

Human rights update

R v Secretary of State for Social Security, ex p Carson and Reynolds: Tim Ward and Marie Demetriou explore the human rights implications

In this human rights update we focus on the recent decision of the House of Lords in *R v Secretary of State for Social Security, ex p Carson and Reynolds* [2005] UKHL 37; (2005) 149 SJ 675, 03.06.05. As we shall explain, its importance goes far beyond the area of social security with which it deals. It contains important statements of general principle as to the correct approach to the Convention rights.

Background

The claimant in *Carson* emigrated to South Africa about 15 years ago. When she turned 60 in September 2000 she became eligible for a UK retirement pension as she had paid all necessary contributions. She was awarded the same pension that she would have received had she been resident in the UK. However, in April 2001, the basic pension for UK pensioners was increased to reflect the rise in the UK cost of living. It has been increased every year since then, but Ms Carson and the 400,000 or so other pensioners living abroad are not entitled to these annual increases. She argued that Art 14 ECHR allows her to be treated in the same manner as pensioners residing in the UK.

The claimant in *Reynolds* complained that, because she was under the age of 25, she was paid jobseeker's allowance and then income support at the reduced rate of £41.35 per week instead of the full rate of £52.20. She argued that Art 14 ECHR allows her to be treated equally with people over the age of 25.

Application of Art 14

The House of Lords gave consideration to the correct approach to the prohibition on discrimination contained in Art 14 ECHR. It provides:

"The enjoyment of the rights and freedoms set forth in this Conven-

tion 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."

Since the Human Rights Act 1998 (HRA) came into force, the courts have struggled to find clear formulae by which this deceptively complex provision can be enforced. One approach that has been much-followed by the courts is that of the '*Michalak* questions', first formulated by Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20:

"(i) Do the facts fall within the ambit of one of the substantive Convention provisions... (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ('the chosen comparators') on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification?"

In practice, these questions have been far more difficult to apply than might be thought from their elegant formulation. In particular, it can be difficult to distinguish questions (iii) and (iv).

In the Court of Appeal [2003] 3 All ER 577, Laws LJ had suggested a compendious approach to questions, (iii) and (iv): namely, whether the circumstances of the claimant and the chosen comparator are:

"...So similar as to call (in the mind of a rational and fair-minded person) for a positive justification [for the difference in treatment]." (para 63)

Like the *Michalak* questions, this for-

mulation has also been much followed by the courts.

In truth, the approach of our domestic courts to Art 14 has been more analytical than that which can be found in the Strasbourg Court's own case law. That court takes a fact-intensive and pragmatic approach to the application of the Convention rights. In the case of Art 14 in particular, as Lord Walker observed, the Strasbourg jurisprudence makes very little use of comparators. It is now being said at Strasbourg that, generally speaking, the court has come to appreciate the highly analytical approach of our domestic courts to the Convention rights when it comes to consider applications from the UK. In *Carson* and *Reynolds*, however, the House of Lords indicated that a more pragmatic and less rigid approach to Art 14 is to be preferred.

Lord Hoffmann observed that although the *Michalak* questions were "no doubt an accurate taxonomy of the various issues decided by the Strasbourg Court... I am not sure that they are always helpful as a framework for reasoning". Lords Walker and Nicholls made similar observations. Nevertheless, their Lordships did not endorse the approach of Laws LJ either. Lord Hoffmann explained that there were two difficulties with this formulation:

"First, it appears to reduce question (iii) to asking whether there was, so to speak, a *prima facie* case of discrimination (do the facts 'call for' a justification) and to treat question (iv) as dealing whether the call has been answered. But this division of the reasoning into two stages is artificial. People don't think that way. There is a single question: is there enough of a relevant difference between X and Y to justify different treatment? Secondly, the invocation of the 'rational and fair minded

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person' (who is, of course, the judge) suggests that the decision as to whether the differences are sufficient to justify a difference in treatment will always be a matter for the judge. In many cases, however, the decision will be a matter for Parliament."

In relation to the facts of Carson's case, Lord Hoffmann simply observed: "What matters in my opinion is that (1) there is no question in this case of discrimination on a ground such as race or gender which denies Ms Carson the right to equal respect; (2) in applying a scheme of social security, it is rational and internationally acceptable to distinguish between inhabitants of the UK and persons resident abroad; (3) the extent to which the claims, if any, of persons resident abroad should be recognised is a matter for parliamentary decision. None of these reasons fits easily into the *Michalak* formula."

Whilst the courts have undoubtedly struggled at times with the *Michalak* questions, time will tell whether the unstructured approach advocated in *Carson* and *Reynolds* proves any less problematic in practice.

Personal characteristic

In *Carson* and *Reynolds* the House of Lords addressed a further aspect of Art 14 which has given rise to much controversy, and conflicting judgments in the Court of Appeal. As set out above, Art 14 applies to discrimination on grounds "such as sex, race, colour... or other status". It has long been clear that this list is not exhaustive. What has proven more difficult to establish is the kind of quality that might be relied upon as a ground of discrimination under Art 14: must it be something enduring and closely bound to a person's identity, such as race, or may something more peripheral, or defined by external relationships suffice? In the early case of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 (para 56), the Court of Human Rights had said that Art 14 applied only if the discrimination was on the basis of a "personal characteristic". In *Michalak*, the Court of Appeal had been persuaded that the court had come to apply Art 14 in cases where it was hard

to say that the ground of discrimination was in any meaningful sense a personal characteristic. In *Hooper*, the Court of Appeal reached a similar conclusion. Yet the Strasbourg Court has regularly referred to the personal characteristic test in recent cases, such as *Magee v UK* [2001] 31 EHRR 35 (para 50). In *R(S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 (para 48), Lord Steyn had endorsed the personal characteristic test. In *Carson* and *Reynolds*, Lords Hoffmann and Walker reaffirmed the approach taken in *S*. It is now clear that the English courts will apply the personal characteristic test – unless and until the Strasbourg Court explicitly abandons it.

Not all personal characteristics are of equal importance under the Convention, however. Lord Walker further emphasised that, even within Art 14, the nature of the ground of discrimination alleged may affect the degree of justification which is required:

"Where there is an allegation that Art 14 has been infringed by discrimination on one of the most sensitive grounds, severe scrutiny is called for."

Thus, even if "the place where a person lives" might be considered to be a personal characteristic, a difference in treatment on this basis may call for less by way of objective justification than discrimination based upon race or sex.

'Deference'

In another much-quoted passage from the judgment of the Court of Appeal in *Carson* and *Reynolds*, Laws LJ emphasised the cautious approach that should be taken by the court in a case which involved an argument for "an extended uprate for the public finances". He observed:

"In any particular area the decision-making power of this or that branch of government may be greater or smaller, and where the power is possessed by the legislature or executive, the role of the courts to constrain its exercise may correspondingly be smaller or greater. In the field of what may be called macro-economic policy, certainly including the distribution of public funds upon retirement pensions, the decision-making power of the elected arms of government is all but at its greatest, and the constraining

role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest."

This approach finds at least an echo in the judgment of the House of Lords. Lord Hoffmann observed:

"I think that this is very much a case in which Parliament is entitled to decide whether differences justify a difference in treatment."

His Lordship concluded that it was "unfortunate" that the Secretary of State had placed emphasis in argument "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". His Lordship considered this to be an unnecessary distraction from the main argument, concluding:

"Once it is conceded... 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 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."

Similarly, on the facts of *Reynolds*, Lord Hoffmann treated as self-evident the Secretary of State's submission that the difference in treatment between people under 25 and people over 25 was explicable on the ground that most people under 25 have lower expenses. His Lordship stated:

"If one wants to analyse the position pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule. But your Lordships are likely to reach what I consider to be the obvious answer without having to resort to such formal reasoning."

There is no doubt that the defendant to a challenge based upon Art 14 bears the burden of proving justification. But *Carson* and *Reynolds* may well prove to have reduced the weight of that burden in some cases at least.