

CP 26/1981
CP 27/1981

MJG/JAW

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.P. 1/81

1. My decision is:

- (i) the claimants are not disqualified for receiving any additional retirement pension from and including 13 November 1978 for such period or periods as they were "in" the territory of Israel;
- (ii) they were "in" the territory of Israel for periods in which their factual circumstances were those described in paragraphs 11 and 12 of this decision:

Social Security Act 1975, Sections 82(5)(a), 126(6) and 143 and Schedule 14, paragraph 2(1); National Insurance and Industrial Injuries (Israel) Order, 1957, SI 1957 No. 1879 Article 8; Social Security Benefit (Persons Abroad) Regulations, 1975 SI 1975 No. 563, regulations 4 and 5; Social Security (Reciprocal Agreements) Order 1976, SI 1976 No. 225; Social Security Benefits Up-rating Order 1978, SI 1978 No. 912 and the Social Security Benefits Up-rating Regulations 1978 SI 1978 No. 1123, regulation 6.

The claimants' appeals against the decisions of the local tribunal dated 30 October 1979 are therefore allowed.

2. These are two appeals, one by a husband and one by his wife from the decisions of a local tribunal on 30 October 1979, heard together by consent before me on 18 August 1981. The appellants, whom I will hereafter describe as the claimants, were present in person but not represented and the insurance officer was represented by Mr N I Browning.

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3. The claimants are both retired. The husband was born on 25 August 1906 and was awarded retirement pension from 26 August 1976, i.e. at age 70. The wife was born on 6 February 1912 and was awarded retirement pension from 10 February 1977, i.e. at age 65. A question has arisen as to whether they are entitled to receive from 13 November 1978 additional retirement pension by virtue of the 1978 Up-rating Order and Regulations referred to in paragraph 1 above. The question has arisen because for a considerable part of each year they are absent from Great Britain while residing at the American Colony Hotel in Jerusalem.

4. While thus absent from Great Britain they would be disqualified for receiving any retirement pension by Section 82(5)(a) of the Social Security Act 1975 unless 'regulations otherwise provide' (Section 82(5)) or unless the disqualification under Section 82(5)(a) of the 1975 Act is modified by an Order in Council, giving effect to a reciprocal agreement with another country, made under the provisions of Section 143 of the Social Security Act 1975 (see paragraph 8 below).

5. To take each of these possibilities in turn, the regulations which remove the disqualification for absence from Great Britain (Section 82(5)(a)) and make provision for payment in certain circumstances of social security benefits to persons who are absent from Great Britain are the Social Security Benefit (Persons Abroad) Regulations, 1975 SI 1975 No. 563. Regulations 4 and 5 are in point. The directly relevant parts of regulations 4 and 5 read,

"4(1) Subject to the provisions of this regulation and of regulation 5 below, a person shall not be disqualified for receiving ... a retirement pension of any category by reason of being absent from Great Britain

(2) - (4)

5(1) Where regulations made in consequence of an Up-rating order provide for the application of this regulation to any additional benefit becoming payable by virtue of that order, the following provisions of this regulation shall ... have effect in relation to the entitlement to that benefit of persons absent from Great Britain

(2)

(3) Where a person is not ordinarily resident in Great Britain immediately before the appointed date for the coming into force of additional benefits under an Up-rating Order the provisions of these regulations (except this regulation) shall not, unless and until he becomes ordinarily resident in Great Britain, affect his disqualification while he is absent from Great Britain for receiving -

(a) - (b)

(c) in any other case, any additional retirement pension of any category, if that person had retired or had otherwise become entitled to a retirement pension before the appointed date;"

6. The relevant Uprating Order was S.I. 1978 No. 912. Regulation 6 of the corresponding Uprating Regulations (S.I. 1978 No. 1123) applied regulation 5 of the Persons Abroad Regulations (set out in paragraph 5 above). The result is that, if the claimants were obliged to rely on regulations 4 and 5 of the Persons Abroad Regulations to avoid the disqualification imposed by Section 82(5)(a) of the 1975 Act for receipt of increase of pension whilst absent from Great Britain, they would have to show that immediately before the appointed date for the 1978 Uprating Order i.e., immediately before 13 November 1978, they were 'ordinarily resident in Great Britain' or, if not, that thereafter they became 'ordinarily resident' in Great Britain.

7. It is only fair to record that both claimants contend forcefully in their written submissions to the Commissioner that, because they returned for a period each year to their house in London, they were ordinarily resident in Great Britain. However, as their appeals succeed under another head, namely the reciprocal agreement with Israel and the Order giving effect to it (see below), it was agreed at the oral hearing that the question of whether or not they were ordinarily resident in Great Britain should not be further gone into and I make no determination on the point. However, because I have allowed the claimants' appeals from the decisions of the local tribunal, the decisions of the local insurance officer dated 2 March 1979 (in the case of the husband) and 4 March 1979 (in the case of the wife) are of course discharged by my decision and cease to have effect including his decision as to "ordinary residence". If it ever becomes material to adjudicate on the question of "ordinary residence" a fresh decision of an insurance officer will be required (see also paragraph 18 below).

8. In addition the whole of the Social Security Act 1975 and regulations made under it (see paragraph 16 below) are subject to Section 143 of the 1975 Act which provides as follows,

"143(1) For the purpose of giving effect to any agreement with the government of a country outside the United Kingdom providing for reciprocity in matters relating to -

(b) payments in respect of ... retirement; Her Majesty may by Order in Council make provision for modifying or adapting this Act in its application to cases affected by the agreement.

(2) The modifications of this Act which may be made by virtue of subsection (1) above include provision -

(a) for securing that acts, omissions and events having any effect for the purposes of the law of the country in respect of which the agreement is made have a corresponding effect for the purposes of this Act (but not so as to confer a right to double benefit);

(b) for determining, in cases where rights accrue both under this Act and under the law of that country, which of those rights is to be available to the person concerned;

(c) for making any necessary financial adjustments."

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9. By the Social Security (Reciprocal Agreements) Order 1976, S.I. 1976 No. 225, there is deemed to have been made under Section 143 of the 1975 Act the National Insurance and Industrial Injuries (Israel) Order, 1957 S.I. 1957 No. 1879. That Order gives effect to a Convention on social security between the United Kingdom and Israel, which Convention is scheduled to the Order. The preamble to the Convention recites that the Governments were (among other matters),

"Desirous of making arrangements enabling persons who go from the territory of one Party to the territory of the other either to keep the rights which they have acquired under the legislation of the former Party or to enjoy corresponding rights under the legislation of the latter".

It should be noted that that preamble refers simply to going from one territory to another and makes no reference to residence, domicile, presence or any other legal or factual concept.

10. Article 8 of the Convention reads as follows,

"PART III - BENEFIT

BENEFIT OF ONE PARTY PAYABLE IN THE TERRITORY OF THE OTHER

ARTICLE 8

(1) Where, under the legislation of one Contracting Party, a person would be entitled to receive an old age pension ... if he were in the territory of that Party, he shall be entitled to receive that benefit while he is in the territory of the other Party".

It should be noted that Article 8 simply refers to a person being 'in the territory' of a Party (my underlining) and again makes no reference to residence, domicile, presence or any other legal or factual concept. By contrast, Article 4 of the same Convention refers to such concepts as "temporary employment" and "ordinary residence". I should add (and it was not argued otherwise) that I interpret "old age pension" in Article 8 to mean the full old age pension, including increases made by Uprating Orders etc.

11. The problem arises in this case because the Convention (which had been signed on 29 April 1957) defines, by Article 1(1), the territory of Israel as meaning "the territory administered by the Government of Israel on 19 July, 1956". At that time the site of the American Colony Hotel in Jerusalem (where the claimants reside when they are in Jerusalem) was outside the territory administered by the Government of Israel, though very close to a demarcation line between the territory administered by Israel and not so administered. That line is indicated on a map which was given in evidence at the hearing. In 1956, that part of Jerusalem (namely East Jerusalem) in which the American Colony Hotel is situated was part of the territory of Jordan but in 1967 East Jerusalem (including the hotel site) became part of

Israel. In June 1967, Israeli Law incorporated East Jerusalem into Israel. As a result, according to the claimants' evidence, the demarcation line in Jerusalem has lost all significance and the claimants, in common with all other residents in Jerusalem, move freely across the demarcation line almost every day for the purposes for example of shopping, visiting friends and places of entertainment or religious worship.

12. The husband claimant states in his written representations to the Commissioner that his working life in Jerusalem is just about equally divided, half spent on one side of the demarcation line and half on the other side of the line. The wife claimant, who is a managing director of the American Colony of Jerusalem, states in her written representations that she constantly crosses the line in the course of her duties and also for an infinite variety of other reasons in the course of normal life. At the oral hearing the claimants gave evidence confirming these statements.

13. The question therefore is whether on the facts as outlined in paragraphs 11 and 12 above the claimants can be said to have been "in" the 1956 territory of Israel within the meaning of the 1957 Convention during the time they were living in Jerusalem, even though their actual residence - the American Colony Hotel - was outside the territory administered by Israel in 1956. In my judgment on the facts as set out above and as confirmed by the claimants' evidence at the oral hearing the claimants were, whilst in Jerusalem and while the circumstances were as stated in paragraphs 11 and 12, "in" the territory of Israel. They did not reside in the 1956 territory of Israel since their home was the American Colony Hotel. Nevertheless they were "in" the 1956 territory of Israel in that a considerable portion of their work and daily living activities of all kinds for every day of the week were in that part of Jerusalem which was administered by Israel in 1956. Consequently I hold that, during such periods as those circumstances existed, the claimants can assert that they were "in" the 1956 territory of Israel for the purposes of Article 8 of the 1957 Convention scheduled to the 1957 Order. The legal result of that holding I elaborate in paragraphs 18 and 19 below.

14. I ought to emphasise however that the facts and circumstances of these two appeals are special. They relate to the claimants' own circumstances in the peculiar factual position in Jerusalem, in relation to which a 1957 Convention has not been supplemented and that Convention refers to territory administered by the Government of Israel on 19 July 1956. My decision should not be taken as a general ruling on all cases concerning Jerusalem. Each case must depend on its own facts. Moreover, on general principle, it would not, in my view, be possible for a claimant to say that he was 'in the territory of' a particular Government simply because he happened to be transitorily present there. Something more than that is necessary, as indeed is the position in these two appeals, where a considerable part of the claimants' lives, both working and otherwise, are in fact spent almost every day in the territory which was administered by Israel in 1956.

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In addition, it would not, in my judgment, be possible for a claimant to establish that he was 'in the territory of' a particular Government by the expedient of making a casual visit to that territory for the express purpose of trying to attract to himself the benefit of a reciprocal agreement. On the question of principle, reference may also usefully be made to Commissioner's Decision C(S) 2/76, interpreting reciprocal agreements with Malta (see S.I.s 1956 No. 1897 and 1958 No. 772) which use the expression, "temporarily in".

15. A further point that should be made is that, as the 1957 Order is deemed to have been made under Section 143 of the Social Security Act 1975, it does of course modify the provision of Section 82(5)(a) of the 1975 Act that there is an absolute disqualification for receipt of social security benefit during absence from Great Britain. In my judgment, when Section 143(1) of the 1975 Act enables Her Majesty by Order in Council to modify 'this Act in its application to cases affected by the Agreement' that includes a power to modify any regulations made under the 1975 Act, including the requirement of regulation 5(3) of the Persons Abroad Regulations 1975 (see paragraph 5 above) that a person in order to receive an increase of retirement pension must have been 'ordinarily resident in Great Britain immediately before the appointed date' of the Uprating Order in question or at some time thereafter. That means that Article 8 of the 1957 Convention in effect over-rides that requirement in relation to the claimants (see also paragraphs 7 and 18).

16. I ought also to make the point that in a most helpful submission at the hearing, Mr Browning on behalf of the insurance officer supplemented the insurance officers' written submissions by in effect conceding that;

- (i) on the facts given in evidence at the oral hearing the claimants had shown that they were "in" Israel within the meaning of Article 8 of the 1957 Order and
- (ii) that being so, regulation 5(3) of the Persons Abroad Regulations 1975 was 'overridden' by Section 143 of the 1975 Act.

17. My decision does not and cannot take the form of a financial award of increase of retirement pension to the claimants from and including 13 November 1978 (the appointed day for the 1978 Uprating Order). That is because the payment of an increase of pension does not have to be the subject of a decision by the statutory authorities (i.e. local insurance officer, local tribunal, or Commissioner). Payment results directly from paragraph 2(1) of Schedule 14 to the Social Security Act 1975 which reads,

'Where the weekly rate of benefit is altered to a fixed amount higher ... than the previous amount, and before the commencing date an award of that benefit has been made ... then subject to such exceptions or conditions as may be prescribed the

benefit shall, except as respect any period falling before the commencing date, become payable at the altered rate without any claim being made for it in the case of an increase in the rate of benefit ... and the award shall have effect accordingly'.
(My underlining.)

18. An exception is prescribed by regulation 5(3) of the Persons Abroad Regulations 1975 (cited in paragraph 5 above) but as I have already indicated (in paragraph 15 above) that regulation is in effect, so far as the claimants are concerned, 'overridden' by Article 8 of the 1957 Order. My jurisdiction is therefore derived from Section 98(1)(b) of the Social Security Act 1975, which confers on the statutory authorities jurisdiction to decide "Any question arising in connection with a claim for, or award of, benefit". My decision therefore has taken the form of answering the question which arose in this case. It will now be for the Secretary of State to apply to the claimants the provisions of Section 126(6) and Schedule 14, paragraph 2(1), of the Social Security Act 1975 and of the 1978 Up-rating Order and Regulations 1978, having regard to the answer which I have given in this decision to the question which has arisen. The question of "ordinary residence" will not arise, for the reasons explained in paragraphs 6 and 7 of this decision, so far as concerns periods when the claimants were "in" Israel. **For periods when they were in Great Britain (whether or not "ordinarily resident" here) they are entitled to the increase in pension because regulation 5(3) of the Persons Abroad Regulations (see paragraph 5 above) applies only when a person is "absent from Great Britain".**

(Signed) M J Goodman
Commissioner

Date: 23 September 1981

Commissioner's Files: C.P. 26/1981 and C.P. 27/1981
C I O Files: I.O. 1220/P/80 and 1219/P/80
Region: Overseas Branch, Newcastle