

MEDIA SUMMARY

R (on the application of Julie Delve and Karen Glynn) v Secretary of State for Work and Pensions

Re: Women's State Pension Age

NOTE: this summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. It is available at: www.judiciary.uk

Summary: The Claimants are women born in the 1950s who are affected by legislation implemented between 1995 and 2014 which equalised the state pension age ("SPA") between men and women and raised the SPA from 65 to 66, 67 or 68, depending on age. The Claimants sought judicial review of the mechanisms chosen to implement these changes, arguing that they discriminated on grounds of age and/or sex; they also sought judicial review of the government's alleged failure to inform them of the changes. The essence of the Claimants' case was that there had been discrimination because the legislation had been intended to equalise the position of women and men, but it had not had that effect because it had exacerbated pre-existing inequalities suffered by women when compared with men. Further, the Claimants argue that there was inadequate notice given of these changes, which frustrated their legitimate expectations and was procedurally unfair.

The Divisional Court (Lord Justice Irwin and Mrs Justice Whipple) dismissed the claim on all grounds.

Background: by operation of the Old Age and Widows' Pension Act 1940, the pension age for women was lowered to 60 while it remained at 65 for men. This was direct discrimination in favour of women which reflected the circumstances of the day, and created a relative disadvantage for men, thought to be justified by the social conditions then applying.

The basic structure of the modern pension is that employees and employers pay national insurance contributions into the national insurance fund and benefits are paid out on a "pay as you go" basis: that is to say, this year's contributions fund this year's benefits. In this way, at any one time, the working population provides the essential funding for the population in receipt of state pension. Thus, the relative numbers in each of these groups is of prime importance. In December 1991 the government published a Green Paper in which views were sought on options for achieving SPA equalisation. This led to a White Paper in 1993 in which the government stated its commitment to equalisation of the SPA.

The legislation under challenge: Equalisation was to be achieved by the **Pensions Act 1995** which affected all women born on or after 6 April 1950. It implemented a staggered raising of pension age over a 10-year period from 2010 to 2020. The oldest affected cohort, comprising those born between 6 April 1950 and 5 May 1950, would receive their pension at the age of 60 and one month, which was in 15 years' time in 2010; the youngest cohort, comprising those born after 6 April 1955, would get their pension at the age of 65, which would come into first operation in 2020. This was a form of legislative "taper" which gradually introduced the

changes. However, the issue continued to be the subject of political debate and concerns were expressed that the SPA should reflect people's longer life expectancy. The **Pensions Act 2007** postponed the SPA to 66, 67 or 68, for those born on 6 April 1953 and after. The precise postponement depended on age. By the **Pensions Act 2011**, the timetable for change was accelerated and equalisation of SPA at 65 was to be achieved by November 2018; the SPA was then to be phased in more quickly so that it would rise from 65 to 66 between 2018 and 2020, for both men and women. The **Pensions Act 2014** increased the pace at which SPA would become equal, brought forward the increase to 67 for those born after 6 March 1961, and implemented transitional provisions for those born between 6 April 1960 and 5 March 1961.

Age Discrimination: The Claimants first claimed that the legislation (specifically, the transitional provisions in the form of the taper) discriminated against them on grounds of age. They argued that the changes offended the EU law principle of non-discrimination. The Court rejected that argument holding that the legislation under challenge was not within the scope of EU law and thus that the EU principle of non-discrimination had no application. The payment of state pension is not "pay" for the purposes of the Treaty on the Functioning of the EU, nor is it within the ambit of the Equality Directive (2000/78) which excludes from its scope state social protection schemes (paras [35]-[42]). Alternatively, the Claimants argued that the legislation breached the European Convention on Human Rights (Article 1, Protocol 1 read with Article 14). The Court rejected that argument too, on the basis of case law which establishes that a State can introduce a new legislative scheme which effects changes from a given date based on age. There was, therefore, no discrimination based on age; but even if there was, it could be justified on the facts (applying the relevant test, which is that the measure is not "manifestly without reasonable foundation"). This legislation operated in the field of macro-economic policy; the underlying objective of the change was to ensure that the state pension regime remained affordable while striking an appropriate balance between state pension age and the size of the state pension; an important consideration was the need to secure inter-generational fairness between pensioners and younger taxpayers; the fact that people live longer is important alongside other demographic and social changes (paras [43]-[55]).

Sex Discrimination: The Claimants also claimed that the legislation discriminated against them on grounds of sex, both directly and indirectly. They first argued that this offended EU law, again invoking the general principle of non-discrimination. But the Court rejected that argument because the derogation contained in Article 7 of the Social Security Directive (79/7/EEC) applied. That derogation permitted Member States to discriminate on the basis of sex in determining pensionable age for the purposes of granting old-age and retirement pensions (paras [[57]-[66]). The Claimants also argued that the legislation breached Article 1, Protocol 1 read with Article 14 of the Convention, from a gender perspective. The Court rejected those Convention arguments too. There was no direct discrimination on grounds of sex, because this legislation does not treat women less favourably than men in law, rather it equalises a historic asymmetry between men and women and thereby corrects historic direct discrimination against men. Nor was there any indirect discrimination because the criteria for indirect discrimination were not met: these were not measures which applied indiscriminately to all, rather they only applied to women; the removal of discriminatory

mitigation of historic disadvantages did not satisfy the need for a causal link between the measure and the disadvantage affecting women, because the historic disadvantages existed anyway; and in any event, the legislation was, as the Court had already found, justified in the sense of not being manifestly without reasonable foundation (paras [67]-[75]).

Lack of Notice: The Claimants also argued that they had not had sufficient notice of the changes, and that this was contrary to the requirements of public law, breached their legitimate expectation and was procedurally unfair. The Court rejected these arguments. The Claimants had no legitimate expectation that the government would not alter the SPA without prior consultation; in any event it was clear that successive governments had engaged in extensive consultation with a wide spread of interested bodies before the legislation was introduced ([118]). Further, this was primary legislation; Parliament chose not to include specific notification measures within the statutes, which measures could only ever have had effect after the legislation was passed anyway. A failure to give notice could not abrogate the statute. Nor could there be any remedy for such a breach, even if it was established, because the Court could not suspend the operation of primary legislation ([119]). The challenge therefore failed in law ([123]).

Conclusion: The Court was saddened by the stories contained in the Claimants' evidence. But the Court's role was limited. There was no basis for concluding that the policy choices reflected in the legislation were not open to government. In any event they were approved by Parliament. The wider issues raised by the Claimants about whether the choices were right or wrong or good or bad were not for the Court. They were for members of the public and their elected representatives ([125]).