CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos. 65731/01 and 65900/01
by STEC and Others
against the United Kingdom

The European Court of Human Rights, sitting on 6 July 2005 as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr B.M. ZUPANČIČ,
Mr L. LOUCAIDES,
Mr J. CASADEVALL,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr A. KOVLER,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mr D. SPIELMANN,
Mr E. MYJER, *judges*

and Mr P.J. MAHONEY, *Registrar*,

Having regard to the above-mentioned applications lodged on 20 November 2000 and 30 January 2001 respectively,

Having regard to the decision of 24 August 2004 by which the Chamber of the Fourth Section, to which the applications had initially been assigned,

relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72 of the Rules of Court),

Having regard to the President's decision of 5 January 2005 to examine jointly the admissibility and the merits of the applications (Article 29 § 3 of the Convention and Rule 54A § 3),

Having regard to the observations on the admissibility and merits of the applications submitted by the applicants and the Government,

Having regard to the parties' oral observations at the hearing on 9 March 2005,

Having deliberated on 9 March and 6 July 2005,

Decides to disapply Article 29 § 3 of the Convention and to examine the admissibility and the merits of the applications separately, and

Delivers the following decision:

THE FACTS

1. The first applicant, Regina Hepple, was born in 1933 and lives in Wakefield. The second applicant, Anna Stec, was born in 1933 and lives in Stoke-on-Trent. The third applicant, Patrick Lunn, was born in 1923 and lives in Stockton-on-Tees. The fourth applicant, Sybil Spencer, was born in 1926 and lives in Bury. The fifth applicant, Oliver Kimber, was born in 1924 and lives in Pevensey.

2. At the hearing on 9 March 2005, the applicants were represented by Mr R. Drabble QC and Ms H. Mountfield, counsel. The first, second, third and fourth applicants were also represented by Ms J. Starling, and the fifth applicant was represented by Mr J. Clinch, both solicitors practising in London. The respondent Government were represented by Mr D. Pannick QC and Ms C. Weir, counsel, and also by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Mrs Hepple

4. On 28 January 1987 the first applicant began to suffer from tenosynovitis, an industrial disease. From 27 January 1989 she was unable to continue working and received Reduced Earnings Allowance ("REA" – see paragraph 16 below). On 15 April 1993 she reached the age of 60 and on 1 May 1996 an adjudication officer decided that, with effect from 31 March 1996, her award of REA should be replaced by an award of Retirement Allowance ("RA" – see paragraph 20 below).

5. The applicant appealed against this decision to the Wakefield Social Security Appeal Tribunal ("the SSAT"), on the basis that, had she been a man of the same age, she would have continued to receive REA, which was more valuable. The SSAT rejected her appeal on 5 September 1996 and the applicant appealed to the Social Security Commissioner ("the Commissioner").

6. All five applicants' cases were joined by the Commissioner who, having heard arguments on 11 and 12 December 1997, decided on 8 May 1998 to refer three questions to the European Court of Justice (ECJ – see paragraph 23 below).

7. The ECJ gave judgment on 23 May 2000 (see paragraph 23 below). On 31 July 2000 the Commissioner, following the ECJ's ruling, struck out the applicants' cases where they were the appellants before him and allowed the appeals where the adjudication officers had been the appellants.

2. Mrs Stec

8. On 18 January 1989 the second applicant injured her back at work and was unable to continue working. She was awarded REA from 24 January 1990. On 13 March 1993 she reached the age of 60 and as from 31 March 1996 her award of REA was replaced by an award of RA.

9. The applicant appealed against this decision on the basis of sex discrimination. The Trent SSAT allowed her appeal on 4 October 1996, and the adjudication officer appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 6-7 above).

3. Mr Lunn

10. On 11 November 1973 the third applicant suffered a work-related injury to his right hand, as a result of which he had to stop working. From 12 May 1974 he received Special Hardship Allowance, which was converted to REA from 1 October 1986. On 19 May 1988 he reached the age of 65 and from May 1993, when he turned 70, he received a statutory retirement pension. On 26 March 1996 an adjudication officer reviewed the award of REA and decided that, with effect from 31 March 1996, it should be replaced by an award of RA, paid at approximately 25% of the REA rate.

11. The applicant appealed on the ground that a woman in the same circumstances would have been treated as having retired on or before 19 May 1988 and would have been entitled to a frozen rate of REA for life, a more valuable benefit. On 24 September 1996 the Stockport SSAT dismissed his appeal, and Mr Lunn appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 6-7 above).

4. Mrs Spencer

12. The fourth applicant suffered a work-related injury to her neck on 17 July 1966. She was awarded Special Hardship Allowance from 15 January 1967 and from 1 October 1986 this was converted to an award of REA. Her sixtieth birthday was on 11 December 1986 and she received a retirement pension from 23 December 1986. It was decided on 10 May 1993, with effect from 11 April 1988, to freeze for life her award of REA at 25.28 pounds sterling (GBP).

13. The applicant appealed to the Bolton SSAT on the basis that, had she been a man, she would have continued to receive unfrozen REA. The SSAT allowed her appeal on 30 November 1994, and the adjudication officer appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 6-7 above).

5. Mr Kimber

14. On 12 March 1982 the fifth applicant injured his back at work and was unable to continue working. He was awarded Special Hardship Allowance from 15 September 1982, converted to REA from 1 October 1986. He reached the age of 65 on 30 September 1989 and received a retirement pension from 29 September 1994. On 29 April 1996 an adjudication officer reviewed his award of REA and decided that with effect from 31 March 1996 it should be replaced by an award of RA.

15. The applicant appealed to the Eastbourne SSAT, on the basis that a woman in his circumstances could have chosen to have been treated as retired from 10 April 1989, and so would have been entitled to frozen REA for life, a more valuable benefit than RA. The SSAT allowed his appeal on 2 October 1996 and the adjudication officer appealed to the Commissioner, who referred the case to the ECJ (see paragraphs 6-7 above).

B. Relevant law

1. Benefits for industrial injury and disease in the United Kingdom

16. Reduced Earnings Allowance ("REA") is an earnings-related additional benefit under the statutory occupational accident and disease scheme which was put in place in 1948. Originally the benefit was known as Special Hardship Allowance, but it was recast and renamed by the Social Security Act 1986. At the time of the introduction of these applications, the relevant legislation was Part V of the Social Security Contributions and Benefits Act 1992.

17. REA has, since 1990, been funded by general taxation rather than the National Insurance scheme. It is payable to employees or former employees who have suffered an accident at work or an occupational

disease, with the purpose of compensating for an impairment in earning capacity. The weekly amount is based on a comparison between the claimant's earnings prior to the accident or disease and those in any actual or notional alternative employment still considered suitable despite the disability, subject to a maximum weekly award of GBP 40. It is a non-contributory benefit, in that eligibility is not conditional on any or a certain number of contributions having been made to the National Insurance Fund.

18. Under more recent legislation the benefit is being phased out altogether and no fresh right to REA can arise from an accident incurred or a disease contracted on or after 1 October 1990. In addition, a succession of legislative measures after 1986 attempted to remove or reduce it for claimants no longer of working age, in respect of whom the government considered any comparison of "earnings" to be artificial. Before these changes, there had been a continued right to REA notwithstanding the attainment of retirement age and REA had been payable concurrently with the State pension.

19. The method chosen to reduce eligibility was to impose cut-off or limiting conditions by reference to the ages used by the statutory old-age pension scheme, namely 65 for men and 60 for women until 1996, then tapering up to eventual equality at 65 in 2020 (Part II of the Social Security Contributions and Benefits Act 1992, as amended by the Pensions Act 1995).

20. Under the new provisions (Social Security Contributions and Benefits Act 1992), all REA recipients who, before 10 April 1989, had reached either (a) 70, if a man, or 65, if a woman, or (b) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman, would receive a frozen rate of REA for life. All other REA recipients would cease to receive REA, and would instead receive Retirement Allowance ("RA") either on reaching (a) 70, if a man, or 65, if a woman, or (b) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman or on giving up employment at 65 for a man or 60 for a woman.

2. Contributory and non-contributory benefits in the United Kingdom

21. In his judgment of 26 May 2005 in *R. v. Secretary of State for Work and Pensions, ex parte Carson and R. v. Secretary of State for Work and Pensions, ex parte Reynolds* [2005] UKHL 37, with which Lord Nicholls of Birkenhead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe agreed, Lord Hoffmann described the United Kingdom's social security system as follows (§§ 20-24):

> "...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'.

> ... 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.
>
> 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. ...
>
> 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. ..."

3. European Union Directive on equal treatment in social security

22. Council Directive 79/7/EEC of 19 December 1978 ("the Directive") concerns the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 4 § 1 of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits. Such discrimination can be justified only under Article 7 § 1 (a), which provides that the Directive is to be without prejudice to the right of member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

4. Judgment of the European Court of Justice in Hepple and Others

23. The questions referred to the ECJ in Case C-196/98, *Regina Virginia Hepple and Others v. Adjudication Officer* (European Court Reports 2000, p. I-3701) by the Social Security Commissioner were as follows:

> "1. Does Article 7 of Council Directive 79/7/EEC permit a member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory old-age pension scheme, on entitlement to a benefit having the characteristics of Reduced Earnings Allowance under a statutory occupational accident and disease scheme, so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:
>
> (a) is not necessary for any financial reason connected with either scheme; and
>
> (b) never having been imposed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the Directive to be given full effect until Article 8?
>
> 2. If the answer to Question 1 is Yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988 to 1989 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?
>
> 3. ..."

24. The ECJ held, first, that "removal of the discrimination at issue ... would have no effect on the financial equilibrium of the social security system of the United Kingdom as a whole" (§ 29). However, it went on to hold that it had been objectively necessary to introduce different age conditions based on sex in order to maintain coherence between the State retirement pension scheme and other benefit schemes, since (§§ 31-34)

> "... the principal aim of the successive legislative amendments ... was to discontinue payment of REA – an allowance designed to compensate for an impairment of earning capacity following an accident at work or occupational disease – to persons no longer of working age by imposing conditions based on the statutory retirement age.
>
> Thus, as a result of those legislative amendments, there is coherence between REA, which is designed to compensate for a decrease in earnings, and the old-age pension scheme. It follows that maintenance of the rules at issue in the main proceedings is objectively necessary to preserve such coherence.
>
> That conclusion is not invalidated by the fact that REA is replaced, when the beneficiary reaches retirement age and stops working, by RA, the rate of which is 25% of REA, since RA is designed to compensate for the reduction in pension entitlement resulting from a decrease in earnings following an accident at work or occupational disease.
>
> It follows that discrimination of the kind at issue in the main proceedings is objectively and necessarily linked to the difference between the retirement age for

men and that for women, so that it is covered by the derogation for which Article 7 § 1 (a) of the Directive provides."

5. The European Social Charter of 1961

25. The European Social Charter of 1961 ("the Social Charter"), revised on 3 May 1996, provides, *inter alia*:

"...

Recalling that the Ministerial Conference on Human Rights held in Rome on 5 November 1990 stressed the need, on the one hand, to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural and, on the other hand, to give the European Social Charter fresh impetus;

...

Have agreed as follows:

...

Part II

The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following Articles and paragraphs.

...

Article 12 - The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1 to establish or maintain a system of social security;

2 to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;

3 to endeavour to raise progressively the system of social security to a higher level;

4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;

b the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 - The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1 to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

2 to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;

3 to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

4 to apply the provisions referred to in paragraphs 1, 2 and 3 of this Article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953."

6. Pensionable age in other European countries

26. According to information provided by the Government, men and women become eligible to receive an old age pension at the same age in Andorra, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Monaco, the Netherlands, Norway, Portugal, San Marino, Slovakia, Spain and Sweden.

27. Women are entitled to receive a pension at a younger age than men in Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Lithuania, Malta, Moldova, Poland, Romania, the Russian Federation, Serbia and Montenegro, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia", Ukraine and the United Kingdom. Many of these countries were phasing in equalisation of pensionable age. This was to take place in Austria between 2024 and 2033; in Azerbaijan by 2012; in Belgium between 1997 and 2009; in Estonia before 2016; in Hungary by 2009; in Latvia by 2008; in Lithuania by 2006 and in the United Kingdom between 2010 and 2020.

COMPLAINTS

28. The applicants claimed that the REA and RA scheme, as it applied to each of them, was discriminatory, in breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

THE LAW

A. Decision to strike out Mrs Hepple's application

29. By a letter dated 25 February 2005, the first applicant, through her representative, informed the Court that, for personal reasons, she no longer wished to continue with the case. In response to the Registrar's request for further information, the applicant's representative confirmed Mrs Hepple's position in a second letter, dated 2 March 2005.

30. On 9 March 2005, the Court decided to strike out Mrs Hepple's application (Article 37 § 1 (a) of the Convention), in view of her request, and considering that respect for human rights did not require it to continue examining the application.

31. By a letter dated 13 April 2005, Mrs Hepple, through her representative, informed the Court that she had changed her mind and now wished to proceed with her application.

32. The Court notes that Mrs Hepple's representative's confirmation of her withdrawal from the case was clear and unequivocal, and that there was no indication that the request to withdraw had not been freely made, at the applicant's initiative. Having regard to these circumstances, and to the fact that the Convention issues raised by Mrs Hepple's application were also raised by those of the remaining applicants, the Court sees no reason to restore her application to the list (Article 37 § 2 of the Convention and Rule 43 § 5 of the Rules of Court).

B. Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

33. The applicants complained that men and women were treated differently under the REA and RA scheme, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. The latter provision reads:

> "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 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in [the] 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."

1. Whether the applicants' interests fall within the scope of Article 1 of Protocol No. 1

(a) The parties' submissions

(i) The Government

34. The Government's main submission was that the applications were incompatible *ratione materiae* with the provisions of the Convention in that non-contributory benefits, like REA and RA, could not be considered to fall within the scope of Article 1 of Protocol No. 1. The Convention and Article 1 of Protocol No. 1 did not confer a right to receive benefits from the State. It was a matter for the State's discretion what provision to make, since there was no right under the Convention to acquire possessions. A limited exception had been recognised in relation to contributory benefits, because the individual had, in effect, paid for the benefits and therefore had a proprietary claim. The distinction between contributory and non-contributory benefits was principled and relatively easy to apply in practice. The applicants were seeking to widen the concept of a "possession" to include claims which had no basis in domestic law, in order to bring a general complaint of discrimination of the type which would be covered by the new Protocol No. 12 but not by Article 14. The Convention and Protocol No. 1 were concerned with civil and political, rather than social and economic, rights. To treat a claim to a non-contributory social security benefit as property within the scope of Article 1 of Protocol No. 1 would conflict with the purpose and effect of the 1961 European Social Charter.

35. Moreover, the Government contended that to conclude that Article 1 of Protocol No. 1 applied to non-contributory benefits would be to expand the scope of that provision beyond what had been recognised in the Court's jurisprudence. In *Gaygusuz v. Austria* (judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV), the Court held that the applicant's entitlement to emergency assistance was a pecuniary right because it was "linked to the payment of contributions to the unemployment insurance fund" (p. 1141, § 39). Most of the decisions after *Gaygusuz* stated that non-contributory benefits were not "possessions" (see for example, *Szrabjet and Clarke v. the United Kingdom*, nos. 27004/95 and 27011/95, Commission decision of 23 October 1997, unreported; *Carlin v. the United Kingdom*, no. 27537/95, Commission decision of 3 December 1997, unreported; *Coke and Others v. the United Kingdom*, no. 38696/97, Commission decision of 9 September 1998, unreported; *Stawicki v. Poland*

(dec.), no. 47711/99, 10 February 2000; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; *Kohls v. Germany* (dec.), no. 72719/01, 13 November 2003; *Kjartan Ásmundsson v. Iceland*, no. 60669/00, ECHR 2004-IX; and the Chamber judgment of 20 June 2002 in *Azinas v. Cyprus*, no. 56679/00, §§ 32-34, which was however superseded by the Grand Chamber judgment of 28 April 2004, which decided the case on a different ground).

(ii) The applicants

36. The applicants asserted that the benefits in question fell within the ambit of Article 1 of Protocol No. 1 and that Article 14 of the Convention therefore applied. Properly read, the Court in paragraph 41 of *Gaygusuz* (cited above) had held that the statutory right to emergency assistance in issue in the case was of itself a property right within the ambit of Article 1 of Protocol No. 1 and that it was not necessary to determine whether it was contributions-based. This was a principled and workable approach, which the Grand Chamber should also apply.

37. To sustain the distinction drawn in the early decisions of the European Commission of Human Rights ("the Commission") between benefits systems based on contributions and non-contributory social assistance schemes would be arbitrary and without any sensible policy objective. Such an approach would require the Court to apprise itself of the detailed nature of the funding regime applicable to any benefit which formed the object of a discrimination claim under Article 14. Only if it found that there was a connection with the payment of contributions, whether as a condition precedent for the benefit (as in *Gaygusuz*), or paid by somebody else (as in *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV), would Article 14 apply.

38. There was no principled reason for drawing a distinction. While contributions undoubtedly fell within the scope of Article 1 of Protocol No. 1, so did the taxes which funded non-contributory schemes. The United Kingdom's industrial injuries scheme, in issue in the present case, well illustrated the arbitrary and inconsistent result that such an investigation might produce. The scheme had evolved over time from a situation where benefits were paid out of a separate industrial injuries fund, maintained at least in part from contributions paid as a result of the employee's status as an employed earner, through a situation where benefits were paid out of the National Insurance Fund, maintained in the same way, to the present situation, where they were funded out of general taxation.

(b) The Court's assessment

39. The Court reiterates that Article 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 (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 35, § 71; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22; and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, p. 585, § 22).

40. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law. It was expressed for the first time in the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits) (judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9), when the Court noted that the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No. 1, and continued as follows:

> "... nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14."

41. The Court must decide, therefore, whether the interests of the applicants which were adversely affected by the impugned legislative scheme fell within the "ambit" or "scope" of Article 1 of Protocol No. 1.

(i) The case-law to date

42. The Court notes that REA and RA are non-contributory benefits, to the extent that they have, since 1990, been funded by general taxation rather than the National Insurance scheme. Although only employees or former employees who have suffered impairment in earning capacity due to an accident at work or an occupational disease are eligible for the benefits, entitlement is not conditional on any or a certain number of contributions having been made to the National Insurance Fund.

43. The Commission was the first Convention organ to consider the extent to which entitlement to pensions and other benefits was protected by Article 1 of Protocol No. 1. It applied the principle that the Article did not confer any right to receive a social security benefit or pension. The making of compulsory contributions, for example to a pension fund or a social insurance scheme, might however create such a right, where there was a

direct link between the level of contributions and the benefits awarded. Otherwise the applicant did not, at any given moment, have an identifiable and claimable share in the fund (see, for example, *Müller v. Austria*, no. 5849/72, Commission decision of 1 October 1975, Decisions and Reports (DR) 3, p. 25; *G. v. Austria*, no. 10094/82, Commission decision of 14 May 1984, DR 38, p. 84; *Kleine Staarman v. the Netherlands*, no. 10503/83, Commission decision of 16 May 1985, DR 42, p. 162).

44. The first judgment of the Court on the subject was *Gaygusuz* (cited above). The applicant, a Turkish citizen, had lived in Austria from 1973 until 1987. He had worked from 1973 until 1984 but from 1984 to 1987 he was either unemployed or was certified unfit. From July 1986 to March 1987 he was paid an advance on his retirement pension by way of unemployment benefit. When this entitlement expired, he applied for another advance on his pension, in the form of "emergency assistance". There were several preconditions for such a payment. A claimant had to be unemployed, but fit and available for work; to have exhausted his entitlement to unemployment benefit; to be in urgent need; and to possess Austrian nationality. The applicant satisfied all these criteria except that of Austrian nationality. In particular, as the Court found, he had been entitled to unemployment benefit since he had paid unemployment insurance contributions in the same way as every employee in Austria and his entitlement to the benefit had been exhausted at the time he applied for emergency assistance. In paragraph 21 of the Court's judgment, it was further noted that the amount of unemployment benefit was "financed partly from the unemployment insurance contributions every employee ha[d] to pay ... and partly from various governmental sources". The "fund" from which benefits were drawn was not, therefore, financed wholly from contributions made by employees or employers.

45. The parties in the present case disagree as to whether the fact that Mr Gaygusuz had made unemployment insurance contributions was crucial to the Court's finding that Article 1 of Protocol No. 1 applied. The applicants submit that the central basis of the Court's decision was, as set out in paragraph 41 of the judgment, that

> "the right to emergency assistance – in so far as provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No. 1".

The Government for their part rely on paragraph 39, in which the Court emphasised that the payment of contributions was a precondition for the payment of unemployment benefit and that

> "[i]t follows that there is no entitlement to emergency assistance where such contributions have not been made".

They submit that the Court would not have found emergency assistance to fall within the scope of Article 1 of Protocol No. 1 if eligibility for it had not been dependent on the prior payment of contributions.

46. The Grand Chamber accepts that the *Gaygusuz* judgment was ambiguous on this important point. This is reflected in the fact that two distinct lines of authority subsequently emerged in the case-law of the Convention organs. The Commission, and the Court in some cases, continued to find that a welfare benefit or pension fell within the scope of Article 1 of Protocol No. 1 only where contributions had been made to the fund that financed it (see the cases cited in paragraph 35 above). In other cases, however, the Court held that even a welfare benefit in a non-contributory scheme could constitute a possession for the purposes of Article 1 of Protocol No. 1 (see *Bucheň v. the Czech Republic*, no. 36541/97, § 46, 26 November 2002; *Koua Poirrez v. France*, no. 40892/98, § 42, ECHR 2003-X; *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV; *Van den Bouwhuijsen and Schuring v. the Netherlands* (dec.), no. 44658/98, 16 December 2003).

(ii) The approach to be applied henceforth

47. Against this background, it is necessary to examine afresh the question whether a claim to a non-contributory welfare benefit should attract the protection of Article 1 of Protocol No. 1. Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally, and must interpret and apply the Convention in a manner which renders its rights practical and effective, not theoretical and illusory (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

48. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 30-31, § 68; see also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). It is noteworthy in this respect that, in its case-law on the applicability of Article 6 § 1, the Court originally held that claims regarding only welfare benefits which formed part of contributory schemes were, because of the similarity to private insurance schemes, sufficiently personal and economic to constitute the subject matter of disputes for "the determination of civil rights" (see *Feldbrugge v. the Netherlands* and *Deumeland v. Germany*, both judgments of 29 May 1986, Series A nos. 99 and 100). However, in *Salesi v. Italy* (judgment of 26 February 1993, Series A no. 257-E), Article 6 § 1 was held also to apply to a dispute over entitlement to a non-contributory welfare benefit, the Court emphasising that the applicant had an assertable right, of an individual and economic nature, to social benefits. It thus abandoned the comparison with private insurance schemes and the requirement for a form of "contract" between the individual and the State. In *Schuler-Zgraggen v. Switzerland*

(judgment of 24 June 1993, Series A no. 263, p. 17, § 46), the Court held that

> "... the development in the law ... and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 § 1 does apply in the field of social insurance, including even welfare assistance".

49. It is in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in Article 1 of Protocol No. 1 should be interpreted in a way which is consistent with the concept of pecuniary rights under Article 6 § 1 of the Convention. It is moreover important to adopt an interpretation of Article 1 of Protocol No. 1 which avoids inequalities of treatment based on distinctions which, nowadays, appear illogical or unsustainable.

50. The Court's approach to Article 1 of Protocol No. 1 should reflect the reality of the way in which welfare provision is currently organised within the member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status (see, with reference to the United Kingdom's system, Lord Hoffmann's comments in *Ex parte Carson*, cited in paragraph 21 above). The REA and RA are good examples of this. Originally funded out of the National Insurance Fund, since 1990 they have been financed by general taxation (see paragraph 17 above). Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax.

51. In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.

52. Finally, and in response to the Government's contention, the Court considers that to hold that a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 no more renders otiose the provisions of the Social Charter than to reach the same conclusion in respect of a contributory benefit. Whilst the Convention sets forth what are

essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26).

53. In conclusion, therefore, if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction.

54. It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, which apply generally in cases under Article 1 of Protocol No. 1, are equally relevant when it comes to welfare benefits. In particular, the Article does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme (see, *mutatis mutandis*, *Kopecký*, § 35 (d)). If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (ibid.).

55. In cases, such as the present one, concerning a complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see *Gaygusuz*, cited above, and *Willis*, also cited above, § 34). Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14.

56. It follows that the applicants' interests fall within the scope of Article 1 of Protocol No. 1, and of the right to the protection of property which it guarantees. This is sufficient to render Article 14 of the Convention applicable.

2. Article 14 of the Convention

(a) The parties' submissions

(i) The Government

57. The Government submitted that it was objectively justifiable to link the age criteria for the receipt of REA and RA to State retirement pension age. REA was a benefit designed to compensate those who had suffered an industrial injury for their loss of earning capacity, and was therefore a benefit linked intrinsically to work. By stopping the benefit at State pension age, Parliament had acted in an objectively justified manner by ensuring that a person, whether male or female, would not be eligible both for a State retirement pension and for a benefit for loss of earning capacity. Using the State pension age promoted, in a manner that could easily be understood and administered, and was proportionate, the objective of discontinuing REA for those who were no longer a regular part of the working and earning sector of the population.

58. The justification for linking social security benefits to State pension age had been recognised by Article 7 of Directive 79/7/EEC on social security (see paragraph 22 above). In May 2000 the full ECJ had considered and rejected the contention raised by the present applicants that they had been discriminated against unlawfully on the ground of their sex in breach of the Directive (see paragraph 24 above). If the Court were to find a violation in the present case it would create considerable confusion, since the domestic legislation would be lawful under a directive specifically concerned with sex discrimination in social security, but unlawful under the general provisions of the Convention concerned with property and discrimination. A finding of a violation would undermine the purpose and effect of Community law.

59. In 1995, Parliament had decided that the State pension ages should be equalised for men and women by 2020. From 2010 onwards, the age at which women become entitled to receive State retirement pension would gradually be increased from 60, until, in 2020, it reached 65, the same as the age for men. Parliament had decided to implement the reform in stages because moving towards equality had enormous financial implications both for the State and for individuals, particularly women who had long been expecting to receive a State retirement pension at 60. Several Contracting States retained different pension ages for men and women, and a number had chosen to implement a gradual equalisation of those ages (see paragraphs 26-27 above).

60. Finally, the Government contended that three of the applicants – Mr Lunn, Mrs Spencer and Mr Kimber – had not been directly affected by the difference in treatment of which they complained. Any loss experienced

by Mr Lunn or Mrs Spencer had been caused by their own acts or omissions, rather than the operation of the transitional scheme. Thus, Mr Lunn had had the option of giving notice of retirement once he reached the age of 65, rather than waiting, as he did, until he was deemed to have retired at 70. Conversely, Mrs Spencer had not been obliged to give notice of retirement when she reached pensionable age at 60, but could have deferred her pension until the age of 65, so bringing herself outside the operation of the transitional regime and entitling her to claim REA and RA in the same way as a male comparator. As for Mr Kimber, a woman with the same birthday would have been entitled to transitional-rate REA only if she had given notice of her intention to retire between 30 September 1984 (her sixtieth birthday) and 9 April 1989 (the cut-off date for the transitional regime). Applying the principle expressed by the Court in *Cornwell v. the United Kingdom* ((dec.), no. 36578/97, 11 May 1999), since Mr Kimber gave no such notice, he could not claim to have been directly affected by the discrimination of which he complains, since a woman in the same position who had made no claim would have had no entitlement under domestic law to the transitional rate.

(ii) The applicants

61. The applicants did not deny that it had been reasonable for the Government to seek to address the anomaly whereby industrial injury earnings replacement benefits continued to be paid to workers after the age when they would, in any event, have ceased paid employment. There was, however, no justification for introducing sex-based discrimination into the scheme by linking the cut-off date to pension age. The same objective could have been achieved, without unacceptable financial consequences, by adopting a common age-limit for men and women or by the use of overlapping benefit regulations, ensuring that any State pension received was offset against REA.

62. It was important to note that the Commissioner, in his reference to the ECJ (see paragraph 23 above), had stated in paragraphs 26 and 27 that "the introduction after 1986 of unequal age conditions on REA for the first time was not necessary to maintain the financial equilibrium or coherence (in so far as that word is to be understood in a financial sense) of the UK social security schemes". He had also found as a fact "that such imposition was not necessary to enable the United Kingdom to retain the different pension ages under its old-age pension scheme".

63. The applicants did not consider that a finding in their favour would have wider implications for the case-law of the ECJ under Article 7 of Directive 79/7/EEC. In the present case, the ECJ had been dealing with the scope of the derogation under Article 7, and had not considered afresh whether the discrimination had been justified.

64. In response to the Government's objection as to his victim status, Mr Lunn submitted that there had been no reason for him to have given notice of retirement on his sixty-fifth birthday, since it would have made no difference to his benefits position at that date. Mrs Spencer argued that the course she had taken in giving notice of retirement on her sixtieth birthday, which led to the transfer from REA to RA, would not have been open to a male comparator. Accordingly the problem she faced would not have been faced by such a comparator, and she could claim to be a victim of discrimination. Mr Kimber, for his part, reasoned that, unlike a woman in his position, there had been no point in his giving notice of retirement, because under the legislative scheme only women were entitled to receive transitional-rate REA upon giving such notice. It could not be assumed to his detriment that, if he had been a woman, he would not have exercised that option.

(b) The Court's assessment

65. The Court considers that the Government's preliminary objection that the above three applicants were not directly affected by the impugned legislation is closely linked to the substance of their complaints under Article 14, and should be joined to the merits. It further considers that the applications raise complex issues of law and fact under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, the determination of which should depend on an examination of the merits. It concludes, therefore, that they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court

Decides, unanimously, not to restore Mrs Hepple's application to the list;

Decides, by a majority, to join to the merits the Government's objections concerning the victim status of the third applicant, Mr Lunn, the fourth applicant, Mrs Spencer, and the fifth applicant, Mr Kimber;

Declares admissible, by a majority, the applications of the second, third, fourth and fifth applicants.