CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 8374/03
by Sydney George PEARSON
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 27 April 2004 as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 27 February 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Sydney George Pearson, is a United Kingdom national, who was born in 1942 and lives in Birmingham.

A. The circumstances of the case

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

The applicant is sixty two years of age, born on 16 April 1942. He will not become eligible for a state pension until he is sixty five, whereas a woman may claim a state pension from age sixty. He is currently unemployed but if he returns to work he and any potential employer would be liable to make national insurance contributions.

On 4 February 2002, the applicant issued proceedings for damages in the High Court against the Benefits Agency, alleging *inter alia* that the refusal to pay him a pension from the age of sixty was discriminatory. On 2 October 2002, the applicant's claim was struck out in September 2002 on the basis that the particulars of claim disclosed no reasonable grounds for bringing the claim (Civil Procedure Rule 3.4.2.). On 27 February 2003, permission to appeal was refused.

B. Relevant domestic law and practice

Section 122 of the Social Security Contributions and Benefits Act 1992 defines "pensionable age" as:

> "(a) the age of 65, in the case of a man; and
>
> (b) the age of 60, in the case of a woman"

Section 126 of the Pensions Act 1995 provides for the equalisation of state pension ages for men and women to the age of 65. The state pension age for women will increase gradually from 2010 and the equalisation will be complete in 2020. At the same time, the age until which women are liable to pay national insurance contributions will gradually increase in line with the increase in the state pension age.

Section 51(a) of the Sex Discrimination Act 1975 provides that any act done to comply with legislation passed before the Sex Discrimination Act is not unlawful under that Act. Therefore, the difference in state pension ages does not constitute sex discrimination for the purposes of the legislation.

C. European Union law

Council Directive 79/7/EEC of 19 December 1978 provides for the progressive implementation of the principle of equal treatment for men and women in matters of social security. However, in Article 7(1)(a) the Directive provides for derogation in the matter of "the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits".

In the Case C-9/91 *The Queen v. Secretary of State for Social Security , ex parte Equal Opportunities Commission* [2000] ECR I-3701 ("the EOC case" concerning reference for a preliminary ruling from the High Court), the European Court of Justice found that

- Article 7(1)(a) had to be interpreted as authorising the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination which are necessarily linked to that difference;
- Inequality between men and women with respect to the length of contribution periods required to obtain a pension constitutes such discrimination where, having regard to the financial equilibrium of the national pension system in the context in which it appears, it cannot be dissociated from a difference in pensionable age;
- In view of the advantages allowed to women by national pension systems, in particular as regards statutory pensionable age and length of contribution periods, and the disruption that would necessarily be caused to the equilibrium of those systems if the principle of equality between the sexes were to be applied from one day to the next in respect of those periods, the Community legislature intended to authorise the progressive implementation of that principle by the Member States and that progressive nature could not be ensured if the scope of the derogation authorised by Article 7(1)(a) were to be interpreted restrictively (Summary of judgment).

COMPLAINTS

1. The applicant complains under Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, about the difference in the age at which men and women became eligible for a state pension.

2. The applicant also complains about the removal of the link between the state pension and average earnings. He further complains that he was not deemed to have made qualifying contributions towards his pension during the period when he was in full time education, because he was then over the age of eighteen. He invokes Articles 1, 4, 6, 17, and 13.

THE LAW

1. The applicant complains that his entitlement to a state pension only accrues at age 65, five years later than for a woman. The relevant provisions of the Convention provide:

Article 14 of the Convention:

> "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."

Article 1 of Protocol No. 1:

> "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."

A. Article 35 § 1 of the Convention – exhaustion of domestic remedies

The Government submitted that the applicant could have taken judicial review proceedings arguing that, as a matter of EC law, the derogation in Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 did not justify continued discrimination in state retirement pension ages and was inconsistent with fundamental EC rights derived from the Member States' common constitutional tradition.

They further submitted that the applicant could have applied to the High Court arguing that the refusal to pay him a state pension was inconsistent with his human rights as set out in the Human Rights Act 1998, seeking a declaration of incompatibility under section 4. This would trigger special powers authorising Ministers to change primary legislation by secondary legislation where possible and where any change could only be made by primary legislation, the making of the declaration invariably led to the prioritisation of such remedial legislation. Thus a successful case would produce real, practical remedies. As the applicant had not brought his complaints, even in substance, to the domestic courts which were best placed to deal with such complex disputes, they submitted that he had not complied with the requirement to exhaust domestic remedies under Article 35 § 1 of the Convention.

The applicant considered that he had exhausted the possibilities of domestic justice as he had submitted a claim in the courts which was dismissed without any proper investigation or hearing. He had done what he was able to do taking into account the fact that he was not a lawyer and all the obstacles put in his way.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (*e.g. Akdivar and Others v. Turkey,* no. 21893/93, §§ 65-67, ECHR 1996-IV; *Aksoy v. Turkey*, no. 21987/93, §§ 51-52, ECHR 1996-VI).

Regarding the Government's arguments that the applicant should have taken judicial review proceedings invoking the equality provisions in the EU Directive, the Court notes that Article 7(1)(a) provides a specific derogation in respect of discrimination linked to the existence of different pensionable ages. Furthermore, in the *EOC* case, the European Court of Justice held that the derogation was not to be interpreted restrictively, emphasising the purpose of the provision as being to enable States to make progressive changes to their systems without disturbing their equilibrium. The United Kingdom has acted with due reliance on this position in gradually phasing in equalisation of its present system. The Court is not persuaded in these circumstances that a challenge under the Directive would stand any realistic prospect of success.

Nor is the Court minded to change the view expressed in its previous cases that a declaration of incompatibility issued by the domestic courts to the effect that a particular legislative provision infringed the Convention cannot be regarded as an effective remedy within the meaning of Article 35 § 1. As stated in *Hobbs v. the United Kingdom* (dec.), no. 63684/00, ECHR 2002-...):

> "In particular, a declaration is not binding on the parties to the proceedings in which it is made. Furthermore, by virtue of section 10(2) of the 1998 Act, a declaration of incompatibility provides the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention. The minister concerned can only exercise that power if he considers that there are "compelling reasons" for doing so."

The Government's arguments have not given any basis for departing from this analysis in the present case.

Consequently, the Court considers that the Government have failed to establish that either of the domestic remedies referred to is sufficiently "effective" so as to be capable of providing the applicant with redress for his complaint, and so as to require exhaustion under Article 35 § 1 of the Convention.

The Court therefore rejects the Government's preliminary objection.

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

The Government accepted that Article 1 of Protocol No. 1 applied to the case and that Article 14 was applicable to any discrimination in relation to the availability of the state retirement pension. They submitted that the differential age for men and women had, however, an objective and reasonable justification. They emphasised that the social, historic and economic basis for the provision of the state retirement pension, as well as the decision to equalise the age progressively from 2010-2020 involved complex social and economic judgments in respect of which the Government enjoyed a broad margin of appreciation. It was not a simple case of sex discrimination but involved issues of fair balance under Article 1 of Protocol No. 1 where the Court had stated that it would respect the legislator's assessment in such matters unless it was devoid of reasonable foundation.

The Government submitted that Parliament decided to implement the reform to equalise state pensionable ages from 2020 as the measure had enormous financial implications both for individuals and the State. In particular, sudden change would adversely affect the interests of women who had been expecting to receive a state pension at age 60 and a long transitional period gave time for people to adjust their expectations and arrange their affairs accordingly. Nor would it be economically feasible for the Government to provide all 60-year-old men with pensions pending equalisation in 2020 as it would involve the diversion of substantial resources from other state needs (an estimated cost of GBP 75 billion). After a full public consultation exercise, the Government decided to bring the age up to 65 for all based on the considerations that people lived longer and healthier lives, there would be more pensioners supported by fewer people of working age, public expenditure on pensions was set to double by 2035 and occupational schemes were predominantly equalising at the age of 65 already. They pointed out that the European Union had accepted that member states must be allowed a period of transition to plan and implement the move to equal ages. The United Kingdom's plans were in line with other developed nations and the European Commission had never suggested that its measures were in any way deficient or disproportionate but had impliedly accepted them.

The applicant submitted that the difference in pensionable ages was blatantly discriminatory and disputed that there was any objective or reasonable justification for it. He contended that the financial impact in equalising the state pension at age 60 was not as drastic as the Government claimed, only amounting to some GBP 50 million. Since the United Kingdom had joined the European Communities in 1972 and agreed to numerous directives requiring equality, he saw no justification for the continued long delay in taking any effective steps to end the situation. He noted that the Government might have consulted employers and pressure groups but not individuals such as himself who followed the trend among men of in fact retiring early without waiting for the state pension age. He considered that health would be more likely to be impaired by late retirement, referring to stress, long hours and overwork, together with other strains in the unsatisfactory employment situation in the United Kingdom. The comparison with occupational schemes highlighted the Government's failures as these had achieved equality of age in 1990. He alleged in conclusion that the Government had unjustifiably denied, delayed and obstructed the basic human rights concerned.

Having regard to the applicant's complaints and the parties' submissions, the Court finds that serious questions of fact and law arise, the determination of which should depend on an examination of the merits. The application cannot be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant has also made various complaints, *inter alia*, about the removal of the link between the state pension and average earnings and way in which qualifying contributions towards his pension have been calculated, as well criticising numerous aspects of Government policy in pensions, taxation and employment. He has also complained about the court proceedings in which he attempted to introduce a claim for damages against the Benefits Agency. He has invoked Articles 1, 4, 6, 13 and 17 of the Convention.

The Court notes that there is no right as such to a pension of any particular amount and that matters of calculation largely fall outside the scope of its examination. Insofar as the applicant makes general complaints about Government policy, he has not shown in what way he can claim to be a victim of a breach of any of the rights under the Convention in those regards. As regards the court proceedings, the Court recalls that the applicant's claims were struck out as disclosing no reasonable cause of action, a claim for damages not lying in such circumstances where the Benefits Agency was clearly acting under the authority of the relevant legislation. As the Government have pointed out, in the context of Article 35 § 1 of the Convention, the only feasible method of challenging

the inequality of pensionable age would have been by way of judicial review. In the circumstances therefore there is no indication of any unfairness in the proceedings or any restriction on access to court.

While the applicant also invokes Article 13, the Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 47, § 85; *Willis v. the United Kingdom*, no. 36402/97, ECHR 2002-IV, § 62). No issue accordingly arises in the context of the present case.

In conclusion, the Court finds that the applicant's remaining complaints disclose no appearance of a violation of any of the provisions of the Convention and must be rejected as manifestly ill-founded as a whole pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint concerning the difference in state pensionable age between men and women;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President