



NEWSLETTER

Number 85

20 March 2012

Dear Colleague

RPI/CPI SWITCH: APPEAL AGAINST THE OUTCOME OF THE JUDICIAL REVIEW

Earlier today, the Court of Appeal handed down its judgement on our appeal against the outcome of the judicial review. **I am sorry to have to tell you that the three judges unanimously dismissed our appeal.**

Our lawyers' summary of the Court's decision is shown below. (Just scroll down)

We will now consult with our lawyers, with our fellow litigants and with the other group of litigants to consider whether there is any scope for further appeal to the Supreme Court. When we have the result of that consultation, your Executive Council will decide whether or not to proceed.

I will let you know your EC's decision as soon as possible.

RPI/CPI SWITCH: E-PETITION

The e-petition calling for immediate restoration of RPI secured more than 110,000 signatures. However, I am also sorry to have to tell you that when the issue was debated in the House of Commons on 01 March 2012 it was lost by 232 votes to 33.

RPI/CPI SWITCH POLITICAL CAMPAIGN

Whether or not we decide to appeal to the Supreme Court, we will continue to campaign politically for a return to RPI indexation.

2012 UPDATING OF THE BASIC STATE PENSION AND PUBLIC SERVICE PENSIONS

I have told you previously, that our basic state pensions and our public service pensions will be updated by 5.2% from 06 April 2012. I am sorry but I got the date wrong. In fact, our basic state pensions and our public service pensions will be updated by 5.2% from **09** April 2012.

Yours sincerely

John Amos

John Amos
Deputy General Secretary

The Court of Appeal rejected the appeal made on behalf of FDA, Prospect, CSPA, GMB and NUT, when parties were represented by Mr Michael Beloff QC and Mr Martin Westgate QC. Other unions were represented by other Counsel.

There were two grounds of appeal considered by the Court.

Ground 1:

The legitimacy of using the Consumer Prices Index for uprating under Section 150 of the 1992 Act

The argument advanced on appeal was that rather than measuring changes in the general level of prices, as required by Section 150 of the Social Security and Administration Act 1992, CPI measured consumer responses to changes in prices. Secondly, contrary to what was required by Section 150, uprating by reference to the annual change in CPI did not involve comparing like with like, because CPI did not involve the general level of prices being assessed according to the same criteria at the start and end of the year in respect of which the exercise was being carried out.

The key question arising from these grounds, as the Court of Appeal found, was whether an index compiled on the basis of a geometric mean, rather than an arithmetic mean, was a permissible basis for determining whether (and if so, to what extent), state pensions and other annual payments have lost "their value in relation to the general level of prices".

The Court determined that under Section 150 the Secretary of State could determine that there was more than one way of measuring a change in general prices over a particular period, and there were matters of opinion and judgment in reaching that determination, which extended not only to determining how goods were weighted, but also whether to use the geometric or arithmetic mean.

They found particular support for this view, from publications from the Office of National Statistics, the use of the CPI in the European Union, and views of certain experts relied upon by the Government in Parliament.

The Court of Appeal therefore found that:-

"Provided that the Secretary of State acts rationally and takes all appropriate (and no inappropriate) matters into account, it is a matter for him which index he chooses. The instant criticism of his choice of CPI is based on the way in which the weighting of items within a category of items is affected. It is quite impossible to say...that the weighting method adopted by CPI is irrational", and in those circumstances, this was "the end of the matter".

Ground 2:

Whether the Secretary of State was entitled to take account of the national economy when selecting an index

The view adopted by the Court was that the Secretary of State was not precluded from taking into account the effect of his selection on the national economy. In short, the Court of Appeal did not accept that the Secretary of State had put the "economic cart before the statutory horse", by determining the matter by reference to the national economic situation, before properly addressing their mind to the statutory test under Section 150.

The Court accepted that the estimation exercise to be carried out under Section 150, to assess the change in the general level of prices, would require "an honest and rational assessment". There was not however any one right answer, and provided the Secretary of State selected an

index which was a rational choice, his selection could not be criticised, unless it was for impermissible reasons.

The Court were of the view that the terms of Section 150 provided the Secretary of State with a relatively wide discretion in selecting the index. It was necessary for the Secretary of State to identify a rational basis for making his estimate, and also that he act honestly in achieving the aims of the Section (to assess the decline in the purchasing power of public service pensions (and other payments)). However, in the Court of Appeal's view, subject to proportionality, that would not rule out taking into account the wider consequences.

The Court therefore found that on this occasion the Secretary of State could take into account the national economic position.

The Court were concerned with the argument that whatever the circumstances, the Secretary of State should as a matter of course be required to put out of his mind the effect on the national economic situation when carrying out functions under Section 150, particularly as Section 150 was macro-economic in nature. However, they did not consider the Secretary of State could "opt for an index which was clearly less good, and more detrimental to the recipients of pensions, than another index, simply because the former index was beneficial to the national Exchequer..

However, aware of the significance of the potential for leaving the Secretary of State with a completely free hand in determining the appropriate index under section 150, the Master of the Rolls on behalf of the Court of Appeal said that before the Secretary of State could invoke the benefit to the national Exchequer by selecting an index he considered less good, three requirements would normally have to be met, namely:-

- i. there would in the Secretary of State's view have to be little to choose between the indices in terms of reliability and aptness;
- ii. the benefit to the national Exchequer of choosing the less good index would have to be significant; and
- iii. the need to benefit the national Exchequer, in terms of the national economy and demands on the public purse, would have to be clear.

In short, the Secretary of State could only select the less good index if it was proportionate to do so.

If the effect on the national economy could not be taken into account, then should the Court intervene?

The normal principle is that if a legally irrelevant factor has been taken into account, the decision is liable to be held to be invalid, unless the factor played no significant part in the decision-making exercise.

The Master of the Rolls on behalf of the Court of Appeal found on analysis of the evidence that CPI was not merely selected because of the wider economic consequences, but because the Government believed it to be an inherently more satisfactory index than RPI for uprating purposes. Hence, irrespective of whether they were right about the Secretary of State's right to take into account the effect of his selection of an index on the national economy, they considered the Secretary's decision to select CPI as an index by reference to which to update under Section 150 was valid.

Further, and in any event, they took the view on a review of the evidence, that if they were to quash the decision to update in 2011 by reference to CPI, and remit it to the Secretary of State on the basis that he should not have taken the national economic situation into account, he would inevitably reach the same conclusion. Hence, even if they were wrong about the Secretary of State's decision making , they would not quash the decision as it would make no difference.

On these bases, the appeal was dismissed.