HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Secretary of State for Work and Pensions (Respondent) *ex parte* Carson (Appellant)
Regina *v.* Secretary of State for Work and Pensions (Respondent) *ex parte* Reynolds (FC) (Appellant)

[2005] UKHL 37

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I too would dismiss these appeals.

2. I wish to make only one observation of my own. In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, Brooke LJ set out four questions which a court might find it convenient to consider sequentially when addressing a discrimination claim under article 14 of the European Convention on Human Rights. Subsequent judicial observations have shown that the precise formulation of these questions is not without difficulty. And at first instance in the Carson appeal Stanley Burnton J suggested a fifth question should be added to the list: see *R (Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994, 1009, para 51.

3. For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometime the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with

whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.

LORD HOFFMANN

My Lords,

4. There are two appeals before your Lordships which were argued separately but in which judgments are being delivered together.

Carson v Secretary of State for Work and Pensions

Pensioners living abroad

5. Annette Carson is a writer. About 15 years ago she emigrated to South Africa. When she turned 60 on 1 September 2000 she became entitled to a United Kingdom retirement pension: £67.50 basic pension plus £32.17 SERPS and £3.95 graduated pension. She had paid all the necessary contributions, including voluntary payments made after emigration. So she started with the same pension she would have received if she had been living in the United Kingdom. On 9 April 2001, the basic pension for United Kingdom pensioners was increased to £72.50 to reflect the rise in the United Kingdom cost of living. It has been increased each year since then. But pensioners ordinarily resident abroad are not entitled to these annual increases. Ms Carson has continued to receive a basic pension of £67.50. As the law now stands, it will remain £67.50 for the rest of her life. The same applies to the other elements of her pension.

6. Ms Carson's case is typical of over 400,000 United Kingdom pensioners living abroad in countries which do not have reciprocal treaty arrangements under which cost of living increases are payable. There are such arrangements with the countries of the EEA and a number of others such as the United States ("treaty countries"). But there are no

such treaties with South Africa, Australia, New Zealand and many other states.

7. Ms Carson complains that she is being unfairly treated. She says she has paid the same national insurance contributions as a United Kingdom resident and should receive the same pension. In these proceedings she claims that her treatment is incompatible with the prohibition of discrimination in article 14 of the European Convention on Human Rights. She is supported by associations of expatriate pensioners in South Africa and elsewhere. The case has generated a good deal of passion. Stanley Burnton J [2002] 3 All ER 994, 997, para 6 said that the pensioners had a "strong and understandable sense of grievance".

8. In my opinion the sense of grievance may be understandable but it is not justified. There is nothing unfair or irrational about according different treatment to people who live abroad. The primary function of social security benefits, including state retirement pensions, is to provide a basic standard of living for the inhabitants of the United Kingdom. They do so as part of an interlocking system of taxation and social welfare, including the provision of benefits in kind such as social housing and the National Health Service. The system as a whole is neither adapted nor intended to maintain the standard of living of inhabitants of other countries, even if they have past connections with the United Kingdom. The rules relating to some benefits do, exceptionally, provide limited recognition of the claims of expatriates such as Ms Carson on the ground of their past contributions to United Kingdom public funds. But they are in a different position from United Kingdom residents whose participation in those same benefits is integrated with the system as a whole. They therefore have no claim to be treated in the same way.

9. The general rule, subject to limited exceptions, has always been that social security benefits are payable only to inhabitants of the United Kingdom. A person "absent from Great Britain" is disqualified: section 113(1) of the Social Security Contributions and Benefits Act 1992. But there is a power to make exceptions by regulation. Regulation 4 of the Social Security Benefit (Persons Abroad) Regulations 1975 (SI 1975/563) (deemed to have been made under the 1992 Act) makes such an exception for retirement pensions. But regulation 5 makes an exception to the exception. In the absence of reciprocal treaty arrangements, persons ordinarily resident abroad continue to be

disqualified from receiving the annual increases. Ms Carson must have been well aware of this when she emigrated to South Africa.

The scope of article 14

10. Article 14, upon which Ms Carson relies, does not prohibit all discrimination but only in certain respects and on certain grounds:

> "The enjoyment of the rights and freedoms set forth in this 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."

The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed. Perhaps the broadest is contained in the 14th Amendment to the constitution of the United States: "No state shall…deny to any person within its jurisdiction the equal protection of the laws." The scope of article 14 is narrower in two ways. First, it has a restricted list of the *matters in respect of which* discrimination is forbidden. They are "the enjoyment of the rights and freedoms set forth in [the] Convention". Secondly, it has a restricted list of the *grounds upon which* discrimination is forbidden. They are "any ground such as [the enumerated grounds] or other status".

11. Does the discrimination of which Ms Carson complains fall within these limits? She says that her right to a pension is a "possession" within the meaning of article 1P of Protocol 1 ("1P1") which protects the right to peaceful enjoyment of possessions. The state is therefore not entitled to discriminate in according her that right. I must confess that my first instinct would not be to regard a social security benefit like a state pension as a possession until it had actually fallen due. But the European Court has developed a somewhat artificial jurisprudence on this question. It has clearly felt frustrated by the need to find a Convention pigeon hole into which to fit every objectionable form of discrimination. Social security benefits are a good example. In principle it does not seem at all unreasonable that in distributing public

money in the form of social security benefits, the state should be obliged to treat like cases alike, although, as we shall see, there may be differences of opinion over what makes cases relevantly different. But the virtual absence of economic rights in the Convention has made it difficult to relate this principle to the enjoyment of any specified right.

12. The preferred choice of the Strasbourg court in locating a Convention right in cases of economic discrimination by the state has been 1P1. In *Müller v Austria* (1975) 3 DR 25 the Commission said that a claim to contributory benefits was a "possession" by analogy with the proprietary right of a contributor to a private pension fund. This case has since been regularly followed: see, for example, *Gaygusuz v Austria* (1997) 23 EHRR 364, 376, para 47. But the analogy is weak because (at any rate in the United Kingdom) contributions are hardly distinguishable from general taxation, the "fund" exists purely as a matter of public accounting and no one is entitled to anything beyond that which the legislation may from time to time prescribe. The Strasbourg court has been obliged to accommodate this state of affairs by saying that although a claim to a social security benefit is a possession (thereby attracting article 14) it does not entitle one to anything in particular: see, for example, *Jankovic v Croatia* (2000) 30 EHRR CD183. Recently a section of the court appears, paradoxically, to have regarded the weakness of the analogy between many state contributory schemes and a private pension scheme as a reason enlarging rather than restricting the scope of 1P1, treating it as applicable to all social security benefits whether contributory or non-contributory: see *Koua Poirrez v France* (2005) 40 EHRR 34, 45, para 37. Your Lordships were told that this question would shortly come before the Grand Chamber in *Hepple v United Kingdom* (App Nos 65731/01 and 65900/01) but, as this case is concerned with contributory benefits, it is unnecessary to say anything more about it. I am content to assume that Ms Carson's pension rights were a possession.

13. Likewise, I am willing to assume that the reason for the alleged discrimination, Ms Carson's foreign residence, was a Convention ground. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733, para 56 the court said that article 14 applied only if the discrimination was on the basis of a "personal characteristic". That is the construction which has recently been adopted by the House of Lords: *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, 2213, para 48 (Lord Steyn). On the other hand, in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 628, para 34 Brooke LJ said that Strasbourg seemed to have moved on since *Kjeldsen's* case and had applied article 14 in cases in which it was

hard to say that the ground of discrimination was in any meaningful sense a personal characteristic. As the House of Lords has recently adopted the *Kjeldsen* test, I need not discuss the later Strasbourg jurisprudence. I am content to assume that being ordinarily resident in South Africa is a personal characteristic.

What is discrimination?

14. There is no doubt that Ms Carson is being treated differently from a pensioner who has the same contribution record but lives in the United Kingdom or a treaty country. But that is not enough to amount to discrimination. Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different. Indeed, it may be a breach of article 14 not to recognise the difference: see *Thlimmenos v Greece* (2001) 31 EHRR 411. There is discrimination only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg court sometimes expresses this by saying that the two cases must be in an "analogous situation": see *Van der Mussele v Belgium* (1983) 6 EHRR 163, 179-180, para 46.

15. Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the 14th Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification: *Massachusetts Board of Retirement v Murgia* (1976) 438 US 285.

16. There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, eg that it is rational to prefer to employ men rather than women because more women than men give up employment to look after childen. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand,

differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.

17. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on these matters. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy. In the present case, the answer seems to me to be clear.

Social security: an interlocking system

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.

The Michalak questions

28. It may have been observed that I have arrived at these conclusions without reference to the well-known questions 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 or more 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."

29. Brooke LJ took these questions from the analysis of the European jurisprudence in *Grosz, Beatson and Duffy's Human Rights: The 1998 Act and the European Convention*, (2000) para C14-08. They are no doubt an accurate taxonomy of the various issues decided by the Strasbourg court. But I am not sure that they are always helpful as a framework for reasoning. Question (i) reflects the fact that article 14 is confined to discrimination as to a list of particular matters and, as Stanley Burnton J said in this case [2002] 3 All ER 994, 1010, para 52 it would be logical to add the question of whether the discrimination was on one of the specified grounds. Unless the claim satisfies these requirements, article 14 is not engaged at all. Question (ii) identifies the nature of the claimant's case. It identifies the real or hypothetical

person in comparison with whom he complains he is being treated differently.

30. The real difficulty about the questions is the apparent overlap between questions (iii) and (iv). If an "analogous situation" in question (iii) means that the two cases are not relevantly different (no two cases will ever be exactly the same) then a relevant difference may be the justification for the difference in treatment. In what kind of case does one go on to question (iv) and ask separately about justification? Laws LJ [2003] 3 All ER 577, 604, para 61 suggested that it might clarify matters to substitute for question (iii) a "compendious question":

> "Are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X".

31. But in my opinion there are two difficulties about this formulation. First, it appears to reduce question (iii) to asking whether there is, so to speak, a prima facie case of discrimination (do the facts "call for" a justification) and to treat question (iv) as dealing with 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 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 or the discretion of the official entrusted with statutory powers.

32. It might be more logical to confine question (iv) to justification for different treatment of cases which were *not* relevantly different, eg to achieve some legitimate teleological or administrative purpose, such as correcting the effect of past discrimination or the administrative convenience of having clear distinctions. That would explain why in such cases the courts insist that the discrimination must be necessary and proportionate for the object to be achieved. But neither the Strasbourg court nor the English courts have approached the matter in this way (in *Michalak* itself, Brooke LJ regarded the fact that near relatives were relevantly different from distant relatives as an answer to

question (iv) rather than question (iii)) and it is certainly not expressed in the formulation of the questions.

33. For these reasons I have found it better not to use the *Michalak* framework. 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.

34. I would therefore dismiss Ms Carson's appeal.

Reynolds v Secretary of State for Work and Pensions

35. I can deal much more shortly with the appeal of Ms Reynolds, partly because I have already covered much of the jurisprudential ground in dealing with the appeal of Ms Carson and partly because there is indeed very little to be said in favour of Ms Reynolds' appeal.

36. Ms Reynolds complains 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 a week instead of the full rate of £52.20. These are the rates prescribed by regulations made under the Jobseekers Allowance Regulations 1996 (SI 1996/207) and the Income Support (General) Regulations 1987 (SI 1987/1967) respectively. She argues that article 14 entitles her to be treated equally with people over the age of 25.

37. The Secretary of State says that the situation of people under 25 is relevantly different. First, many more of them live with parents or in shared accommodation and therefore have lower expenses. Secondly, people under 25 who are in work tend to be paid less than older workers. A reduced rate of payment would represent the same proportion of what they could expect to earn.

38. The evidence adduced on behalf of Ms Reynolds did not contradict the view of the Secretary of State on either of these points, although Mr Gill QC, who appeared for Ms Reynolds, denied the relevance of the second point. He said that jobseeker's allowance and income support were based on need, not on a relationship with presumptively lost earnings. As for the first point, he said it would be fairer if the regulations distinguished between householders and non-householders. If one was a householder under 25, as Ms Reynolds was, one had the expenses of a householder and it was nothing to the point that many other young people could live more economically with parents or friends.

39. The Secretary of State replied that the regulations had originally distinguished between householders and others but that the distinction had been abandoned, and an age qualification substituted, because it had proved very difficult to operate. It contemplated a standard nuclear family in which the father was the householder and the wife and children were not. But modern households tended increasingly to vary from this pattern and in the case of accommodation shared between friends, there was no reason why one occupant should be designated the householder rather than another. In any case, as a matter of policy, the government wanted to discourage people under 25 from occupying accommodation on their own. It was wasteful of scarce housing resources.

40. I pass over the question of whether income support (a non-contributory benefit) falls within 1P1. In my opinion, once it is accepted that the necessary expenses of young people, as a class, are lower than those of older people, they can properly be treated differently for the purpose of social security payments. No doubt there are different ways of giving effect to the distinction, but that is a matter for Parliament to choose.

41. Mr Gill emphasised that the 25th birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question 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. I would dismiss Ms Reynolds' appeal.

LORD RODGER OF EARLSFERRY

My Lords,

42. I have had the privilege of considering in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons which they give, I too would dismiss the appeals.

43. I respectfully agree with the way in which your Lordships have formulated the issues which may arise in discrimination cases. It would therefore serve no useful purpose - and might risk causing confusion - if I were to attempt a further formulation of my own. As the speeches show, a court faced with a case of alleged discrimination should not go mechanically through a series of questions. Rather, it should look at the facts of the case as a whole and identify the particular issue or issues which will have to be resolved in order to decide whether there has been discrimination contrary to article 14.

44. Often, the critical question will be whether the person complaining of discrimination is really in an analogous situation to that of the person who is treated more favourably. So, in Mrs Carson's case the key question is whether, for the purposes of article 14, she, as a pensioner living in South Africa, is in an analogous position to that of a pensioner living in the United Kingdom or in a country where a bilateral agreement applies. For the reasons given by Lord Hoffmann and Lord Walker I am satisfied that she is not. So the fact that she gets less by way of pension does not constitute unlawful discrimination contrary to article 14.

45. Ms Reynolds complains of discrimination in terms of article 14 because, for some of the time when she was under 25 years of age, she received less by way of jobseeker's allowance and income support than people of 25 and over. In other words, she was discriminated against on the ground of her age. There is no doubt that the relevant Regulations, endorsed by Parliament, deliberately gave less to those under 25. But

this was not because the policymakers were treating people under 25 years of age as less valuable members of society. Rather, having regard to a number of factors, they judged that the situation of those under 25, as a class, was different from that of people of 25 and over, as a class. For example, in broad terms, those under 25 could be expected to earn less and to have lower living costs. Moreover, paying them a smaller amount of benefit would encourage them to live with others, rather than independently – something that was regarded as desirable in terms of general social policy. The scheme also had certain administrative advantages. In my view, having regard to these and other factors, it was open to ministers and Parliament, in the exercise of a broad political judgment, to differentiate between the two groups and to set different levels of benefit for them. Drawing the bright demarcation line at 25 was simply one part of that exercise. It follows that the difference in treatment of which Ms Reynolds complains easily withstands scrutiny and there is no unlawful discrimination in terms of article 14.

LORD WALKER OF GESTINGTHORPE

My Lords,

46. The appellants in these two appeals complain of unlawful discrimination in their entitlement to social security benefits.

47. I shall in due course summarise the facts of the two cases and the statutory provisions relevant to them. At this stage it is sufficient to note that the appellant in the first appeal, Mrs Annette Carson, spent most of her working life in the United Kingdom, making contributions to her prospective retirement pension, but by the time when she attained the age of 60 and began to draw her pension she had settled in South Africa. She has since 2000 received a weekly pension of £103.62 but because she is not resident in the United Kingdom she has not (in 2001 or any later year) received any increase in any part of her benefits. If she remains resident in South Africa the gap between her entitlement and that of a pensioner with a similar contributions record living in the United Kingdom (or in an overseas territory which has a reciprocal social security agreement with the United Kingdom) seems bound to increase year by year.

48. As to the appellant in the second appeal, Ms Joanne Reynolds, it is sufficient to state, at this stage, that she complains about the amounts of two benefits to which she was successively entitled during a period of about eight months from the autumn of 2000 to the summer of 2001: jobseekers' allowance which she received between 24 October 2000 (when she lost her job, just before her 24th birthday) and 12 January 2001 (when she was classified as incapable of working because of health problems); and income support which she received from 12 January 2001 until 9 June 2001 (when she gave birth to a son). Under the social security legislation she was (until she became a mother) entitled to both benefits at a lower level than would have been payable to a comparable claimant aged 25 or more. Ms Reynolds attained that age on 9 November 2001.

Why discrimination is unlawful

49. In the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law. Discrimination on the ground of sex or race demeans the victim by using a sexual or racial stereotype as a sufficient ground for unfavourable treatment, rather than treating her as an individual to be judged on her own merits. Baroness Hale of Richmond explained this point very clearly in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 604, para 130:

> "My Lords, it is not so very long ago in this country that people might be refused access to a so-called 'public' bar because of their sex or the colour of their skin; that a woman might automatically be paid three quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a 'no blacks' notice in her window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made: to whether he or she would be a fit and proper person to have a drink with others in a bar, to how well she might do the job, to how good a tenant or lodger he might be. It was wrong because it depended on stereotypical assumptions about what a woman or a black person might be like, assumptions which had nothing to do with the qualities of the individual involved: even if there were any reason to believe that more women than men made bad customers this was no justification for

> discriminating against all women. It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about."

50. Discrimination must always be on some ground. Completely blind, motiveless malevolence may be anti-social and abhorrent but it cannot amount to discrimination, because it is indeed indiscriminate. Two types of discrimination which are universally recognised in human rights instruments are discrimination on the grounds of sex or race, and statutory prohibitions on these types of discrimination were introduced in the United Kingdom by the Sex Discrimination Act 1975 (preceded in employment law by the Equal Pay Act 1970) and the Race Relations Act 1976.

51. Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in the following terms:

> "The enjoyment of the rights and freedoms set forth in this 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."

It is common ground that this prohibition (unlike the 12th Protocol, as yet unsigned by the United Kingdom) is not a free-standing prohibition of all discrimination. It prohibits discrimination in the enjoyment of Convention rights. The scope of this qualification is a controversial topic to which Laws LJ devoted some space in his judgment in the Court of Appeal [2003] 3 All ER 577, 592-595, paras 32-41, but it is not really an issue in these appeals as they come before this House.

52. It will be apparent that the grounds of discrimination prohibited by article 14 extend a good way beyond sex and race. Its enumeration of grounds does not in terms include residence (the ground of complaint in Mrs Carson's case) or age (the ground of complaint in Ms Reynolds' case). The residual group, "or other status" (in the French text, *toute autre situation*), is far from precise. The respondent Secretary of State does not contend that the grounds of residence and age cannot be included within the scope of article 14. But it is clear from the jurisprudence of the Strasbourg Court that the possible grounds of

discrimination under article 14 are not wholly unlimited; nor are all possible grounds of equal efficacy in establishing unlawful discrimination. These points call for some explanation, since they are relevant to these appeals.

53. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, an early Strasbourg decision concerned with compulsory sex education in state primary schools, the court (at pp 732-733, para 56) interpreted "status" in article 14 as "a personal characteristic . . .by which persons or groups of persons are distinguishable from each other." The fact that a number of parents objected to their children receiving sex education at school was not accepted as equivalent to a religious belief so as to make the complainants a group for the purposes of a claim under article 14 taken together with article 2 of the First Protocol.

54. It was suggested in argument that the *Kjeldsen* test of looking for a personal characteristic is no longer part of the Strasbourg jurisprudence. But it has recently been followed by the Fourth Section of the European Court of Human Rights in two admissibility decisions, *Budak v Turkey* (unreported), 7 September 2004 (App No 57345/00) and *Beale v United Kingdom* (unreported), 12 October 2004 (App No 6743/03). In *Budak* the only relevant difference was in the criminal procedure adopted for two different types of offence. In *Beale* it was the different investigatory procedures appropriate for the police (on the one hand) and trading standards officers (on the other hand). In neither case was there any personal characteristic of the claimant which could be a ground for discrimination contrary to article 14. Moreover this House has recently applied *Kjeldsen* in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, 2213, para 48 (Lord Steyn).

"Suspect" grounds of discrimination

55. The proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the Strasbourg Court. It appears much more clearly in the jurisprudence of the United States Supreme Court, which in applying the equal protection clause of the 14th Amendment has developed a doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change (apart from the wholly exceptional case of transsexual gender

reassignment) and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim.

56. The United States Supreme Court described the concept of a "suspect class" in *San Antonio School District v Rodriguez* (1973) 411 US 1, 29 as a class:

> "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Under the law of Massachusetts uniformed state police officers had to retire at the age of 50. This was challenged in *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307. The Supreme Court held that in the circumstances of the case the appropriate test for equal protection of the laws was not strict scrutiny. The only issue was whether the mandatory retirement age had a rational basis, which it did: maintenance of a police force fit enough to carry out arduous and demanding duties. The majority opinion observed (at p 314):

> "This inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines which create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."

57. As I have said, these distinctions are not so clearly signalled in the jurisprudence of the European Court of Human Rights. But Mr Howell QC (for the respondent Secretary of State) submitted, in my opinion correctly, that the equivalent doctrine is to be found there. Where there is an allegation that article 14 has been infringed by discrimination on one of the most sensitive grounds, severe scrutiny is called for. As my noble and learned friend, Lord Nicholls of Birkenhead put it in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 568, para 19:

> ". . .where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."

58. In its judgments the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive grounds. This appears, for instance (in relation to cases of discrimination on the ground of sex) in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, 501, para 78; *Schmidt v Germany* (1994) 18 EHRR 513, 527, para 24; *Van Raalte v Netherlands* (1997) 24 EHRR 503, 518-519, para 39. When Harris, O'Boyle and Warbrick's valuable work, *Law of the European Convention on Human Rights*, was published in 1995, the authors recognised that the Strasbourg Court had its own suspect categories, identifying them as discrimination on the grounds of race, gender or illegitimacy. Since then religion, nationality and sexual orientation have, it seems, been added: see *Jacobs and White, European Law of Human Rights*, 3rd ed (2002), pp 355-6, citing *Hoffmann v Austria* (1994) 17 EHRR 293, 316, para 36; *Gaygusuz v Austria* (1997) 23 EHRR 364, 381, para 42 and *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 1055, 1071, para 36. Where an individual lives is in principle a matter of choice. So although it can be regarded as a personal characteristic it is not immutable. Nor is there anything intrinsically demeaning about an individual's place of residence. Social or business practices which amount to what is sometimes called a "postcode lottery" might, if devoid of any rational basis, constitute discrimination. But that is not this case.

59. Mr Blake QC (for Mrs Carson) submitted that the category of suspect grounds is not yet closed, and that discrimination on the ground of residence is at least half-way to admission to the suspect category. Mr Manjit Gill QC (for Ms Reynolds) made a similar submission in relation to age. Attractively though counsel made these submissions, I would not accept them.

60. Age is a personal characteristic, but it is different in kind from other personal characteristics. Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years. As the High Court of Australia said (in a different context) in *Stingel v The Queen* (1990) 171 CLR 312, 330:

> "the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness."

There is nothing intrinsically demeaning about age. It may be disheartening for a man to be told that he cannot continue in his chosen job after 50, and it is certainly demeaning for a woman air hostess to be told that she cannot continue as cabin crew after the age of 40 (see *Defrenne v Société Anonyme Belge de Navigation Aérienne* (Case 43/75) [1976] ECR 455). But Mlle Defrenne was discriminated against on the ground of sex, not age. In relation to normal retirement ages lines have to be drawn somewhere, as *Murgia* explains.

The Michalak Catechism

61. In a well-known passage in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, Brooke LJ suggested a series of questions to be asked when article 14 is in issue:

> "It appears to me that it will usually be convenient for a court, when invited to consider an article 14 issue, to approach its task in a structured way. For this purpose I adopt the structure suggested by Stephen Grosz, Jack Beatson QC and the late Peter Duffy QC in their book *Human Rights: The 1998 Act and the European Convention* (2000). If a court follows this model it should ask itself the four questions I set out below. If the answer to any of the four questions is 'No', then the claim is likely to fail, and it is in general unnecessary to proceed to the next question. These questions are as follows. (i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see section I (1) of the Human Rights Act 1998)? (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 other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim

> sought to be achieved? The third test addresses the question whether the chosen comparators were in a sufficiently analogous situation to the complainant's situation for the different treatment to be relevant to the question whether the complainant's enjoyment of his Convention right has been free from article 14 discrimination."

62. This passage has attracted a good deal of comment. In his first-instance judgment in Mrs Carson's case, Stanley Burnton J pointed out [2002] 3 All ER 994, 1009, para 51 that there is a fifth question to be asked, that is whether the different treatment of the complainant was on a prohibited ground. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 605, para 134, Baroness Hale of Richmond described the questions as a useful tool of analysis, but as having a considerable overlap between them. The overlap was also noted by Mance LJ in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, 1883, para 56. In *Michalak* itself, Brooke LJ acknowledged [2003] 1 WLR 617, 625, para 22 that there may sometimes:

> ". . . be a need for caution about treating the four questions as a series of hurdles, to be surmounted in turn."

63. One of the most powerful criticisms of a rigid, step by step approach based on comparators is, if I may respectfully say so, in the speech of my noble and learned friend Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. That was a case under the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) and this House had to grapple with the statutory definition of discrimination. Lord Nicholls demonstrated that a step by step approach was liable to obscure the real issue in the case, which was *why* the complainant had been treated as she had been treated. Until that question was answered, it was impossible to focus properly on the question of comparators. Lord Nicholls observed (p 341, para 8) that:

> " … sequential analysis may give rise to needless problems."

He also observed (p 342, para 11) that:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

Lord Rodger of Earlsferry (p 377, para 125) agreed with Lord Nicholls on these points. So do I, and I think that Lord Nicholls' observations are even more apposite to the more open-textured language of article 14.

64. My Lords, I think the time has come to say that in cases on article 14, the *Michalak* catechism, even in a corrected form, is not always the best approach. When the United Kingdom first enacted legislation against discrimination on grounds of sex or race, over 20 years before the Human Rights Act 1998, it was natural that Parliament felt bound to provide detailed definitions of discrimination suitable for statutes of a penal character. The definitions in the Sex Discrimination Act 1975 and the Race Relations Act 1976 are far removed from the broad sweep of language appropriate to a human rights instrument. Inevitably they gave rise to much learning on the subject of "comparators."

65. The Strasbourg jurisprudence, by contrast, has made little direct use of comparators. The approach of the European Court of Human Rights has been described as follows by Professor David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p 144:

> "The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. That is why, as

> van Dijk and van Hoof observe, and 'in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test'. However, there are occasions on which the court has rejected applications under article 14 purely on the ground that the applicant has provided no evidence that the people who were treated differently had been in analogous situations, or because the comparators are not genuinely in analogous positions."

66. The footnotes to the last sentence of this passage refer to (among other cases) *Van der Mussele v Belgium* (1983) 6 EHRR 163 and *Johnston v Ireland* (1986) 9 EHRR 203. These cases, although to some extent exceptions to the general approach, are instructive. Under Belgian law every judicial district's Order of Advocates is under an obligation to provide legal assistance to those who need it. Mr Van der Mussele, a pupil advocate, was required to represent a man accused of theft and drug-dealing. He complained of having been required to put in about 18 hours unpaid work on that case, and many more hours for very little remuneration on other cases. He made his complaint under article 4 (forced labour) both on its own and in conjunction with article 14. These complaints were unanimously rejected. The applicant had relied on the fact that in Belgium, doctors, veterinary surgeons, pharmacists and dentists are not required to provide free services to the poor. The court observed, 6 EHRR 163, 179-180, para 46:

> "Article 14 safeguards individuals, placed in analogous situations, from discrimination. Yet between the Bar and the various professions cited by the applicant, including even the judicial and parajudicial professions, there exist fundamental differences to which the Government and the majority of the Commission rightly drew attention, namely differences as to legal status, conditions for entry to the profession, the nature of the function involved, the manner of exercise of those functions, etc. The evidence before the court does not disclose any similarity between the disparate situations in question: each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect."

67. In *Johnston v Ireland* 9 EHRR 203, the first and second applicants were an unmarried couple who could not marry, and so legitimate their daughter, the third applicant, because the Irish

Constitution did not permit divorce. The first and second applicants relied on article 14 in conjunction with article 8, arguing that they had been discriminated against on grounds of their limited financial means, since (had they been better off) they could have obtained a divorce by the expedient of a spell of residence outside the Republic. This rather optimistic complaint was therefore in a sense based on residence (or domicile). It was rejected in short measure, 9 EHRR 203, 221, para 60:

> "Article 14 safeguards persons who are 'placed in analogous situations' against discriminatory differences of treatment in the exercise of the rights and freedoms recognised by the Convention. The court notes that under the general Irish rules of private international law foreign divorces will be recognised in Ireland only if they have been obtained by persons domiciled abroad. It does not find it to have been established that these rules are departed from in practice. In its view, the situations of such persons and of the first and second applicants cannot be regarded as analogous."

68. In these cases (and numerous other cases in which there is even less discussion of the meaning of "analogous situations") the European Court of Human Rights was, without any elaborate analysis or discussion of comparators, reaching an overall conclusion as to whether in the enjoyment of Convention rights there had been unfair and unjustifiable discrimination on the grounds of some personal characteristic. This assessment calls for a process of judicial evaluation which must be sensitive to the factual context. Some analogies are close, others are more distant. As Brooke LJ recognised [2003] 1 WLR 617, 625, para 22, the evaluation process may not be assisted by setting out standard questions "as a series of hurdles, to be surmounted in turn."

69. It is sometimes suggested (and this may have influenced the shape of Mr Howell's submissions on these appeals) that a structural, step by step approach is necessary because of considerations of burden of proof: if the state gets to the last ditch of justification, it must discharge that burden. That is a material consideration in some cases but I venture to think that its importance may have been exaggerated. It seems to have caused little concern at Strasbourg. Although the phrase "burden of proof" is often used, the court (whether here or in Strasbourg) is in these cases concerned mainly with a broad evaluation of competing private and public interests, and rarely has to make a detailed assessment of the credibility and cogency of factual evidence

(see on this point the observations of my noble and learned friend Lord Nicholls of Birkenhead in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 WLR 590, 604, para 47). In the present appeals the parties have placed before the House quite a lot of written material and it has been of considerable assistance, especially in the case of Ms Reynolds, in explaining some of the policy considerations underlying the social security legislation. But I doubt whether your Lordships would, in the absence of any such material, have reached a different conclusion on either appeal.

70. I would not, however, wish to suggest that there are not some circumstances in which justification must be considered as a separate issue. The clearest case, mentioned by my noble and learned friend, Lord Hoffmann in his opinion, is that of "positive discrimination," in which a category of disadvantaged persons is accorded specially favourable treatment (and others are correspondingly worse treated) precisely because of some personal characteristic (such as race or gender) of the preferred group. That personal characteristic obviously cannot be taken into account as a relevant difference negativing "analogous circumstances"; positive discrimination must be justified, if at all, for reasons which focus on (and as it were make a virtue of) what would otherwise be a proscribed ground. That possibility has been recognised in the Strasbourg jurisprudence since the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, para 10, in which the court observed that "certain legal inequalities tend only to correct factual inequalities."

Mrs Carson's appeal

71. I have already outlined the facts of Mrs Carson's case. While she was working in the United Kingdom (at some times in employment and at other times self-employed) she (and her employer, when she had one) made contributions towards statutory retirement benefits. After she moved to South Africa in 1990, when she was 50, she continued to pay voluntary contributions towards her retirement benefits. In 2000 she became entitled to a pension at the rate of £103.62 a week (consisting of a basic pension of £67.50 a week and further earnings-related benefits), but it has remained frozen at that level because of her non-residence. It is easy to understand Mrs Carson's dissatisfaction at this state of affairs. But it is not suggested that she was in any way misled about what her entitlement would be.

72. The freezing of the pensions of Mrs Carson, and the numerous non-resident pensioners in the same position as Mrs Carson (they number nearly half a million people) results from the interaction of some provisions of primary and secondary legislation, that is section 113(1)(a) of the Social Security Contributions and Benefits Act 1992, regulations 4(1) and 5 of the Social Security Benefit (Persons Abroad) Regulations 1975 and regulation 3 of the Social Security Benefits (Up-Rating) Regulations 2001 (which in effect repeat regulation 5 of the 1975 Regulations). The 2001 Regulations were made under and in accordance with section 150 of the Social Security Administration Act 1992, which provides (in sub-section (1)) for up-rating by reference to "the general level of prices obtaining in Great Britain."

73. By section 179 of the Social Security Administration Act 1992, Her Majesty may by Order in Council modify the social security legislation as it applies in cases covered by a bilateral agreement with another state for reciprocity of social security benefits. Some bilateral agreements provide for reciprocal up-rating of benefits. There is no such agreement with South Africa. Mr Howell emphasised in his submissions that the fact that states may enter into bilateral agreements builds on, and could not exist without, the more basic proposition that in international law a state is free, if it thinks fit, to provide social security benefits only for its own residents.

74. It is common ground that entitlement to a pension under a contributory state scheme is included in a person's "possessions" for the purpose of article 1 of the First Protocol (see *Gaygusuz v Austria* (1997) 23 EHRR 364; *Wessels-Bergervoet v Netherlands* (2004) 38 EHRR 793). It is also common ground that Mrs Carson's retirement pension should be classified as contributory for this purpose, although the parties emphasised different aspects of its contributory character. Mr Blake (for Mrs Carson) emphasised Mrs Carson's satisfactory contributions record, including the 10 years of voluntary contributions which she had made from South Africa. Mr Howell emphasised that contributions are not based on any assumption of prospective up-rating; that national insurance contributions go (in part) towards the general costs of the National Health Service; and that the whole social security system has important elements of social solidarity (in other words, a redistributive effect).

75. Mrs Carson does not complain of being *deprived* of any of her possessions as a straight violation of article 1 of the First Protocol. The Commission has often dismissed such claims (see *J W v United*

Kingdom (1983) 34 DR 153 and *Corner v United Kingdom* (unreported), 17 May 1985 (App No 11271/84) following *Müller v Austria* (1975) 3 DR 25). Her complaint is made under article 1 of the First Protocol in conjunction with article 14.

76. At first instance Stanley Burnton J held that Mrs Carson was not in a situation analogous to a person living in the United Kingdom, or in some other country with a bilateral agreement: [2002] 3 All ER 994, 1012, para 65:

> "It seems to me that the comparison between the positions of persons living in different countries, in different social and economic circumstances, and under different tax and social security regimes, is complex, and cannot simply be restricted to a comparison of the sterling amounts of their United Kingdom pensions."

He also held that there was, if needed, objective and reasonable justification: p 1014, para 73:

> "The government has decided that uprated pensions are to be confined to those living in this country or living in certain other countries. It seems to me that a government may lawfully decide to restrict the payment of benefits of any kind to those who are within its territorial jurisdiction, leaving the care and support of those who live elsewhere to the governments of the countries in which they live. Such a restriction may be based wholly or partly on considerations of cost, but having regard to the wide margin of discretion that must be accorded to the government, I do not think it one that a court may say is unreasonable or lacking in objective justification."

77. In the Court of Appeal, Laws LJ (with whom Simon Brown and Rix LJJ agreed) took a rather different line about comparators but reached essentially the same conclusions. As to comparators he said [2003] 3 All ER 577, 604, para 63:

> "In my judgment, the circumstances of Ms Carson and her chosen comparators are not so similar as to call (in the

> mind of a rational and fair-minded person) for a positive justification for the withholding of the pension uprate in the cases where it is withheld. I arrive at this conclusion in [the] light of all the factors discussed by Stanley Burnton J (at [61]-[65]). And if the right question is not the compendious one which I have ventured to suggest, but (more conventionally) whether the comparators put forward by Mr Drabble are in an analogous position to that of Ms Carson, I consider that Stanley Burnton J gave the right answer."

I would add that in my view the "compendious question" which Laws LJ proposed (p 604, para 61) in place of the *Michalak* question (iii) is not without its attractions, but it is open to the objections mentioned by Lord Hoffmann in his opinion.

78. As to justification, Laws LJ quoted from the speech of my noble and learned friend Lord Hoffmann in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240, para 75 and observed [2003] 3 All ER 577, 608, para 73:

> "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. I conceive this approach to be wholly in line with our responsibilities under the Human Rights Act 1998. In general terms I think it reflects a recurrent theme of the Strasbourg jurisprudence, the search for a fair balance between the demands of the general interest of the community and the protection of individual rights: see *Sporrong v Sweden* (1982) 5 EHRR 35."

Laws LJ also cited well-known passages from the judgment of the European Court of Human Rights in *James v United Kingdom* (1986) 8 EHRR 123, 142, para 46, and from the speech of Lord Hope of Craighead in *R v Director of Public Prosecutions, Ex p Kebeline* [2000] 2 AC 326, 381.

79. In your Lordships' House Mr Blake has assailed all these conclusions. He has urged that the issue of comparators ought to be a very short question, a matter of impression, and that it is a sort of threshold test. I would not accept that it should be regarded as a threshold test. I would accept, for reasons already mentioned, that it is sometimes a matter of impression which does not profit from elaborate analysis. But I do not think that that helps the appellant in this case. I share the clearly-expressed views of the courts below that Mrs Carson was not in a situation sufficiently analogous to that of a pensioner resident in the United Kingdom or in a country which has the benefit of a bilateral agreement.

80. Nor can I accept Mr Blake's criticism of the conclusions of the lower courts on the issue of justification. This is an issue of macro-economic policy which is eminently within the province of the legislature and the executive. I would dismiss Mrs Carson's appeal.

Ms Reynolds' appeal

81. I have already summarised most of the facts relevant to Ms Reynolds' appeal. While she was under 25 and before the birth of her son she received jobseeker's allowance and income support at the weekly rate of £41.35, whereas had she attained the age of 25 she would have received £52.20. This was the effect of sections 124 (4), 135 (1) and 137 (1) of the Social Security Contributions and Benefits Act 1992, Regulation 17 (1) of and Schedule 2 to the Income Support (General) Regulations 1987, section 4 of the Jobseekers Act 1995 and Regulation 79 of the Jobseeker's Allowance Regulations 1996. The type of jobseeker's allowance to which Ms Reynolds was entitled (sometimes referred to as "JSA (C)" is contribution-based. Income support is a non-contributory, means-tested benefit.

82. Throughout the period of about eight months to which her claim relates Ms Reynolds was living alone in a one-room council flat in Bilston, West Midlands. She received other benefits, that is housing

benefit and council tax benefit, and (during the last three months of her pregnancy) maternity allowance. Nevertheless Ms Reynolds' case (which the Secretary of State does not accept in all respects) is that she suffered severe hardship, partly because of her high expenditure on gas and electricity for the flat, and partly because she had to spend £10 a week in repaying a loan which she had obtained in order to furnish the flat.

83. The first issue on the appeal was agreed to be whether entitlement to income support (a non-contributory benefit) is included in a person's "possessions" for the purpose of article 1 of the First Protocol (the Secretary of State accepts that JCA (C) falls within the ambit of that article). Ms Reynolds wishes to rely on article 1 of the First Protocol, in conjunction with article 14, in relation to both jobseeker's allowance and income support; alternatively, she wishes in relation to both benefits (but especially in relation to income support) to rely on article 8 of the Convention in conjunction with article 14.

84. Strasbourg jurisprudence on the status of non-contributory social security benefits is at present in the melting-pot. The Grand Chamber has very recently held an oral hearing (but is unlikely to give judgment for some time) in an important case raising that issue, *Hepple and others v United Kingdom.* Your Lordships considered that it was not necessary in order to dispose of this appeal, and that it might prove unproductive, to go into this complex issue while the judgment of the Grand Chamber in *Hepple* is pending. The House has therefore proceeded on the assumption, without deciding, that both Ms Reynolds' benefits should be regarded as within the ambit of article 1 of the First Protocol. Her case under article 8 in conjunction with article 14 does not appear to add anything to her case under article 1 of the First Protocol in conjunction with article 14.

85. At first instance, Wilson J considered this claim in paras 23-34 of his judgment. He cited the same passages from *James v United Kingdom*, 8 EHRR 123, 142, para 46 and *Ex p Kebeline* [2000] 2 AC 261, 381, as were later cited by Laws LJ in the Court of Appeal. Wilson J then observed (para 28):

> "In the light of the above guidance I regard it as unnecessary, indeed inappropriate, for me to address the arguments presented by the [Secretary of State] by way of justification for the demarcation with a degree of detail

into which, drawing upon a statement of an eminent statistician as well as a host of other material, Mr Gill would have me descend. Indeed, as his enthusiastic argument proceeded, I increasingly sensed the incongruity that such a debate was proceeding in court instead of in Parliament. The [Secretary of State] accepts that the appropriateness of the demarcation is a subject on which views may reasonably differ but articulates five considerations of policy which allegedly justify it."

86. The policy considerations on which the Secretary of State relied were summarised as follows in a witness statement by Mr Bruce Taylor, an official in the Department of Work and Pensions:

> "(1) People in the 18-24 age-group in general earn less than those 25 or over, and may legitimately be regarded as having lower earnings expectations.
>
> (2) The majority of those 18-24 do not live independently and may legitimately be regarded as having lower living costs than the group of claimants aged 25 or over.
>
> (3) The payment of lower rates of JSA and IS to those between 18-24 may be expected to have the effect of discouraging them from living independently, and encouraging them to live together with others, notably parents or other family members, which may be seen to have wider social benefits.
>
> (4) Other aspects of the social security system serve to prevent any resultant hardship to the minority of persons in the position which was that of the claimant who are aged between 18-24 and do live independently.
>
> (5) It is important from the point of view of good administration for the social security system to be based upon clear, easily applicable rules, rather than attempting to cater for the individual situation of every claimant."

Mr Taylor then enlarged on these five points, and the judge commented on them in paras 29-33 (inclusive) of his judgment. The judge concluded (para 34) that although the onus of establishing justification was on the Secretary of State, he had placed before the court material

which conclusively demonstrated that the demarcation at age 25 embodied in the Regulations was not "manifestly without reasonable foundation" (language echoing the European Court of Human Rights in *James* in the passage which he and Laws LJ cited).

87. In his submissions on behalf of the Secretary of State, Mr Howell added a significant footnote to the point about the need for clear, easily applicable rules. Before the structural reforms of social security benefits in the late 1980's the social security system did draw a distinction between "householders" and "non-householders", in order to recognise that some persons entitled to income support would have responsibilities for housing costs (such as rent and rates) which did not fall on other claimants. But as the White Paper Reform of Social Security (1985 Cmnd 9691) pointed out (para 2.34),

> ". . . the increase of shared housing arrangements makes the existing rules (with their connotation of a clearly identifiable head of the household) increasingly difficult to administer."

The distinction led to disputes which reached the social security appeal system and, in some cases, the court. There were therefore sound reasons, in the interests of good administration, for providing for housing costs by other, more selective benefits (principally housing benefit and council tax benefit, both of which Ms Reynolds received).

88. In the Court of Appeal Laws LJ considered that in the case of Ms Reynolds a rational and fair-minded person would give an affirmative answer to his "compendious question" as to the need for a positive justification of the less favourable treatment of a claimant under 25. But he added [2003] 3 All ER 577, 608, para 75,

> "However, the depth of the justification required, the reach of the court's scrutiny of what is advanced by way of justification, is quite another matter."

Laws LJ agreed fully with Wilson J's approach. Like the judge he declined to be drawn into any sort of detailed debate on the appropriate demarcation age. Such a debate would be appropriate in Parliament but not in the court.

89. In his final written submissions to your Lordships Mr Gill challenged the approach of the lower courts to this question of intensity of scrutiny. He referred to the passage from the speech of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 568, para 19, which I have already cited. But in that passage Lord Nicholls was referring to the most highly "suspect" grounds of discrimination (Lord Nicholls instanced race, sex and sexual orientation). Mr Gill also referred to *Asmundsson v Iceland*, App. No. 60669/00, 12 October 2004, para 43, in which the European Court of Human Rights (in the course of considering a complaint under article 1 of the First Protocol) made a passing reference to differential treatment of a pensioner suggesting that the impugned measure was unjustified for the purposes of article 14 (though the Court refrained from deciding any separate issue under article 14).

90. *Asmundsson* was a very unusual case. A seaman aged 30 had a serious accident at work, as a result of which he had to stop working as a seaman, with his disability assessed at 100%. This made him eligible for a disability pension from the Seamen's Pension Fund, a statutory contributory social security fund. However, he found work in the office of a transport company, and seems to have risen to a senior position. In 1992, about 14 years after his accident, the pension fund was seriously insolvent and it adopted new rules which applied to existing pensioners as well as future pensioners. Mr Asmundsson's disability was reassessed at 25%, which was below the threshold for any pension entitlement under the new rules. The court held this to be a breach of article 1 of the first Protocol, because (para 44) although the claimant was still classified as 25% incapacitated, he had been deprived of the entirety of his disability pension. I do not think that case is relevant to the determination of this appeal.

91. On the contrary, in my opinion the courts below were entirely correct in their approach to the appropriate intensity of scrutiny. Demarcation lines of this sort have to be reasonably bright lines, and the task of drawing them is (as the United States Supreme Court said in *Murgia*): ". . . peculiarly a legislative task and an unavoidable one." I would dismiss Ms Reynolds' appeal.

LORD CARSWELL

My Lords,

92. I have had the advantage of reading in draft the opinion prepared by my noble and learned friends, Lord Hoffmann and Lord Walker of Gestingthorpe. I agree with much of their reasoning and with their conclusions in respect of Miss Reynolds. I have, however, reached a different conclusion in the appeal of Mrs Carson and I shall therefore set out my views on her case as shortly as I can. The facts relating to her case have been outlined by Lord Hoffmann and Lord Walker of Gestingthorpe and the legislative provisions have been fully set out in the judgment of Laws LJ in the Court of Appeal [2003] 3 All ER 577. It is accordingly unnecessary for me to repeat these and I shall turn immediately to the issues.

93. The essence of the complaint of Mrs Carson and those other pensioners living abroad who are in like case was summarised in paragraph 6 of the judgment of Stanley Burnton J at first instance [2002] 3 All ER 994, 997:

> "Very many of the expatriate United Kingdom pensioners who do not receive uprated pensions have a strong and understandable sense of grievance. They paid their contributions calculated in the same way as pensioners now living here and in, say, the United States, yet they do not receive the same pension. They feel that they have been deprived of an increasingly substantial part of the fruit of their contributions. The real value, at least in the United Kingdom, of their pensions is declining from year to year.

It is clear from Laws LJ's exposition of the legislation that as far as domestic law is concerned that difference of treatment is in accordance with the law and has to be endured by Mrs Carson and other pensioners similarly affected, who can only hope that their appeals to logic and a sense of fair play will eventually prevail, contrary to their experience to date. The issue in this appeal, however, is whether the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as brought into play by the

Human Rights Act 1998, has made it unlawful for the Government to operate legislation which has such an effect.

94. The claim was originally advanced on behalf of Mrs Carson that the failure to pay her an uprated pension constituted a direct breach of article 1 of the First Protocol to the Convention. This claim was rejected by the judge and by the Court of Appeal. Before your Lordships' House her counsel Mr Blake QC, while not abandoning the submission that there had been a breach of article 1 of the First Protocol standing alone, did not present any arguments on it, founding his case on the claim that there was a breach of article 14 of the Convention taken with article 1 of the First Protocol.

95. It was accepted by counsel for the respondent Secretary of State that Mrs Carson's case fell within the ambit of article 1 of the First Protocol for the purpose of triggering the operation of article 14 of the Convention. Nor was any argument presented that her residence abroad could not constitute a "status" within the meaning of the term in article 14. The matters in issue between the parties were (i) whether the difference in treatment of pensioners residing in different countries amounted to discrimination, and (ii) if so, whether it was objectively justifiable.

96. It might be supposed, if one were innocently unacquainted with the arcane subtleties of discrimination law, that the first question answered itself in the appellant's favour without the need for serious argument. Yet those who have such acquaintance will hardly be surprised to be told that there was a substantial dispute on this question and that it was stoutly maintained on behalf of the respondent that Mrs Carson's case could not be sufficiently equated with that of others put forward as comparators, so that she fell at the hurdle of establishing that she had been discriminated against. I do not wish to denigrate the arguments presented, which found favour with the majority of your Lordships, as well as with Stanley Burnton J and the Court of Appeal, but I have to say that they seem to me misdirected. They are founded upon the premise that the appellant's financial circumstances cannot be directly compared with those of pensioners either in the United Kingdom or in other countries, since exchange rates, inflation rates and the cost of living vary between these countries. It was submitted that for that reason her case could not be directly compared with theirs and that accordingly she had not been discriminated against.

97. Many discrimination cases resolve themselves into a dispute, which can often seem more than a little arid, about comparisons and identifying comparators, where a broader approach might more readily yield a serviceable answer which corresponds with one's instincts for justice. The appeals which came before the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 are good examples. Much of the problem stems from focusing too closely on finding comparisons, an approach which may tend to place too much emphasis on finding answers to the four questions posed by Brooke LJ in paragraph 20 of his judgment in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625. The questions have been set out in paragraph 61 of the opinion of Lord Walker of Gestingthorpe in the present appeal and I need not repeat them. These questions can supply an admirable analysis for some cases, but can form a Procustean bed if others are forced into their framework. Question (i) will be a constant in every consideration of article 14, but is not in issue in the present appeal. Question (ii) requires to be answered in some form, for the essence of discrimination is in the different treatment of persons who ought to be treated in the same or a similar fashion. Laws LJ substituted a compendious question in place of Brooke LJ's questions (iii) and (iv), which he described as a possible approach, for he recognised, as Baroness Hale of Richmond pointed out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 605, para 134, as did Mance LJ in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, 1883, para 56, that there is a considerable overlap in the content of the questions. This may again be helpful in some cases, but fail to assist in finding the proper answer in others. There is also the fifth question propounded by the judge in the present case, whether the different treatment of the complainant was on a prohibited ground. That again is not in issue in this case. I accordingly am in agreement with the views expressed by my noble and learned friends Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Walker of Gestingthorpe that a broader and simpler approach to discrimination is required, certainly in cases in which resort is had to the Convention.

98. In my opinion the comparison in this case should be a simple one, between the appellant Mrs Carson and other contributing pensioners who reside in the United Kingdom or in countries where their pensions are uprated by our government. She and other pensioners who reside in countries in which their pensions are not uprated are unquestionably treated differently, to their disadvantage, by reason of their residence in those countries. I consider it fallacious to argue that because the exchange rates may vary and the cost of living in those countries may differ from the United Kingdom, the appellant and pensioners in like condition cannot be compared with pensioners

residing in the United Kingdom or in countries where pensions are uprated. That makes as little sense as arguing that pensioners in the United Kingdom could not be compared with each other because some are better off through possession of other income or because some live frugally and others spend their money in a different way. 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. It is not a matter of comparing the economic state of third countries, as the European Commission on Human Rights stated in *Corner v United Kingdom* (unreported), 17 May 1985, (App No 11271/84) which is set out in paragraph 74 of Laws LJ's judgment [2003] 3 All ER 577, 609. It is a matter of simple justice between groups of people who have paid the same contributions.

99. I regard this appeal as turning on the question whether the difference made between the two classes, uprated and not uprated, is justified, an issue which was discussed in detail in the judgments of Stanley Burnton J and Laws LJ. I of course accept that the courts should be slow to intervene in matters of macro-economic policy which are the province of the executive and legislative branches of government. If the government had put forward sufficient reasons of economic or state policy to justify the difference in treatment, I should have been properly ready to yield to its decision-making power in those fields. It has not done so. On the contrary, it is clearly apparent from the terms of the Department of Social Security memorandum on the uprating of state retirement pensions payable to people resident abroad, furnished by the DSS to the House of Commons Social Security Committee in the session 1996-7, that the reasons for the policy lie wholly in the cost of uprating. It is stated in paragraph 11 of the memorandum:

> "Agreeing to additional expenditure on pensions paid overseas would be incompatible with the government's policy of containing the long term cost of the social security system to ensure that it remains affordable."

In short, pensions were becoming too expensive to pay at the full rate to all those who had contributed, so the government had to find some means of keeping down the cost, and the chosen means of doing so was to deprive one class of uprating. Inclusion of individual pensioners in this class depended on the adventitious matter of whether this country had in the past entered into a reciprocal agreement with the particular states in which they reside. I do not find it possible to regard the selection of this class for less favourable treatment as a matter of high state policy or an exercise in macro-economics. It has the appearance rather of the selection of a convenient target for saving money. This in my view is a very different matter from the clutch of policy reasons for differential rates of payment of jobseeker's allowance in Miss Reynolds' case, which are set out in paragraphs 85 and 86 of the opinion of Lord Walker of Gestingthorpe.

100. Mr Howell QC argued on behalf of the respondent that since the government has no legal obligation to pay any pensions at all to persons resident abroad they cannot complain when they receive some part but not all of the pensions payable to pensioners resident in the United Kingdom. The government has, however, paid to pensioners resident abroad the amount of their pensions, with or without uprating, depending on their place of residence. It was accepted by Mr Howell that the ground for its doing so was the fact that the pensioners had paid pension contributions. Once it is accepted that pensions should be paid to contributing pensioners resident abroad, then no justification remains for paying some less than others and less than UK residents.

101. Mr Howell then argued that if the appellant has any entitlement it is only to the amount of the standard pension payable at the time when she became eligible to receive it. That amount itself contains a number of increases added to the basic pension when the statutory figure was first fixed. I see no logical ground for the submission that the appellant should be entitled to receive those increases but not any subsequent ones. It was also argued that uprating is discretionary and is done to meet the needs of pensioners in the United Kingdom, being fixed by reference to increases in the cost of living in this country. If the uprating were done purely on the basis of need, one might expect that these pensions would be means-tested or that there might be regional variations in the rates of pension payable, to reflect variations in the cost of living throughout the country. This is manifestly not the case, which disproves the thesis that uprating is purely discretionary to meet financial need.

102. Nor do I think that the respondent can derive assistance from the fact that the Social Charter and Code of Social Security adopted by the Council of Europe, the body which produced the Convention, envisage that payment of benefits may be suspended when the recipient is resident abroad. Counsel argued from this that the Council cannot have considered that article 14 was an obstacle to suspension of payment. It is not clear whether it had in mind contributory pensions as distinct from welfare benefits payable on the basis of need. Whatever opinion the Council may have entertained, I do not think that it can determine the decision of the House on the issue before it.

103. I therefore do not consider that the case for justifying the difference in treatment has been made out. The government may have been entitled under domestic law to take this course if it so chose, but for the reasons which I have indicated I consider that article 14 of the Convention operates to prevent such discrimination.

104. I would therefore allow the appeal and declare that regulation 3 of the Social Security Benefits Up-rating Regulations 2001 (SI 2001/910) is unlawful and of no effect as being incompatible with Mrs Carson's Convention rights contained in article 14 of the Convention taken together with article 1 of the First Protocol. I would see considerable merit in making the invalidity prospective only, but since the majority of your Lordships do not agree with my conclusion concerning the unlawful nature of the regulation I do not feel it necessary to discuss the point.