payable only to inhabitants of the United Kingdom. A person "absent from Great Britain" is disqualified: section 113(1) of the Social Security Contributions and Benefits Act 1992. But there is a power to make exceptions by regulation. Regulation 4 of the Social Security Benefit (Persons Abroad) Regulations 1975 (SI 1975/563) (deemed to have been made under the 1992 Act) makes such an exception for retirement pensions. But regulation 5 makes an exception to the exception. In the absence of reciprocal treaty arrangements, persons ordinarily resident abroad continue to be disqualified from receiving the annual increases. Ms Carson must have been well aware of this when she emigrated to South Africa.

The scope of article 14

10. Article 14, upon which Ms Carson relies, does not prohibit all discrimination but only in certain respects and on certain grounds:

> "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."

The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed. Perhaps the broadest is contained in the 14th Amendment to the constitution of the United States: "No state shall…deny to any person within its jurisdiction the equal protection of the laws." The scope of article 14 is narrower in two ways. First, it has a restricted list of the *matters in respect of which* discrimination is forbidden. They are "the enjoyment of the rights and freedoms set forth in [the] Convention". Secondly, it has a restricted list of the *grounds upon which* discrimination is forbidden. They are "any ground such as [the enumerated grounds] or other status".

11. Does the discrimination of which Ms Carson complains fall within these limits? She says that her right to a pension is a "possession" within the meaning of article 1P of Protocol 1 ("1P1") which protects the right to peaceful enjoyment of possessions. The state is therefore not entitled to discriminate in according her that right. I must confess that my first instinct would not be to regard a social security benefit like a state pension as a possession until it had actually fallen due. But the European Court has developed a somewhat artificial jurisprudence on this question. It has clearly felt frustrated by the need to find a Convention pigeon hole into which to fit every objectionable form of discrimination. Social security benefits are a good example. In principle it does not seem at all unreasonable that in distributing public money in the form of social security benefits, the state should be obliged to treat like cases alike, although, as we shall see, there may be differences of opinion over what makes cases relevantly different. But the virtual absence of economic rights in the Convention has made it difficult to relate this principle to the enjoyment of any specified right.

12. The preferred choice of the Strasbourg court in locating a Convention right in cases of economic discrimination by the state has been 1P1. In *Müller v Austria* (1975) 3 DR 25 the Commission said that a claim to contributory benefits was a "possession" by analogy with the proprietary right of a contributor to a private pension fund. This case has since been regularly followed: see, for example, *Gaygusuz v Austria* (1997) 23 EHRR 364, 376, para 47. But the analogy is weak because (at any rate in the United Kingdom) contributions are hardly distinguishable from general taxation, the "fund" exists purely as a matter of public accounting and no one is entitled to anything beyond that which the legislation may from time to time prescribe. The Strasbourg court has been obliged to accommodate this state of affairs by saying that although a claim to a social security benefit is a possession (thereby attracting article 14) it does not entitle one to anything in particular: see, for example, *Jankovic v Croatia* (2000) 30 EHRR CD183. Recently a section of the court appears, paradoxically, to have regarded the weakness of the analogy between many state contributory schemes and a private pension scheme as a reason enlarging rather than restricting the scope of 1P1, treating it as applicable to all social security benefits whether contributory or non-contributory: see *Koua Poirrez v France* (2005) 40 EHRR 34, 45, para 37. Your Lordships were told that this question would shortly come before the Grand Chamber in *Hepple v United Kingdom* (App Nos 65731/01 and 65900/01) but, as this case is concerned with contributory benefits, it is unnecessary to say anything more about it. I am content to assume that Ms Carson's pension rights were a possession.

13. Likewise, I am willing to assume that the reason for the alleged discrimination, Ms Carson's foreign residence, was a Convention ground. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733, para 56 the court said that article 14 applied only if the discrimination was on the basis of a "personal characteristic". That is the construction which has recently been adopted by the House of Lords: *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, 2213, para 48 (Lord Steyn). On the other hand, in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 628, para 34 Brooke LJ said that Strasbourg seemed to have moved on since *Kjeldsen's* case and had applied article 14 in cases in which it was hard to say that the ground of discrimination was in any meaningful

sense a personal characteristic. As the House of Lords has recently adopted the *Kjeldsen* test, I need not discuss the later Strasbourg jurisprudence. I am content to assume that being ordinarily resident in South Africa is a personal characteristic.

What is discrimination?

14. There is no doubt that Ms Carson is being treated differently from a pensioner who has the same contribution record but lives in the United Kingdom or a treaty country. But that is not enough to amount to discrimination. Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different. Indeed, it may be a breach of article 14 not to recognise the difference: see *Thlimmenos v Greece* (2001) 31 EHRR 411. There is discrimination only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg court sometimes expresses this by saying that the two cases must be in an "analogous situation": see *Van der Mussele v Belgium* (1983) 6 EHRR 163, 179-180, para 46.

15. Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the 14th Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification: *Massachusetts Board of Retirement v Murgia* (1976) 438 US 285.

16. There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, eg that it is rational to prefer to employ men rather than women because more women than men give up employment to look after childen. 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 (eg 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.

17. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on these matters. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy. In the present case, the answer seems to me to be clear.

Social security: an interlocking system

18. The denial of a social security benefit to Ms Carson on the ground that she lives abroad cannot possibly be equated with discrimination on grounds of race or sex. It is not a denial of respect for her as an individual. She was under no obligation to move to South Africa. She did so voluntarily and no doubt for good reasons. But in doing so, she put herself outside the primary scope and purpose of the UK social security system. Social security benefits are 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. They are an expression of what has been called social solidarity or *fraternité*; the duty of any community to help those of its members who are in need. But that duty is generally recognised to be national in character. It does not extend to the inhabitants of foreign countries. That is recognised in treaties such as the ILO Social Security (Minimum Standards) Convention 1952 (article 69) and the European Code of Social Security 1961.

19. Mr Blake QC, who appeared for Ms Carson, accepted the force of this argument. He agreed in reply that she could have no complaint if the United Kingdom had rigorously applied the principle that UK social security is for UK residents and paid no pensions whatever to people who had gone to live abroad. And he makes no complaint about the fact that she is not entitled to other social security benefits like jobseeker's allowance and income support. But he said that it was irrational to recognise that she had an entitlement to a pension by virtue of her contributions to the National Insurance Fund and then not to pay her the same pension as UK residents who had made the same contributions.

20. The one feature upon which Ms Carson seizes as the basis of her claim to equal treatment (but only in respect of a pension) is that she has paid the same national insurance contributions. That is really the long and the short of her case. In my opinion, however, concentration on this single feature is an over-simplification of the comparison. The situation of the beneficiaries of UK social security is, to quote the European Court in *Van der Mussele v Belgium* (1983) 6 EHRR 163, 180, para 46, "characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect".

21. In effect Ms Carson's argument is that because contributions are a necessary condition for the retirement pension paid to UK residents, they ought to be a sufficient condition. No other matters, like whether one lives in the United Kingdom and participates in the rest of its arrangements for taxation and social security, ought to be taken into account. But that in my opinion is an obvious fallacy. National insurance contributions have no exclusive link to retirement pensions, comparable with contributions to a private pension scheme. In fact the link is a rather tenuous one. National insurance contributions form a source of part of the revenue which pays for all social security benefits and the National Health Service (the rest comes from ordinary taxation). If payment of contributions is a sufficient condition for being entitled to a contributory benefit, Ms Carson should be entitled to all contributory benefits, like maternity benefit and job-seekers allowance. But she does not suggest that she is.

22. The interlocking nature of the system makes it impossible to extract one element for special treatment. The main reason for the provision of state pensions is the recognition that the majority of people of pensionable age will need the money. They are not means-tested, but that is only because means-testing is expensive and discourages take-up of the benefit even by people who need it. So state pensions are paid to everyone whether they have adequate income from other sources or not. On the other hand, they are subject to tax. So the state will recover part of the pension from people who have enough income to pay tax and thereby reduce the net cost of the pension. On the other hand, those people who are entirely destitute would be entitled to income support, a non-contributory benefit. So the net cost of paying a retirement pension to such people takes into account the fact that the pension will be set off against their claim to income support.

23. None of these interlocking features can be applied to a non-resident such as Ms Carson. She pays no United Kingdom income tax, so the state would not be able to recover anything even if she had substantial additional income. (Of course I do not suggest that this is the case; I have no idea what other income she has, but there will be expatriate pensioners who do have other income). Likewise, if she were destitute, there would be no saving in income support. On the contrary, the pension would go to reduce the social security benefits (if any) to which she is entitled in her new country.

State and private pensions

24. It is, I suppose, the words "insurance" and "contributions" which suggest an analogy with a private pension scheme. But, from the point of view of the citizens who contribute, national insurance contributions are little different from general taxation which disappears into the communal pot of the consolidated fund. The difference is only a matter of public accounting. And although retirement pensions are presently linked to contributions, there is no particular reason why they should be. In fact (mainly because the present system severely disadvantages women who have spent time in the unremunerated work of caring for a family rather than earning a salary) there are proposals for change. Contributory pensions may be replaced with a non-contributory "citizen's pension" payable to all inhabitants of this country of pensionable age. But there is no reason why this should mean any change in the collection of national insurance contributions to fund the citizen's pension like all the other non-contributory benefits. On Ms Carson's argument, however, a change to a non-contributory pension would make all the difference. Once the retirement pension was non-contributory, the foundation of her argument that she had "earned" the right to equal treatment would disappear. But she would have paid exactly the same national insurance contributions while she was working here and her contributions would have had as much (or as little) causal relationship to her pension entitlement as they have today.

Parliamentary choice

25. For these reasons it seems to me that the position of a non-resident is materially and relevantly different from that of a UK resident. I do not think, with all respect to my noble and learned friend, Lord Carswell, that the reasons are subtle and arcane. They are practical and fair. Furthermore, I think that this is very much a case in which Parliament is entitled to decide whether the differences justify a difference in treatment. It cannot be the law that the United Kingdom is prohibited from treating expatriate pensioners generously unless it treats them in precisely the same way as pensioners at home. Once it is accepted that the position of Ms Carson is relevantly different from that of a UK resident and that she therefore cannot claim equality of treatment, the amount (if any) which she receives must be a matter for Parliament. It must be possible to recognise that her past contributions gave her a claim in equity to some pension without having to abandon the reasons why she cannot claim to be treated equally. And in deciding what expatriate pensioners should be paid, Parliament must be entitled to take into account competing claims on public funds. To say that the reason why expatriate pensioners are not paid the annual increases is to save money is true but only in a trivial sense: every decision not to spend more on something is to save money to reduce taxes or spend it on something else.

26. I think it is unfortunate that the argument for the Secretary of State placed such emphasis upon such matters as the variations in rates of inflation in various countries which made it inappropriate to apply the same increase to pensioners resident abroad. It is unnecessary for the Secretary of State to try to justify the sums paid with such nice calculations. It distracts attention from the main argument. Once it is conceded, as Mr Blake accepts, that people resident outside the UK are relevantly different and could be denied any pension at all, Parliament does not have to justify to the courts the reasons why they are paid one sum rather than another. Generosity does not have to have a logical explanation. It is enough for the Secretary of State to say that, all things considered, Parliament considered the present system of payments to be a fair allocation of available resources.

27. The comparison with residents in treaty countries seems to me to fail for similar reasons. Mr Blake was able to point to government statements to the effect that there was no logical scheme in the arrangements with treaty countries. They represented whatever the UK had from time to time been able to negotiate without placing itself at an undue economic disadvantage. But that seems to me an entirely rational basis for differences in treatment. The situation of a UK expatriate pensioner who lives in a country which has been willing to enter into suitable reciprocal social security arrangements is relevantly different from that of a pensioner who lives in a country which has not. The treaty enables the government to improve the social security benefits of UK nationals in the foreign country on terms which it considers to be favourable, or at least not unduly burdensome. It would be very strange if the government was prohibited from entering into such reciprocal arrangements with any country (for example, as it has with the EEA countries) unless it paid the same benefits to all expatriates in every part of the world.

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