

**IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT****In support of Judicial Review Application****I RESTATEMENT OF FACTS**

The claimants in the action seek judicial review of the mechanisms selected by the UK government to implement an upward equalisation of state pension age for women born in the 50s. Women born in the 50s are members of a particular social group directly and adversely impacted by the mechanisms so selected. Their extreme adverse impact resulted from at least three voluntary policies set out in law implemented by the UK government fundamentally changing the mechanism for calculating the date at which a woman born in the 50s will be able to access her state pension, namely, the mechanism of application of a temporal taper, a State failure in its obligation to inform those who would be adversely and severely impacted by the temporal taper, and a State failure to review these mechanisms for adverse and severe impact on a particular social group of women born in the 50s. The imposition of the mechanisms resulted in women born in the 50s' access to pensions being postponed, in some cases for years, despite the fact that women born in the 50s had a life-long expectation and had been repeatedly told that they would be entitled to their State pension at 60. The effect of the State measures of delay in being able to access State-sponsored pensions has meant a decrease in income for women born in the 50s as well as obligating women born in the 50s to continue to work or to find employment in order to make up any shortfall in pensions. This has led to substantial financial insecurity for the women so affected. By their actions, the State has discriminated against these women because they are women as the measures only seriously adversely affect women born in the 50s, made the economic and health position of women born in the 50s significantly worse and thereby have infringed their human rights and fundamental freedoms as proscribed by CEDAW.

**II SUMMARY OF ARGUMENT**

The United Kingdom ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1986. In 2004 it ratified the Optional Protocol to the Convention. The UK has repeatedly reiterated its commitment to the obligations contained within CEDAW and the General Recommendations issued

by the CEDAW Committee at international and national fora, taking an active part in the Commission on the Status of Women (CSW) each year (with Government Ministers in attendance), negotiating within the EU block and submitting regular reports within the four-year reporting cycles and the accelerated questioning procedure of the UK by the CEDAW Committee (the monitoring mechanism of the CEDAW). Its stated commitment to the international human rights of women is therefore well documented. However, realisation or implementation of the rights contained within these and related documents can be (and has been, see below) described as patchy. The case in question is an example of how the UK is in breach of its obligations under international law relating specifically to women.

UK's international law obligations under CEDAW pertain to women's equality within society, in both the public and private spheres, obligating States to formulate policies, laws and programmes to advance women and promote substantive equality (equality in outcome, not only equality of opportunity) as well as from refraining from actions that will put women in a worse position. It includes alleviating economic disadvantage as a result of persistent structural inequality and remedying past injustices that had and continue to put women in a disadvantageous position vis-à-vis men. In relation to the matters in this case, it is the argument of Back to 60 that the UK has breached several articles of CEDAW alongside several paragraphs of various General Recommendations of the CEDAW Committee as outlined below. [All emphases have been added by authors.]

In general terms, the mechanisms chosen and their consequent negative impact on women born in the 50s breach the UK's international law obligations under CEDAW, namely, constitute discrimination against women and a failure on the part of the State to advance women's position in society as well as a State failure to implement substantive and/or transformative equality, as outlined throughout the Convention, in particular, under Articles 1, 2, 3, 11, 15, 16 CEDAW and General Recommendations (GR) of the CEDAW Committee, namely, GR 21, 25, 27, 28, thereby putting women so affected into a worse position, rather than advancing the position of women causing severe hardship and health issues for women so affected.

### **III CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) - UK'S CEDAW OBLIGATIONS**

**Article 1** CEDAW states

‘For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

It is the argument of this amicus brief that the mechanisms chosen by the UK are a distinction, exclusion and restriction which have the effect of impairing the enjoyment and exercise of women born in the 50s’ human rights and fundamental freedoms in the economic and health sphere because the tapers have the effect of forcing women born in the 50s to wait to access their pensions without being given a reasonable amount of notice. This added period has also had the effect of forcing some women born in the 50s to find employment or continue to be in employment much longer than they had reasonably planned, despite any health issues suffered by the women, and to what they were led to believe by the State. The waiting period in question is significantly longer than any (or most) comparable males born in the 50s who had a life-long expectation to work until the age of 65 (as compared to females 60). The differential treatment has led to women born in the 50s to be in a much worse position than before the taper was enacted.

**Article 2** CEDAW states (in relevant part):

‘States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

CEDAW Committee General Recommendation No. 28<sup>1</sup> (2010) provided States further practical guidance on interpreting Article 2 the Convention by stating that

‘35. Subparagraph (d) establishes an obligation of States parties to abstain from engaging in any act or practice of direct or indirect discrimination against women. States parties must ensure that State institutions, agents, laws and policies do not directly or explicitly discriminate against women. They must also ensure that any laws, policies or actions that have the effect or result of generating discrimination are abolished.’

‘37. In order to satisfy the requirement of “appropriateness”, the means adopted by States parties must address all aspects of their general obligations under the Convention to respect, protect, promote and fulfil women’s right to non-discrimination and to the enjoyment of equality with men. Thus the terms “appropriate means” and “appropriate measures” used in article 2 and other articles of the Convention comprise measures ensuring that a State party:

(a) Abstains from performing, sponsoring or condoning any practice, policy or measure that violates the Convention (respect);

(b) Takes steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations (protect);

(c) Fosters wide knowledge about and support for its obligations under the Convention (promote);

(d) Adopts temporary special measures that achieve sex non-discrimination and gender equality in practice (fulfil).

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<sup>1</sup> CEDAW/C/GC/28.

**Article 3** CEDAW states that

‘States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.’

The State action did not fulfil the obligation of advancement of women in order to guarantee them equal rights, rather, it had the effect of discriminating against women (Article 2(d), GR 28, paras (a), (b), (d)), not ensuring full development and advancement of women (Article 3), not fostering wide knowledge about the obligations in the Convention (non-discrimination, GR 28 para 37(c) because of the voluntary implementation of the use of the mechanisms in issue in this case had the effect of causing a financial penalty to women born in the 50s that has led to health problems, financial dependency and poverty. Indeed, the CEDAW Committee (GR 28) has stated that in order to remedy past injustices and to fully comply with the obligations outlined throughout the Convention, here, *inter alia*, Articles 2 and 3, the State should implement temporary special measures (GR 28 para 37(d)) as a non-discriminatory remedy.

The CEDAW Committee provided further guidance to States in relation to the context of temporary special measures in CEDAW General Recommendations 25<sup>2</sup> and 28, the latter stating,

‘20. The obligation to fulfil encompasses the obligation of States parties to facilitate access to and provide for the full realization of women’s rights. The human rights of women shall be fulfilled by the promotion of de facto or substantive equality through all appropriate means, including through concrete and effective policies and programmes aimed at improving the position of women and achieving such equality, including where appropriate, through the adoption of temporary special measures in accordance with article 4, paragraph 1, and general recommendation No. 25.’

In CEDAW General Recommendation 29<sup>3</sup> the Committee clarified further the purpose and intent of the Convention to lead to substantive transformative equality for women by remedying the negative impact on women of any measures enacted by the State, including policies that had been rooted in gender stereotypical roles (such as women staying at home looking after children and not

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<sup>2</sup> CEDAW/C/GC/25.

<sup>3</sup> CEDAW/C/GC/29.

being able to be employed outside the home as well as not being paid the same wage as men doing the same work):

‘8. The Committee has consistently concluded that the elimination of discrimination against women requires States parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be achieved only when the States parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women’s disadvantage or exclusion. In respect of the economic dimensions of family relations, a substantive equality approach must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women’s economic capacity.’

It is the argument of this amicus brief that the negative impact of the mechanisms employed by the State do not lead to substantive transformative equality for women born in the 50s because provisions at issue in this case are clearly barriers to the full enjoyment of human rights and fundamental freedom, especially in relation to employment.

Further, the UK’s international law obligations as outlined above necessitate it to examine the application and effects of laws and policies and ensure that they provide equality in fact – taking into account women’s disadvantage or exclusion. Such an examination was not undertaken by the State in the present case. It thus constitutes a State failure to fulfil its CEDAW obligations.

By applying the mechanism of a taper, not informing the women adversely impacted and by not reviewing the mechanism once the negative impact on women became apparent, the UK breached Articles 1, 2 and 3 CEDAW in that it enacted a distinction based on sex which had the effect of impairing and nullifying the enjoyment and exercise by a specific group of women of their human rights in the economic field and did not advance their human rights. Indeed, the breaches in question led to added disadvantage economically in retirement (and in preparation of retirement) as well as increased health issues, the exact opposite of the intent and purpose of the Convention.

Further, other articles of CEDAW speak directly to the vulnerable position of older women, in particular, as it is this group of women who are still directly and negatively impacted by older laws and policies (and their temporal impact) which directly discriminated against them as a group (e.g., having to give up employment upon getting married, exclusion from pension schemes, financial

penalties for part-time work). Women born in the 50s are part of this generation of women adversely affected by many of these measures and gender stereotyping.

**Article 11** (in part) states:

‘1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.’

**Article 13** states that

‘States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.’

CEDAW General recommendation No. 21<sup>4</sup>: Equality in marriage and family relations (1994) outlines the minimum requirements and interpretation of several CEDAW articles, including ones applicable in the case.

26. Article 15(1) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.

**Article 15** (in part)

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<sup>4</sup> CEDAW/C/GC/21.

- ‘1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.’

### **Article 16**

1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

As CEDAW General Recommendation 21 points out: ‘The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of their children. ... When a woman cannot attain financial independence and plan for her retirement with adequate timing, she is denied legal autonomy.’

The latter underlined point directly addresses the issues in the present case. The mechanisms chosen by the UK government denied a class of women born in the 50s the opportunity to attain financial independence and adequately plan for their retirement. Any such restriction prevents them from a dignified and enabled life. Such restrictions seriously limit a woman’s ability to provide for herself and her dependants and therefore constitutes a barrier to her advancement and the full enjoyment and exercise of her human rights. It is therefore a breach of CEDAW under Articles 11, 13, 15 and 16.

The CEDAW Committee explained the obligations of full realisation of rights in General Recommendation 28. It directly relates to the discrimination perpetrated by the UK against the particular group of women born in the 50s in the following way:

‘9. Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women’s right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights... The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with article 4, paragraph 1, of the Convention and general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures. This entails obligations of means or conduct and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.’

10. States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women’s rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws. Likewise, States parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular.

16. States parties are under an obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order that they improve their position and implement their right of de jure and de facto or substantive equality with men. States parties shall ensure that there is neither direct nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on

women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.

17. States parties also have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres. This protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies, where appropriate. States parties should ensure that all Government bodies and organs are fully aware of the principles of equality and non-discrimination on the basis of sex and gender and that adequate training and awareness-raising programmes are set up and carried out in this respect.

18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

The CEDAW Committee issued General Recommendation 27 concerning the human rights of older women. It acknowledged that

‘the impact of gender inequality throughout their lifespan is exacerbated in old age and is often based on deep-rooted cultural and social norms. The discrimination that older women experience is often a result of unfair resource allocation, maltreatment, neglect and limited access to basic services.’<sup>5</sup>

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<sup>5</sup> General Recommendation 27, paragraph 11.

The General Recommendations quoted above make clear that the State's obligations are negative and positive ones: refraining from making women's positions any worse than they historically have been, not undermining their economic position within society, and indeed to advance policies, laws and measures that elevate women in society, by means of concerted positive measures designed to positively transform the lives of women, including older women. This includes temporary special measures that provide the means to help women.

The mechanisms chosen by the UK government at issue in this case have the reverse effect: they worsen the position of women born in the 50s, implement policies that negatively impact on the wellbeing of older women and reduce their economic independence and opportunity to exercise their human rights because of the restriction placed on their accessing their own financial savings.

The UK has already been examined on austerity measures and has been urged to mitigate the effects of austerity on women. The UK government therefore has already been given notice that it is not fulfilling its international law obligations vis-à-vis women.

#### **IV CEDAW COMMITTEE AND UK'S AUSTERITY MEASURES**

The CEDAW Committee's 2013 response<sup>6</sup> to the UK report specifically mentions the negative impact austerity measures are having on women. In particular, the Committee stated that [emphasis added],

‘20. The Committee is concerned that the austerity measures introduced by the State party have resulted in serious cuts in funding for organisations providing social services to women, including those providing for women only. The Committee is concerned that these cuts have had a negative impact on women with disabilities and older women. It is also concerned that the State party resorts to commissioning women's services instead of direct funding, which allegedly risks undermining the provision of these services. The Committee is further concerned that budgetary cuts in the public sector, disproportionately affect women, due to their concentration in this sector.

21. The Committee urges the State party to mitigate the impact of austerity measures on women and services provided to women, particularly women with disabilities and older women. It should also ensure that Spending Reviews continuously focus on measuring and balancing the impact of austerity measures on women's rights. It should further review

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<sup>6</sup> CEDAW/C/GBR/CO/7.

the policy of commissioning services wherever this may undermine the provision of specialised women's services.'

## **V REMEDIES**

CEDAW General Recommendation 28 outlining the obligations of States in relation to Article 2(b) CEDAW makes clear that

'32. ... the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.'

'33. According to subparagraph (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention...'

### **Temporary Special Measure (Article 4 CEDAW)**

In addition, General Recommendation 27 makes clear that '[i]n its decision 26/III of 5 July 2002, the Committee acknowledged that the Convention "is an important tool for addressing the specific issue of the human rights of older women."<sup>7</sup> General Recommendation 25 on Article 4(1) of the Convention (temporary special measures) also recognizes that age is one of the grounds on which women may suffer multiple forms of discrimination.'

CEDAW goes further and under Article 4 clearly permits special temporary measures to be enacted in order to alleviate some of the historic inequalities that women still face; these special measures are not deemed to be discriminatory.

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<sup>7</sup> Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 38 (A/57/38, Part One, chap. I, decision 26/III, and chap. VII, paras. 430-436).

General Recommendation 25 reiterated that States who know of a situation that discriminates and do not remedy it, are in breach of the Convention. Any State in this situation should employ a temporary special measure in order to remedy it. The Committee also stated that there is a positive duty on the State: ‘State parties provide adequate explanations with regard to any failure to adopt temporary special measure.’<sup>8</sup> In other words, the case in issue here, with a limited number of women who are caught by the taper, is a perfect candidate for a temporary special measure, ‘going back to 60’, that the CEDAW Committee and the drafters of the Convention had in mind in order to remedy an historic injustice for a group of women. General Recommendation 27 on older women specifically reminds State parties of temporary special measures in relation to pension rights, stating that

‘42. States parties have an obligation to ensure that the retirement age in both the public and private sectors do not discriminate against women. Consequently, States parties have an obligation to ensure that pension policies are not discriminatory in any manner, even when women opt to retire early, and that all older women who have been active have access to adequate pensions. States parties should adopt all appropriate measures, including, where necessary, temporary special measures, to guarantee such pensions.’<sup>9</sup>

In addition, the General Recommendation makes clear:

47. States parties have an obligation to eliminate discrimination in all its forms against older women in economic and social life...

Alternatively, the UK government must, by repealing the effects of the Pensions Acts 1995, 2007 and 2011, remove the barriers to the advancement of women and full enjoyment of the rights enshrined in CEDAW by women born in the 50s.

**The effect of the mechanisms in issue in this case have a discriminatory effect on women born in the 50s, adversely impacting on older women’s health, economic and social life in that the voluntary use of the mechanisms have the effect of failing to provide adequate access to pensions for women and therefore must be removed and full restitution substituted.**

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<sup>8</sup> CEDAW/C/GC/25, paragraph 29.

<sup>9</sup> CEDAW Committee, General Recommendation 27 on older women and protection of their human rights, paragraph 42.