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

FOURTH SECTION

**CASE OF CARSON AND OTHERS v. THE UNITED KINGDOM**

*(Application no. 42184/05)*

JUDGMENT

STRASBOURG

4 November 2008

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
16/03/2010

*This judgment may be subject to editorial revision.*

**In the case of Carson and Others v. the United Kingdom,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 May 2007 and 7 October 2008,

Delivers the following judgment, which was adopted on the last date:

# PROCEDURE

1. The case originated in an application (no. 42184/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 24 November 2005 by thirteen British nationals: Ms Annette Carson, Mr Bernard Jackson, Mrs Venice Stewart, Mrs Ethel Kendall, Mr Kenneth Dean, Mr Robert Buchanan, Mr Terrance Doyle, Mr John Gould, Mr Geoff Dancer, Ms Penelope Hill, Mr Bernard Shrubsole, Mr Lothar Markiewicz and Mrs Rosemary Godfrey.

2. The applicants were represented by Mr T. Otty Q.C. and Mr B.Olbourne, lawyers practising in London, and M. P. Tunley and H. Gray, lawyers practising in Toronto. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged that the refusal of the United Kingdom authorities to up-rate their pensions in line with inflation was discriminatory, in breach of Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1 and in breach of Article 1 of Protocol No. 1 taken alone.

4. On 17 February 2006 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. On 18 September 2007 the Court decided to adjourn its examination of the case pending the delivery by the Grand Chamber of its judgment in *Burden v. the United Kingdom,* no. 13378/05.

6. On 24 January 2008, the non-governmental organisation Age Concern England was granted leave to intervene as a third party (Article 36 § 2 of the Convention).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. The applicants

#### *1. Annette Carson*

7. Ms Carson was born in 1931. She spent most of her working life in the United Kingdom, paying National Insurance Contributions in full, before emigrating to South Africa in 1989, where she has been resident since 1990. From 1989 to 1999 she paid further National Insurance Contributions on a voluntary basis to maintain her entitlement to a full State retirement pension.

8. In 2000 she became eligible for a State pension and an additional pension under the State Earnings Related Pension Scheme ("SERPS"). She receives a total of GBP 103.62 per week, comprising GBP 67.50 basic State pension, GBP 32.17 SERPS and GBP 3.95 graduated pension. Her pension has remained fixed at this rate since 2000. Had her basic pension benefited from up-rating in line with inflation, it would now be worth GBP 82.05 per week.

9. There is no State social security system in South Africa. Ms Carson therefore contends that she is dependent on her British pension to support her in retirement, having no other resources other than some earnings as a writer.

10. Ms Carson brought domestic proceedings challenging the refusal to up-rate her pension: see paragraphs 24-36 below.

#### *2. Bernard Jackson*

11. Mr Jackson was born in 1922. He spent 50 years working in the United Kingdom, paying National Insurance Contributions in full. He emigrated to Canada on his retirement in 1986 and became eligible for a State pension in 1987. His basic State pension was then GBP 39.50 a week, and it has remained fixed at that level since 1987. Had his State pension

benefited from up-rating since 1987 it would now be worth GBP 82.05 a week.

*3. Venice Stewart*

12. Mrs Stewart was born in 1931. She spent 15 years working in the United Kingdom, paying National Insurance Contributions in full, before emigrating to Canada in 1964. She became eligible for a State pension in 1991. Her basic State pension was then GBP 15.48 per week, and it has remained fixed at that level since 1991. Had her State pension benefited from up-rating, it would now be worth approximately GBP 22.50 per week.

*4. Ethel Kendall*

13. Mrs Kendall was born in 1913. She spent 45 years working in the United Kingdom, paying National Insurance Contributions in full, before retiring in 1976. She became eligible for a State pension in 1973, and emigrated to Canada in 1986, at which point her State pension had increased to GBP 38.70 per week. It has remained fixed at that level. Had it benefited from up-rating, it would now be worth approximately GBP 82.05 a week.

*5. Kenneth Dean*

14. Mr Dean was born in 1923. He spent 51 years working in the United Kingdom, paying National Insurance Contributions in full, before retiring in 1991. He became eligible for a State pension in 1988, and emigrated to Canada in 1994, when his weekly State pension was GBP 57.60. It has remained fixed at that level since 1994. Had it benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*6. Robert Buchanan*

15. Mr Buchanan was born in 1924. He spent 47 years working in the United Kingdom, paying all applicable National Insurance Contributions in full, before emigrating to Canada in 1985. He became eligible for a State pension in 1989. His basic State pension was then GBP 41.15 per week, and it has remained fixed at that level since 1989. Had his State pension benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*7. Terence Doyle*

16. Mr Doyle was born in 1937. He spent 42 years working in the United Kingdom, paying National Insurance Contributions in full, before retiring in 1995 and emigrating to Canada in 1998. He became eligible for a State pension in 2002. His basic State pension was then GBP 75.50 per week, and it has remained fixed at that level since then. Had it benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*8. John Gould*

17. Mr Gould was born in 1933. He spent 44 years working in the United Kingdom, paying National Insurance Contributions in full, before retiring and emigrating to Canada in 1994. He became eligible for a State pension in 1998. His basic State pension was then GBP 64.70 per week, and it has remained fixed at that level since then. Had his State pension benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*9. Geoff Dancer*

18. Mr Dancer was born in 1921. He spent 44 years working in the United Kingdom, paying National Insurance Contributions in full, before emigrating to Canada in 1981. He became eligible for a State pension in 1986. His basic State pension was then GBP 38.30 per week, and it has remained fixed at that level. Had it benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*10. Penelope Hill*

19. Mrs Hill was born in Australia in 1940; it appears that she remains an Australian national. She lived and worked in the United Kingdom between 1963 and 1982, paying National Insurance Contributions in full, before returning to Australia in 1982. She made further National Insurance Contributions for the tax years 1992-1999, and became eligible for a British State pension in 2000. Her basic State pension was then GBP 38.05 per week.

20. Between August 2002 and December 2004 she spent over half her time in London. During this period, her pension was increased to GBP 58.78, which included an up-rating of the basic State pension. When she returned to Australia, her pension returned to the previous level, including a basic State pension of GBP 38.05. Her pension has remained at this level subsequently. Had her State pension benefited from up-rating, it would now be worth approximately GBP 43.08 per week.

*11. Bernard Shrubshole*

21. Mr Shrubshole was born in 1933. His contributions record in the United Kingdom qualified him for a full basic State pension in 1998. He emigrated to Australia in 2000, at which point his State pension had increased to GBP 67.40. Save for a period of seven weeks when he returned to the United Kingdom (during which time his pension was increased to take into account annual up-ratings), his State pension has remained fixed at that level since 2000. Had his State pension benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*12. Lothar Markiewicz*

22. Mr Markiewicz was born in 1924. He spent 51 years working in the United Kingdom, paying National Insurance Contributions in full, and became eligible for a State pension in 1989. In 1993 he emigrated to Australia. His basic State pension was then worth GBP 56.10 a week, and it has remained fixed at that level. Had it benefited from up-rating, it would now be worth approximately GBP 82.05 per week.

*13. Rosemary Godfrey*

23. Mrs Godfrey was born in 1934. She spent 10 years working in the United Kingdom between 1954 and 1965, paying National Insurance Contributions in full, before emigrating to Australia in 1965. She became eligible for a State pension in 1994. Her basic State pension was then GBP 14.40 per week, and it has remained fixed at that level. Had it benefited from up-rating, it would now be worth approximately GBP 20.51 per week. Mrs Godfrey contends that she is ineligible for any old age security benefits from the Australian Government, and is thus dependent on her British State pension as a source of income.

## 2. The domestic proceedings brought by Ms Carson

24. In 2002, Ms Carson brought proceedings by way of judicial review to challenge the failure to index-link her pension. At first instance she was supported by the Australian Government as an intervening party, but the Australian Government withdrew from the proceedings before the Court of Appeal and House of Lords.

*1. The High Court*

25. Before the High Court, Ms Carson based her argument on Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention. Stanley Burnton J, in a judgment handed down on 22 May 2002 (*R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin)), dismissed her application for judicial review.

26. Applying the principles he drew from the case-law of the Court, the judge found that the pecuniary right that fell to be protected by Article 1 of Protocol No. 1 had to be defined by the domestic legislation that created it. He found that, by the operation of the domestic legislation, Ms Carson had never been entitled to an up-rated pension, so that there could be no breach of Article 1 of Protocol No. 1 taken in isolation.

27. The matter nonetheless fell within the ambit of Article 1 of Protocol No. 1, such that the judge had to consider whether Ms Carson had suffered discrimination contrary to the provisions of Article 14. He held that residence, applied as a criterion for the differential treatment of citizens,

was a ground within the scope of Article 14; like domicile and nationality, it was an aspect of personal status. This was not contested by the Secretary of State. Stanley Burnton J went on, however, to dismiss the claim following the reasoning of the European Commission of Human Rights in *JW and EW v United Kingdom* (no. 9776/82, decision of 3 October 1983, Decisions and Reports (DR) 34, p. 153) and *Corner v United Kingdom* (no. 11271/84, decision of 17 May 1985, unpublished), holding that the applicant was not in a comparable position to pensioners in countries attracting up-rating. The differing economic conditions in each country, including local social security provision and taxation, made it impossible simply to compare the amount in sterling received by pensioners.

28. Stanley Burnton J found that, in the alternative, even if the applicant could claim to be in an analogous position to a pensioner in the United Kingdom or a country where up-rating was paid subject to a bi-lateral agreement, the difference in treatment could be justified. He considered that the Government had a considerable margin of appreciation, that there was a lack of consistency in State practice, and that the limitation had been publicised for some time. He declined to accept that the payment of an up-rated pension in one country (or several) meant that there was an obligation under Article 14 to pay up-rated pensions to all pensioners living abroad. He found that the illogicality in the scope of bilateral agreements reflected their political nature, the relative complexity of the issue, and historical factors. He therefore concluded that the "remedy of the expatriate United Kingdom pensioners who do not receive up-rated pensions is political, not judicial. The decision to pay them up-rated pensions must be made by Parliament."

*2. The Court of Appeal*

29. Ms Carson appealed to the Court of Appeal, which dismissed her appeal on 17 June 2003 (*R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797). For similar reasons to the High Court, the Court of Appeal (Lords Justice Simon Brown, Laws and Rix) found that, since Article 1 of Protocol No. 1 conferred no right to acquire property, the failure to up-rate Ms Carson's pension gave rise to no violation of that provision.

30. As to the complaint under Article 14 in conjunction with Article 1 of Protocol No. 1, the Court of Appeal noted that the Secretary of State accepted that place of residence constituted a "status" for the purposes of the Article. However, it found that the applicant was in a materially different position to those she contended were her comparators. In this connection it was significant that the legislative scheme was entirely geared toward the impact of price inflation in the United Kingdom, such that it would be "inescapable that [an annual up-rate] being awarded across the board to all ... pensioners [in Ms Carson's position] would have random effects."

31. The Court of Appeal also considered, in the alternative, the question of justification and found that the "true" justification of the refusal to pay the up-rate was that Ms Carson and those in her position "had chosen to live in societies, more pointedly economies, outside the United Kingdom where the specific rationale for the uplift may by no means necessarily apply." The Court of Appeal thus considered the decision to be objectively justified without reference to what they accepted would be the "daunting cost" of extending the up-rate to those in Ms Carson's position. Moreover, the cost implications were "in the context of this case a legitimate factor going in justification for the Secretary of State's position," because to accept Ms Carson's arguments would be to lead to a judicial interference in the political decision as to the deployment of public funds which was not mandated by the Human Rights Act 1998, the jurisprudence of this Court or by a "legal imperative" which was sufficiently pressing to justify confining and circumscribing the elected Government's macro-economic policies.

*3. The House of Lords*

32. Ms Carson appealed to the House of Lords, relying on Article 1 of Protocol No. 1 read together with Article 14. Her appeal was dismissed on 26 May 2005 by a majority of four to one (*R (Carson and Reynolds) v. Secretary of State for Work and Pensions* [2005] UKHL 37).

33. The majority (Lords Nicholls of Birkenhead, Hoffmann, Rodger of Earlsferry and Walker of Gestinghope) accepted that a retirement pension fell within the scope of Article 1 of Protocol No. 1 and that Article 14 was thus applicable. They further assumed that a place of residence was a personal characteristic and amounted to "any other status" within the meaning of Article 14, and was thus a prohibited ground of discrimination. However, because a person could choose where to live, less weighty grounds were required to justify a difference of treatment based on residence than one based on an inherent personal characteristic, such as race or sex.

34. The majority observed that in certain cases it was artificial to treat separately the questions, first, whether an individual complaining of discrimination was in an analogous position to a person treated more favourably and, secondly, whether the difference in treatment was reasonably and objectively justified. In the present case, the applicant was not in an analogous, or comparable position, to a pensioner resident in the United Kingdom or resident in a country with a bilateral agreement with the United Kingdom. The State pension was one element in an interconnected system of taxation and social security benefits, designed to provide a basic standard of living for the inhabitants of the United Kingdom. It was funded partly from the National Insurance Contributions of those currently in employment and their employers, and partly out of general taxation. The pension was not means tested, but pensioners with a high income from other

sources paid some of it back to the State in income tax. Those with low incomes might receive other benefits, such as income support. The provision for index-linking was intended to preserve the value of the pension in the light of economic conditions, such as the cost of living and the rate of inflation, within the United Kingdom. Quite different economic conditions applied in other countries: for example, in South Africa, where Ms Carson lived, although there was virtually no social security, the cost of living was much lower, and the value of the rand had dropped in recent years compared to sterling.

35. Lord Hoffmann, who gave one of the majority opinions, put the arguments as follows:

> "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."

36. Lord Carswell, dissenting, found that Ms Carson could properly be compared to other contributing pensioners living in the United Kingdom or other countries where their pensions were up-rated. He continued:

"How persons spend their income and where they do so are matters for their own choice. Some may choose to live in a country where the cost of living is low or the

> exchange rate favourable, a course not uncommon in previous generations, which may or may not carry with it disadvantages, but that is a matter for their personal choice. The common factor for purposes of comparison is that all of the pensioners, in whichever country they may reside, have duly paid the contributions required to qualify for their pensions. If some of them are not paid pensions at the same rate as others, that in my opinion constitutes discrimination for the purposes of Article 14 ..."

Lord Carswell therefore considered that the appeal turned on the question of justification. He accepted that the courts should be slow to intervene in questions of macro-economic policy. He further accepted that, had the Government put forward sufficient reasons of economic or State policy to justify the difference in treatment, he should have been properly ready to yield to its decision-making power in those fields. However, in the present case the difference in treatment was not justified: as the Department of Social Security itself accepted, the reason all pensions were not up-rated was simply to save money, and it was not fair to target the applicant and others in her position.

## II. RELEVANT NON-CONVENTION MATERIAL

### A. The State retirement pension

37. In the United Kingdom, the State pension is a contributory benefit payable from pensionable age to an individual who, for a requisite number of years during his or her "working life", has paid or been credited with contributions to the National Insurance Fund (see the Social Security Contributions and Benefits Act 1992: "the 1992 Act"). National Insurance Contributions, payable by earners, employers and others under the 1992 Act, together with taxation, provide funds for the payment of a number of benefits, including the state retirement pension, job-seekers' allowance, incapacity benefit, maternity allowance and survivors' benefits. Contributions also part-fund the National Health Service.

### B. Provision for index-linking within the United Kingdom

38. Section 44(4) of the 1992 Act set the weekly rate of the basic pension at GBP 54.15. In each tax year the Secretary of State is obliged by virtue of section 150 of the Social Security Administration Act 1992 to review the sum specified in section 44(4) of the 1992 Act in order to determine whether it has retained its value "in relation to the general level of prices obtaining in Great Britain" and to lay an up-rating order before Parliament where it appears to him that the general level of prices has risen. The draft order must increase the sum specified in section 44(4) by a percentage which is no less than the increase in general inflation. Provided

that Parliament approves the draft order, then by virtue of section 150(9) of the 1992 Act, the basic State pension is up-rated annually in line with United Kingdom inflation.

### C. Payment of the State pension to expatriates

39. Section 113(1) of the 1992 Act creates a general rule withholding benefits, including pensions, from all expatriates:

> "Except where regulations otherwise provide, a person shall be disqualified for receiving [benefits including the State pension] for any period during which the person –
>
> is absent from Great Britain; ..."

40. However, section 113(3) of the 1992 Act provides that the Secretary of State may adopt secondary legislation allowing for a person resident overseas to receive any benefit to which he or she would be entitled if living in the United Kingdom. Regulation 4(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 (SI 1975 No. 563: "the 1975 Regulations"), made under a similar provision in earlier legislation, provides, so far as material:

> "Subject to the provisions of this regulation and of regulation 5 below, a person shall not be disqualified for receiving ... a retirement pension of any category ... by reason of being absent from Great Britain."

### D. Non-payment of pension up-ratings to expatriates

41. Regulation 5 of the 1975 Regulations, however, provides that a person not ordinarily resident in Great Britain shall, unless or until he or she becomes resident there again, be disqualified from receiving up-rated benefits.

42. The Regulations applicable at the time that Ms Carson started her claim before the United Kingdom courts were the Social Security Benefits Up-rating Regulations 2001, SI 2001/910 ("the 2001 Regulations"). Regulation 3 of the 2001 Regulations provided for the application of the disqualification to the additional benefit payable by virtue of the Social Security Benefits Up-rating (No 2) Order 2000, SI 2001 No. 207 including the up-rating of the retirement pension introduced by article 4 of the 2001 order with effect from 9 April 2001:

> "Regulation 5 of the Social Security Benefit (Persons Abroad) Regulations 1975 (application of disqualification in respect of up-rating of benefit) shall apply to any additional benefit payable by virtue of the Up-rating Order."

The Regulations were publicised in a series of leaflets produced by the Department of Social Security and routinely sent to United Kingdom

residents and former residents who, for example, applied to pay voluntary National Insurance Contributions from abroad.

### E. Reciprocal agreements

43. By section 179(1) of the Social Security Administration Act 1992, the Queen is empowered by Order in Council to make provision for modifying or adapting the relevant legislation in its application to cases affected by an agreement with a country outside the United Kingdom which provides for reciprocity in matters relating to payments for purposes similar or comparable to the purposes of the 1992 Act. The purpose of a reciprocal agreement is to provide a reciprocal basis for wider social security cover to workers and their families moving between States Party than is available under national legislation alone. Reciprocal agreements are not entered into solely to allow for payment of annual up-rating increases to recipients of United Kingdom pensions resident abroad. Cover under reciprocal agreements varies. Each results from negotiations between the United Kingdom and the partner State, taking into account the scope for reciprocity between the two social security schemes.

44. Between 1948 and 1992 the United Kingdom entered into bilateral agreements, or reciprocal social security agreements, with a number of foreign States, principally the United States of America, Japan, Mauritius, Turkey, Bermuda, Jamaica and Israel. With one minor exception, the agreements entered into force after 1979 fulfilled earlier commitments given by the United Kingdom Government. Agreements with Australia, New Zealand and Canada, where the majority of British expatriate pensioners live, came into force in 1953, 1956 and 1959 respectively; however they did not require payment of up-rated pensions. The agreement with Australia was terminated by Australia with effect from 1 March 2001, because of the refusal of the United Kingdom Government to pay up-rated pensions to its pensioners living in Australia. Up-rating has never been applied to those living in South Africa, Australia, Canada and New Zealand.

45. The EC Regulations on social security for migrant workers (Regulation (EEC) No 1408/71, as updated) require up-rating of benefits throughout the European Union.

46. The existence of a bilateral agreement is not necessary for the up-rate to be paid, as the question is regulated purely by domestic legislation. However, it is the case that up-rating is not applied for non-resident pensioners save where a bilateral agreement is in place.

47. In the Third Report (January 1997) of the House of Commons Social Security Committee (Up-rating of State Retirement Pensions Payable to People Resident Abroad; HC Paper 143), the Committee reported that:

> "It is impossible to discern any pattern behind the selection of countries with whom bilateral agreements have been made providing for up-rating."

On 13 November 2000 the Minister of State (Mr Jeff Rooker) in a statement in the House of Commons (356 HC Official Report (6th Series) col 628) concluded as follows:

> "I have already said I am not prepared to defend the logic of the present situation. It is illogical. There is no consistent pattern. It does not matter whether a country is in the Commonwealth or outside it. We have arrangements with some Commonwealth countries and not with others. Indeed, there are differences among Caribbean countries. This is an historical issue and the situation has existed for years. It would cost some £300 million to change the policy for all concerned."

## F. International law provisions

48. The International Labour Organisation's Social Security (Minimum Standards) Convention, 1952, provides in Article 69:

Article 69

> "A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to X of this Convention may be suspended to such extent as may be prescribed –
>
> (a) as long as the person concerned is absent from the territory of the Member; ..."

49. The above provision is echoed in Article 68 of the European Code of Social Security, 1964, which is one of the basic standard-setting instruments of the Council of Europe in the field of social security:

> "A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to X of this Code may be suspended to such extent as may be prescribed:
>
> as long as the person concerned is absent from the territory of the Contracting Party concerned; ..."

## G. Up-rating: international practice

50. Many States impose some restriction on payment of benefits outside their territory. It appears, however, that the United Kingdom is unique in continuing to pay a pension to expatriates while restricting the extent to which expatriates living in certain countries can benefit from index-linking.

51. The applicants have also annexed to their application witness statements from civil servants working for the Australian and Canadian Governments. The former was produced in the context of the domestic proceedings brought by Ms Carson; the latter has been produced in the context of the current application to this Court. The Australian statement is to the effect that: (1) the approach of the United Kingdom Government has a detrimental effect on most of the 220,000 United Kingdom pensioners resident in Australia; (2) the formal view of the Australian Government is

that the approach of the United Kingdom does amount to unlawful discrimination; (3) in 2001 Australia terminated its Social Security Agreement with the United Kingdom because of the United Kingdom Government's refusal to provide up-rating of pensions to its nationals residing in Australia; and (4) Australian pensioners resident in the United Kingdom enjoy the same annual indexation of their pensions as those resident in Australia.

52. The Canadian statement is to the effect that: (1) the United Kingdom Government's approach directly affects virtually all the approximately 151,000 British pensioners resident in Canada; (2) indexation is a universal feature of social security systems and the United Kingdom's policy of arbitrarily restricting its application in respect of certain individuals is clearly discriminatory and contrary to acceptable international practice in the realm of public pensions; and (3) the United Kingdom's failure to index pensions into Canada is the reason why no arrangements on benefits or removal of barriers of exportability are contained in the Canada/United Kingdom Social Security Convention.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

53. The applicants complained that the failure to up-rate their pensions in line with inflation breached Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention, and Articles 8 and 14 taken together.

Article 1 of Protocol No. 1 states:

> "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 reads as follows:

> "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."

## A. The parties' submissions

### *1. The Government*

54. The Government accepted that the applicants' complaint fell within the scope of Article 1 of Protocol No. 1.

55. Although the House of Lords had been prepared to assume that Ms Carson's foreign residence was a ground protected under Article 14 as falling within the phrase "or other status", the Government disagreed. They pointed out that the Court had consistently held that "status" within Article 14 meant "a personal characteristic ... by which persons or groups of persons are distinguishable from each other" (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23). That interpretation had more recently been followed by the Court in *Budak v. Turkey* ((dec.), no. 57345/00, 7 September 2004 ) and *Beale v. the United Kingdom* ((dec.) no. 16743/03, 12 October 2004). Choice of residence was not such a personal characteristic. They submitted that the decision to live outside the United Kingdom was a matter of choice rather than birth, and was not a choice dictated by the individual's conscience or deeply held belief system. It was difficult to see what core Convention value required the protection of choice of personal residence. Moreover, choice of residence in most cases inevitably led to a series of differences in the position of the person concerned, which flowed from differences in national systems, including social security systems. The differences between the positions of Ms Carson and her two chosen comparators did not stem from any personal characteristic by which persons or groups were distinguishable from each other, but instead from the different systems and conditions under which individuals had chosen to live. Alternatively, even if choice of residence could be regarded as a personal characteristic within the concept of "other status", the fact that it was a matter of choice meant that, unlike for example sex or race, it did not require special scrutiny and "very weighty reasons" to justify a difference of treatment.

56. Ms Carson and other pensioners living outside the United Kingdom were not in an analogous situation to those resident in the United Kingdom or, if they were, the difference in treatment was reasonably and objectively justified, as the national courts had found. Social security benefits, including the State pension, were part of an intricate and interlocking system of social welfare and taxation which existed to ensure certain minimum standards of living for those in the United Kingdom. Contributions to the National Insurance Fund could not be equated to contributions to a private pension

scheme, because the money was used, together with money provided from general taxation, to finance a range of different benefits and allowances. Social security and taxation systems in other States were similarly complex and tailored to local conditions, including the cost of living. Differences between countries as regards the rates of inflation, interest and currency exchange further made it difficult to compare the position of residents and non-residents and justified differences in treatment as regards pension up-rating. For example, because of the depreciation of the rand, Ms Carson's pension, paid in sterling, was worth 20% more in April 2002 than April 2001.

57. Lord Hoffmann was correct in observing that the duty of any community to help those of its members who are in need was "generally recognised to be national in character ... it does not extend to inhabitants of foreign countries". That recognition was reflected in national legislation, which provided as a general rule that benefits funded by National Insurance were payable only to those in Great Britain. Moreover, the duty of review imposed on the Secretary of State by section 150 of the 1992 Act (see paragraph 38 above) was "in order to determine whether [the benefits] have retained their value in relation to the general level of prices obtaining in Great Britain". The national character of welfare schemes was also recognised by international law, in treaties such as the ILO Social Security (Minimum Standards) Convention 1952 (Article 69) and the European Code of Social Security 1964 (see paragraphs 48-49 above). The pattern of bi-lateral agreements was the result of history and perceptions in each country as to perceived costs and benefits of such an arrangement. It was Ms Carson's case before the House of Lords that she could have had no complaint under Article 14 if the Government had chosen not to make any pension provision whatsoever for those who chose to live abroad. The Government agreed with Lord Hoffmann that it could not be the law that the United Kingdom was prohibited from treating expatriate pensioners generously unless it treated them in exactly the same way as pensioners at home.

58. Governments regularly had to make difficult decisions about the allocation of resources and the taxation needed to fund such spending; social security policy was inevitably about making distinctions between different groups in order to direct limited resources to achieve whatever result was considered most desirable at a given time. Such decisions were pre-eminently for elected governments in touch with local conditions.

*2. The applicants*

59. The applicants contended that entitlement to a basic State retirement pension was a "possession" within the meaning of Article 1 of Protocol No. 1. Section 113(1)(a) of the 1992 Act (see paragraph 39 above) operated as an interference with or deprivation of that possession, since there was a

general entitlement to up-rating of the pension, from which a person resident abroad in a country without a reciprocal up-rating agreement with the United Kingdom (a "frozen" country) was disqualified. Over time, each applicant's continued residence in a "frozen" country, combined with the effect of inflation, had led to the erosion in value of his or her pension to the point where its essence as a possession was, or would soon be, destroyed. In this way, the purpose for which the applicants paid their pension contributions throughout their working lives, and which the basic pension was intended to achieve, was defeated. The interference lacked justification and amounted to a violation of the applicants' rights under Article 1 of Protocol No. 1.

60. In addition, since the complaint fell within the scope of Article 1 of Protocol No. 1, Article 14 applied. The submitted that the narrow interpretation of the term "status" in the *Kjeldsen* case (cited above) had been superseded by subsequent decisions of the Court and that the circumstances of the inadmissibility decisions relied on by the Government were markedly different from those in the present case. They submitted that they were in any event the victims of a difference of treatment based on personal characteristics. The decision where to live on retirement was central to personal autonomy, and was frequently not a matter of free choice but conditioned by such factors as a desire or need to be close to adult children. In cases such as the present where discrimination on grounds of residence was capable of impacting heavily upon the enjoyment of core human rights such as the right to family life, freedom of movement and basic human dignity, and where there were differential impacts on women (because of their longevity) and the very elderly, the Court was justified in closely scrutinising the Government's actions.

61. The applicants urged the Court to be careful not to undermine the requirement on a Government to provide justification for differential treatment by finding too readily that there was no true comparison between groups. Their rights to a basic State pension were secured differently and less favourably in comparison with at least two other relevant classes of individuals, namely pensioners with identical work and contributions histories resident either in the United Kingdom or in another country where pension up-rating was paid. The domestic courts had been wrong to conclude that the situations of one of the applicants and an individual within each of these two classes were not analogous. In particular, each would have spent precisely the same amount of time working in the United Kingdom; each would have made precisely the same contributions during his or her working life towards receipt of a basic State pension; each would have become entitled to the same amount of State pension at retirement age; each would have an identical interest in maintaining his or her standard of living beyond retirement.

62. The Government bore the burden of showing an objective and reasonable justification for differential treatment. However, in their public statements, the Government had accepted that the list of countries whose residents benefited from up-rating of the basic pension was a matter of historical accident, lacking logic or consistent pattern. Neighbouring countries, such as the United States of America and Canada, or Jamaica and Trinidad and Tobago, were treated differently despite their similar economic conditions and even those countries, such as Canada and Australia, that made up-rating available unilaterally were not offered any relevant reciprocal bilateral agreement. Non-payment of up-rated pensions to British pensioners resident in "frozen" countries could not be justified on the basis of objective differences in their positions compared to pensioners resident in the United Kingdom, because the Government had never conducted any relevant analysis of their respective positions. It could not simply be assumed that since social security systems were essentially national, there must exist in those other countries in which British pensioners resided adequate and proper systems for the provision of social security to them. These points were, in the applicants' view, strongly supported by the evidence set out by Age Concern (see paragraphs 64-67 below), which showed that, in many countries to which they emigrated, British pensioners faced the loss of the welfare, health and social care benefits they would have received had they remained in the United Kingdom without obtaining access to comparable benefits in their host country.

*3. The third party*

63. Age Concern England emphasised that the strength of an older person's family and other social and support networks directly affected his or her ability to cope with increasing frailty. Kinship networks fulfilled a number of vital roles for older people, including the provision of informal care, the prevention of isolation and exclusion, and advocacy to help the elderly exercise their rights and access appropriate services. The Institute of Policy Research had found in a study published in 2006 that nearly one-fifth of older people residing abroad permanently had moved for family or personal reasons.

64. However, financial considerations and their impact on the family played an influential part in an older person's decision to migrate. Focus groups held by Age Concern England with older members of the Chinese community indicated that access to benefits and the up-rated State pension played a significant part in an individual's decision not to return to his or her country of origin in old age. The United Kingdom State pension was not up-rated in five of the ten most popular countries for British nationals' migration, namely China, Australia, Canada, South Africa and New Zealand. It could therefore be assumed that a large proportion of the older population had family residing in countries where the State pension was not

up-rated and the refusal to up-rate might, therefore, limit the ability of a large number of older people to join their families abroad.

65. Age Concern England's research showed that in many countries an older migrant would not have the loss of welfare, health and social care benefits in the United Kingdom recompensed fully by any gain in the host country. Those who did choose to move abroad frequently faced extreme financial hardship as a result of the policy not to up-rate the State pension and Age Concern England was regularly contacted by older migrants in difficulty. For a significant number, the problems became insurmountable and there was no choice but to return to the United Kingdom. The most common reason for people over the age of 50 being repatriated was destitution and a move under these circumstances was likely to be extremely traumatic.

66. The policy of freezing the State pension had a particularly adverse effect on female pensioners. Because many women had taken time out of paid employment to care for children or other family members, as a group they were less likely than men to be eligible for a full State pension or to have built up private pension entitlement. Moreover, women in Britain over the age of 65 had an average life expectancy of 19.7 years whereas men's life expectancy at the same age was 16.9 years.

## B. The Court's assessment

### *1. Admissibility*

67. The Court recalls that Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not guarantee the right to acquire possessions (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 50). It follows that there is no right under Article 1 of Protocol No. 1 to receive a social security benefit or pension payment of any kind or amount, unless national law provides for such an entitlement (see *mutatis mutandis*, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005-II).

68. In the present case, national law does not provide for index-linked up-rating to be paid to United Kingdom pensioners, such as the applicants, who live in countries which have not concluded reciprocal agreements with the United Kingdom (see paragraph 39 above). The fact that the applicants paid contributions to the National Insurance Fund, from which the State retirement pension is partially funded (see paragraph 37 above), does not provide a right under national law, comparable to a contractual right under a private pension scheme, to a State retirement pension of any particular amount (see Lord Hoffmann's comments in the House of Lords: paragraph 35 above).

69. It follows that the applicants' complaint under Article 1 of Protocol No. 1 taken alone is incompatible *ratione materiae.*

70. As for the applicants' complaint regarding discrimination in the denial of pension up-rating, the Court recalls 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. 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 *Stec and Others* (dec.), cited above, § 39; *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008). 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 (*Stec and Others* (dec.), cited above, § 40).

71. While, as stated above, there is no obligation on a State under Article 1 of Protocol No. 1 to create a welfare or pension scheme, the Court has held that if a Contracting State does decide to enact legislation providing for the payment as of right of a welfare benefit or pension - 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 (*Stec and Others* (dec.), cited above, § 54). In cases, such as the present, concerning a complaint under Article 14 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. 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 (*Stec and Others* (dec.), cited above, § 55).

72. In the present case there is a clear difference in treatment between various categories of United Kingdom pensioners depending on their country of residence. The Court considers that the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 raises complex issues of law and fact, the determination of which should depend on an examination of the merits.

It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

*2. The merits*

73. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*, cited above, § 56). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden* cited above, § 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*Stec and Others v. the United Kingdom,* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006).

74. In the High Court and Court of Appeal, the Government conceded that a place of residence constituted a "status" within the meaning of Article 14 of the Convention; in the House of Lords, the Government likewise did not contend that the grounds of residence could not be included within the scope of Article 14 and it was assumed in the judgments of the House that being ordinarily resident in a country outside the United Kingdom was a "personal characteristic" for the purposes of the test in the *Kjeldsen* case (see paragraph 33 above).

75. The Court recalls that the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see *Engel and Others v. The Netherlands,* judgment of 8 June 1976, Series A no. 22, § 72). It further recalls that the words "other status" (and *a fortiori* the French "*toute autre situation*") have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has

examined under Article 14 the legitimacy of alleged discrimination based, *inter alia*, on domicile abroad (*Johnston v. Ireland*, judgment of 18 December 1986, Series A no. 112, §§ 59-61) and registration as a resident (*Darby v. Sweden*, judgment of 23 October 1990, Series A no. 187, §§ 31-34). In addition, the Commission examined complaints about discrepancies in the law applying in different areas of a single Contracting State (*Lindsay and Others v. the United Kingdom*, no. 8364/78, Commission decision of 8 March 1979, Decisions and Reports 15, p. 247; *Gudmundsson v. Iceland*, no. 23285/94, Commission decision of 17 January 1996, unreported). It is true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics (see, for example, *Magee v. the United Kingdom*, judgment of 6 June 2000, no. 28135/95, § 50, ECHR 2000-I). However, as pointed out by Stanley Burnton J., these cases are not comparable to the present case, which involves the different application of the same pensions legislation to persons depending on their residence and presence abroad.

76. The Court considers that, in the circumstances of the present case, ordinary residence, like domicile and nationality, is to be seen as an aspect of personal status and that the place of residence applied as a criterion for the differential treatment of citizens in the grant of State pensions is a ground falling within the scope of Article 14.

77. Discrimination means a failure to treat like cases alike; there is no discrimination when the cases are relevantly different. The applicants contend that they are in a relevantly similar position to United Kingdom pensioners living in the United Kingdom or in countries where up-rating is available, on the grounds, first, that they have spent the same amount of time working in the United Kingdom and have made the same contributions towards the National Insurance Fund and, secondly, that their need for a reasonable standard of living in their old age is the same. Every national judge who examined the applicants' complaints, with the exception of Lord Carswell (see paragraphs 24-36 above), held that the applicants were not in an analogous, or relevantly similar, situation to a pensioner of the same age and contribution record living in the United Kingdom or in a country where up-rating was available.

78. The Court will consider first whether the applicants are in an analogous situation to British pensioners who have chosen to remain in the United Kingdom. It notes in this respect that the Contracting State's social security system, including the system it has chosen to provide for those deemed too old for paid employment, is intended to provide a minimum standard of living for those resident within its territory (and this is all that is required under the International Labour Organisation and Council of Europe Conventions on Social Security: see paragraphs 48-49 above). For this reason, although the Court has held that the words “other status” are wide

enough to include the place of residence, it considers that individuals ordinarily resident within the Contracting State are not in a relevantly analogous situation to those residing outside the territory insofar as concerns the operation of pension or social security systems. As the Commission found in *J.W. and E.W. v. the United Kingdom* (no. 9776/82, Commission decision of 3 October 1983, Decisions and Reports 34, p. 156), examining an application from a British pensioner who was denied an up-rated pension following a move to Australia:

> "it is almost inevitable that where a person in effect changes over from one social security system to another, he may find that his entitlements differ from those of persons in other countries. Depending on the circumstances such differences may or may not favour the individual.
>
> Furthermore the Commission notes that the applicants will only lose the benefit of future increases in their pensions, whose purpose broadly speaking is to compensate for rises in the cost of living in the United Kingdom. Given that they will not be living in the United Kingdom it appears reasonable that this element in their pension rights in particular should be replaced by the possibility of benefitting under the system of the country they are moving to."

Moreover, the Court notes in this connection that it was Ms Carson's case before the House of Lords that she could have had no complaint under Article 14 if the Government had chosen not to make any pension provision whatsoever for those who chose to live abroad.

79. The Court is, further, hesitant to find an analogy between the positions of the applicants, who live in "frozen" countries, and British pensioners resident in countries outside the United Kingdom where up-rating is available. In this connection, the Court notes that National Insurance Contributions are only one part of the United Kingdom's complex system of taxation and that the National Insurance Fund is one of a number of sources of revenue used to pay for the United Kingdom's Social Security and National Health systems. It does not consider the applicants' payment of National Insurance Contributions during their working lives in the United Kingdom to be of any more significance than the fact that they may have paid income tax or other taxes while domiciled there (see *Stec and Others* (dec) [GC], cited above, § 50). Turning to the applicants' second argument (see paragraph 75 above), the Court is of the view that even between States in close geographical proximity, such as the United States of America and Canada, South Africa and Mauritius, or Jamaica and Trinidad and Tobago, differences in social security provision, taxation, rates of inflation, interest and currency exchange make it difficult to compare the respective positions of residents.

80. In any event, even if the applicants could be said to be in an analogous position to the residents of countries where pensions are up-rated under reciprocal agreements, the Court considers that the difference in treatment has objective and reasonable justification. While there is some

force in the applicants' argument, echoed by Age Concern, that an elderly person's decision to move abroad may be driven by a number of factors, including the desire to be close to family members, place of residence is nonetheless a characteristic which can be changed as a matter of choice. The Court therefore agrees with the Government and the national courts that the individual does not require the same high level of protection against differences of treatment based on this ground as is needed in relation to differences based on an inherent characteristic, such as gender or racial or ethnic origin (see, for example, *Van Raalte v. the Netherlands,* judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, § 39; *D.H. and Others*, cited above, § 176, and compare *Magee*, cited above, § 50). It is, moreover, relevant in this connection that the State took steps to inform United Kingdom residents moving abroad about the absence of index-linking for pensions in certain specified countries (see paragraph 42 above). Thus each of the applicants could have taken this factor into account amongst all the other reasons for and against the choice of country of residence.

81. As Lord Hoffmann emphasised, the pattern of reciprocal agreements is the result of history and perceptions in each country as to perceived costs and benefits of such an arrangement. They represent whatever the Contracting State has from time to time been able to negotiate without placing itself at an undue economic disadvantage and apply to provide reciprocity of social security cover across the board, not just in relation to pension up-rating. In the Court's view, the State does not exceed the very wide margin of appreciation which it enjoys in matters of macro-economic policy by entering into such reciprocal arrangements with certain countries but not others.

82. It follows that there has been no violation of Article 14 taken in conjunction with Article 1 of Protocol no. 1 on the facts of the present case.

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

83. The applicants further complained that since some of them had had to choose between surrendering a large part of their pension entitlement or living far away from their families, the absence of up-rating also amounted to a breach of their rights under Article 14 taken in conjunction with Article 8. Article 8 provides:

> "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."

84. The Court considers that the same arguments apply in relation to Article 8 taken in conjunction with Article 14 as apply in relation to Article 1 of Protocol No. 1 taken in conjunction with Article 14. It does not therefore consider it necessary to consider this complaint separately.

## FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 admissible and the complaint under Article 1 of Protocol No. 1 taken alone inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

3. *Holds* unanimously that it is not necessary to consider the complaint under Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 4 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Fatoş Aracı,<br>Deputy Registrar | Lech Garlicki<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Lech Garlicki is annexed to this judgment.

L.G.
F.A.

# DISSENTING OPINION OF JUDGE GARLICKI

To my regret, I cannot subscribe to the Chamber's finding of no violation.

This case is about the exclusion of pensioners living abroad from the index-linked up-rating scheme applicable to all pensioners in the United Kingdom. It is not contested that there is a clear difference between various categories of pensioners depending on their actual country of residence. It is further not contested that, in the circumstances of this case, the fact that residence was applied as a criterion for the differential treatment brings the case within the scope of Article 14.

In my opinion, however, the difference in treatment has no objective and reasonable justification. There is some force in the arguments submitted by the majority which, to a large extent, reproduce the position taken by the majority of the House of Lords. There are, however, at least four arguments that may warrant another conclusion.

First, the State pension scheme is compulsory and is based upon the principle of contributions. Even if there is no automatic connection between the amount of contributions and the amount of the future pension, the very idea is the distribution of obligations: those who work have to contribute to the State pension fund and the State has to pay pensions to those who are no longer of working age. Ms Carson, as well as the other applicants, fulfilled her side of the deal in full: for most of her working life she paid contributions (as well as taxes) and those contributions were gladly accepted by the State. Her contributions were spent (as we should hope) on the pensions of current pensioners and also on the annual indexation of their pensions. There was no difference at all between her and other persons working in the UK at that time. Now she is no longer of working age, it is time for the State to meet its obligations. However, the State treats her differently from other fellow contributors solely because of her new place of residence. The fact that she does not reside in the UK does not incur any additional costs for the State. While it is true that she is no longer a UK taxpayer, there are no prohibitions – under our Convention – on imposing a UK tax on her UK-based income, whatever its amount. But unlike those who have remained in the UK, she has been deprived of the index-linking privilege. Considerations of social justice and equity require that persons who have duly contributed towards the pensions of others should not be treated differently in the subsequent calculation of their own pension. Differential treatment based solely on current residence has no link to the contributory nature of pensions and, therefore, is deprived of a reasonable justification.

Secondly, one of the arguments raised by both the House of Lords and our Court concerns the economic differences between the UK and the actual

countries of residence. It is true that there are different levels of inflation, different paces of growth and different exchange rates in relation to the UK currency. But there is a common feature for all countries involved, and this feature is inflation. Thus, it is difficult to accept that the situation of UK residents is basically different from that of non-UK residents. The legislature has, of course, no obligation to up-rate pensions according to inflation in the host country. It is also entitled to adjust indexation to take into account differences between particular countries, but it cannot simply ignore the very existence of inflation as a common economic characteristic of the modern world. Such a regulation penalises persons who, after having fulfilled their side of the contributory scheme, move abroad. Such penalisation runs counter to the principle of individual freedom and, therefore, cannot be regarded as reasonably justified.

Third, the existing system is not based upon any cogent scheme. As was observed by the domestic authorities (see paragraph 47 of the judgment), it would be difficult "to defend the logic of the present situation ... There is no consistent pattern". In consequence, the situation of British pensioners varies from country to country. This makes the majority's references to the margin-of-appreciation doctrine (see paragraph 81 of the judgment) less convincing. Under this doctrine, the State is allowed to devise its own ways of addressing social and economic problems. Had the UK developed a coherent and logical solution to the issue of index-linking for foreign residents, it would have been easier to accept it. But the doctrine of the margin of appreciation cannot legitimise a situation of an illogical and, therefore, arbitrary nature.

Finally, I have complete respect for the House of Lords' position that the matter is more legislative than judicial in nature. However, such an argument, while convincing at the domestic level, cannot prevail before our Court. A violation that results from legislative omissions is still within the reach of European supervision.

This Court has on several occasions found that nationality-based differentiations in social benefits are inherently suspect. Particularly in *Gaygusuz v. Austria* (16 September 1996, *Reports of Judgments and Decisions* 1996-IV), *Koua Pouirrez v. France* (no. 40892/98, ECHR 2003-X) and *Luczak v. Poland* (no. 77782/01, ECHR 2007-...), differentiation between residents based on nationality (citizenship) was found to be in violation of Article 14. I am not convinced that the differentiation between nationals based on place of residence is so fundamentally different that Ms Carson should enjoy lesser protection than that offered to the applicants in the above-mentioned cases.