

15 September 2020

PRESS SUMMARY

The Queen (oao Delve and Glynn) (Appellants) v The Secretary of State for Work and Pensions (Respondent)
[2020] EWCA Civ 1199

On appeal from: [2019] EWHC 2552 (Admin)

JUDGES: Sir Terence Etherton MR, Lord Justice Underhill, Lady Justice Rose.

BACKGROUND TO THE APPEAL

The main issue in this appeal is whether the Pensions Acts enacted between 1995 and 2014 which equalised the state pension age for men and women and then raised the state pension age for both genders gives rise to unlawful discrimination either directly on the basis of age or indirectly on the basis of gender or a combination of age and gender. The appeal also raises the question whether the Respondent was under an obligation to notify the Appellants of the changes to their pension age and whether the Appellants' delay in bringing the challenge rules out the grant of any remedy if they succeed.

The state pension was introduced in 1909 with the same pension age for everyone. In 1940 the age of entitlement for women was reduced from 65 to 60 but retained at 65 for men. The Pensions Act 1995 provided that a woman born before 6 April 1950 would still receive her state pension at age 60 but a woman born after that date would receive her pension on a specified date when she was aged between 60 and 65, depending on her date of birth. The relevant provisions are contained in section 126 of, and Part 1 of Schedule 4 to, that Act. The Pensions Acts 2007, 2011 and 2014 then accelerated the move to age 65 as the state pension age for women and raised the state pension age for some men and women to 66, 67 or 68 depending on their date of birth.

The state pension is funded by national insurance contributions paid into a fund by individuals and employers. Benefits are paid out of that fund on a 'pay as you go' basis, this year's contributions funding this year's benefits. A person's eligibility for state pension depends on the contributions made by him or her between the ages of 16 and their state pension age. Since 1959 the rate of contribution has been linked to earnings.

The First Appellant, Julie Delve, was born on 21 May 1958. Under the Pensions Act 1995 she would have had a state pension age of 65. This was then increased to 66 by the Pensions Act 2011. She was not affected by the 2007 and 2014 Acts. The Second Appellant, Karen Glynn, was born on 23 September 1956. Under the Pensions Act 1995 she would have had a state pension age of 65 and this was increased to 66 by the 2011 Act. She is also unaffected by the 2007 and 2014 Acts.

JUDGMENT

The Court unanimously dismisses the appeal, holding that adopting the same state pension age for men and women does not amount to unlawful discrimination under either EU law or the Human Rights Convention. The Court considers whether there is any legal obligation on the Respondent to notify people of the change to their pension age and holds that in any event the Divisional Court was entitled to conclude on the evidence that the publicity campaign implemented by the DWP had been adequate and reasonable. Finally, the Court holds that the application for judicial review had

been made substantially out of time and the long delay in bringing the proceedings would have precluded the grant of any remedy even if the grounds of challenge had been made out.

REASONS FOR THE JUDGMENT

Age Discrimination Contrary to Article 14 ECHR

The first issue is whether for the purposes of Article 14 ECHR women born before the 1950s, who were still entitled to receive their pension at age 60, comprise a legitimate comparator group which is treated more favourably than women in the Appellants' age cohort. The Court does not regard the case law of the Strasbourg Court as clearly precluding such reliance [29] – [34]. In the earlier cases relied on by the Respondent, the difference between the applicants and the proposed comparator group was simply that the applicants fell on one side of the commencement date of a new legislative regime and the comparator group on the other. Here there is an additional factor in that the comparator group is defined not only by the fact that they fall on the more favourable side of the cut-off date for the application of the Pensions Act 1995 but by their age, which is a protected characteristic for the purposes of anti-discrimination law [35] – [37].

The Court upholds the Divisional Court's conclusion that the legislation equalising and then raising the state pension age was justified. The Divisional Court were right to approach the issue on the basis that this legislation operates in a field of macro-economic policy where the decision-making power of Parliament is very great [41]. The evidence shows that the Government was faced with an urgent need to reform state pensions because of the projected increase in the number of pensioners combined with a decrease in the number of people of working age potentially contributing to the national insurance fund, the increase in life expectancy for both men and women, and the projected increase in state pension costs both in real terms and as a percentage of GDP [42] – [49]. The many consultation documents published by the Government before and after each successive Pensions Act show that the Government had to weigh up many competing policy factors including that removal of the state pension from women aged 60 – 66 could cause hardship for some women as it had for the Appellants [50] – [53]. Other measures had been introduced to mitigate this to some extent [57]. The choice of pension age and the speed with which the changes are introduced are matters for Parliament to decide. The Court cannot say that those decisions were manifestly without reasonable foundation, which is the relevant test.

Indirect sex or sex/age discrimination under EU law

The Court holds that the Appellants cannot rely on the prohibition of discrimination in Article 4 of the EU Social Security Directive. Article 7 of that Directive provides a derogation from the prohibition in respect of the determination of pensionable age. That derogation is not limited to enabling Member States to maintain a differential state pension age in force as the Appellants contend, but also covers measures such as the Pensions Acts aimed at equalising the state pension age [61] – [68].

Indirect sex or sex/age discrimination under Article 14

The Appellants argued that they were indirectly discriminated against compared with men aged between 60 and 65. Like women between those ages, such men do not receive a pension and also suffered an increase in their pension age from 65 to 66. The Appellants say that the lack of a state pension in those years affects women more disadvantageously than it affects men because a higher proportion of women in that age group need the state pension to pay for their basic living costs than men [75] – [77]. The Court holds that there is no sufficient causal link between the disadvantage

suffered by women and their protected characteristics of gender and age. Although many women in the Appellants' age cohort arrive at their 60s in a poorer financial position than men because of the effect of long-standing disadvantages in the workplace, this does not make it indirectly discriminatory to apply the same pension age to men and women [78] – [83].

In any event, the Divisional Court were entitled to hold that the adoption of a common state pension age and the increase in the state pension age for both men and women are justified. The correct test for justification in this context is whether the legislation is manifestly without reasonable justification [84] – [87]. The Pensions Acts are primary legislation which deal with matters of the highest economic and social importance aiming to ensure intergenerational fairness, to make pensions affordable at a time of great pressure on public finances, and to reflect changing demographics, life expectancy and social conditions. The Government was fully aware of the disparity between the financial position of men and women as a result of discrimination against women throughout their working lives [91] – [92]. The measures dealt with controversial matters of huge political weight, falling within the macro-political field and they were not manifestly without reasonable foundation.

Notification

The Court rejects the submission that the common law entitles or requires the Court to impose on the Respondent a duty to notify those affected by changes in primary legislation. Any obligation to notify must be determined by Parliament and specified in the legislation. There was no legitimate expectation on the part of the Appellants either that their pension age would remain at 60 or that they would be notified if it changed [96] – [104]. An extensive publicity campaign had been implemented by the Department over many years [108] – [113]. Although there was evidence that many women, like the Appellants, had not realised that they were affected by the legislation until shortly before they reached 60, the Divisional Court were right to hold that it was impossible to conclude that the notice provided to the Appellants' cohort had been inadequate or unreasonable [119].

Delay

The Civil Procedure Rules provide that a judicial review challenge must be brought promptly and in any event not later than three months after the grounds for making the claim first arise. The court has power to extend time. The Senior Courts Act 1981 provides that where there has been “undue delay” in making an application for judicial review, the court may refuse a remedy if the grant of relief would be detrimental to good administration.

The Court holds that the grounds to make this claim first arose when the Pensions Acts were enacted, not when the Appellants reached age 60 [124] – [126]. The claim was therefore substantially out of time. Since time had been extended when permission to bring the claim was granted and there had been no appeal against that extension, the question of delay was relevant only to the discretion whether to grant relief. The Divisional Court were undoubtedly right to say that, if any of the grounds of discrimination had been upheld, the long delay in bringing these claims would have made it almost impossible to fashion any practical remedy [128].

Ms Delve's and Ms Glynn's appeals are therefore dismissed.

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk