S.S. Law P.A.

The Social Security Law Practitioners Association

Social Security Law Practitioner's Association
Minutes of meeting held on 28/01/04

Present.

Desmond Rutledge	Pupil at 2 Garden Ct (Chair)
John Beckley	Pupil at 2 Garden Ct
Robert Jenkins	Stockport Advice
Sue Willman	Pierce Glynn & Co Solicitors
Nadine Clarkson	Old Hansen and Partners Solicitors
M Chan-Sui-Hing	Ole Hansen and Partners Solicitors
A James	OSSCSC
M Bayliss	OSSCSC
Paul Stagg	1 Sergeant's Inn
Pauline Rowe	Newham Claimant's Union
Emma Baldwin	North Kensington Law Centre
H Glover	North Kensington Law Centre
Ranjiv Khubber	6 KBW
Dave Olison	Southwark Law Centre

Guest Speaker.

Richard Drabble QC - Social Security and the impact of European Community Law – A guide for practitioners

Richard Drabble QC ("RD") said he would talk about the impact of EU law on social security law in three main areas:

- Council Directive 79/7 – equal treatment for men and women

Directive 79/7/EEC is the main equal treatment provision in EU law. The question whether a particular benefit comes within scope of that Directive has spawned a long line of cases. Some of these have produced permanent advances for the claimants while there have been some setbacks. There is no doubt of the Directive's historical impact but its impact is not dead yet. Mr Hockenjos' second appeal [***Hockenjos v SSSS*** [2001] EWCA Civ 624] on the link between Child Benefit and the dependant's allowance within JSA is still pending in the Court of Appeal. This raises issues of indirect discrimination, proportionality, equalising up, comparators and proportionality and shows that Direction 79/7 remains an active tool for attacking discriminatory treatment in the social security. Discrimination based on differences based on sex is now fairly developed area of law but

practitioners should keep an eye on the relationship between Directive 79/7 in EU law and the Article 14 – the anti-discrimination provision in ECHR.

- Council Regulation 1408/71 – residence conditions

The themes associated with Council Regulation (EEC) N0 1408/71 include: (i) Can you export your benefit broad? (ii) The ability of the member state to impose residence tests. (iii) The difference between contributory and non-contributory benefits RD said he was going to 'cheat' and say something about **Nessa**, when this was really a case under domestic law. He would also talk about the relationship between ***Swaddling v AO*** and case law on 1408/71.

- General rules – free movement of workers

RD said he would then talk about the rules dealing with the movement of workers within EU. This area has the potential for revolutionary change within the field of social security. The classic approach looks at movement as a social advantage guaranteed to you – on the same terms as other nationalities of the host member state. But you had to be a worker. The rights protected for someone with the status of a worker all flow from economic activity ***Lebon*** However, in Sala the ECJ threw doubt on this approach and simply said it was unlawful to discriminate in terms of nationality. The full implications of this approach are due to be considered again in the case of ***Collins***. This concerns an Irish national who lived in the USA and has not worked in UK since 1980. Is he entitled to JSA immediately even though only a work seeker? The Advocate General's Opinion delivered in July 2003 said no and the matter has been with the ECJ for some 6 months.

1. EQUAL TREATMENT

Turning first to the Strasbourg case law, at the moment the present law is established by ***Reynolds*** [R (on the application of Joanne Reynolds) v SSWP [2002] EWHC 426, para 17] and now confirmed in the Court of Appeal ***Carson and Reynolds*** [Carson and Reynolds v Secretary of State for Work and Pensions [2003] EWCA Civ 797, paras 42-50] that means tested benefit such as IS/JSA are not property for purposes of Article 1 of Protocol 1.[1] Therefore, an allegation such as discrimination does not get off the ground as it is not within the ambit of an a Convention Right

Under the Luxemburg case law, ***Hepple*** [R(I) 2/00 (Hepple and others v AO – REA - whether unequal age conditions linked to different pension ages for men and women contrary to Council Directive 79/7/EEC] lost in Luxembourg. This was a very short judgment and lost on the basis that discrimination was authorised by the derogation under Article 7 of Directive 79/7. But Strasbourg declared a case admissible under article 14 – as REA is a property right. The case is being held up by the Turkish case on property rights.

[1] Both parties have petitioned the House of Lords for leave to appeal.

The reason Directive 79/7/EEC may still be relevant despite the introduction of Article 14 of the ECHR is revealed by ***Hockenjos*** in which the Court of Appeal ruled that JSA provides protection against the risk of unemployment and therefore falls within the scope of the directive.

Both parents were responsible for one child throughout the week but as the mother received CB, the father was not entitled to any dependant allowance within his JSA for the daughter living with him. The case raised the question whether it is a breach of Direction 79/7 if my female/male comparator gets benefit whereas I do not? For benefit purposes the level up, equalise up rule is relevant. The remedy should not be which parent/carer receives the benefit for the dependent. If both parents care for the children equally over the week the remedy should be that both parents receive benefits for the dependants.

Article 1 of Directive 79/7/EEC contains the purpose, Article 2 defines to whom it shall apply - that formula is known as the personal scope. The case law is generous in one direction. The way it deals with work as an activity interrupted by illness. In ***Drake v CAO*** (Case C-150/85) [1987] QB 166, Mrs Drake was a lollipop lady who gave up her job to look after her mum. She claimed Invalid Carers Allowance but it was refused because it is not paid to married women.

The arguments put forward by the CAO in ***Drake*** were (i) her employment had not been interrupted by her own illness (ii) ICA is not a benefit. The Court of Appeal gave this short shrift. Someone who gives up for another person is interrupted. The result is ungenerous – it does not protect woman who do not work – to look after children. But the ECJ held that "worker" includes someone who gives up work to care for a sick relative [Case C-150/85 Drake v CAO [1986] ECR 1995] but see CG/5425/1995]

But the case law is ungenerous in other respects. It does not cover someone who gives up work to look after healthy children, since this is not one of the risks covered in Article 3, see ***Johnson*** [Case C-31/90 Johnson v CAO (Johnson 1) [1991] ECR 2723]

Article 3 defines the range of statutory schemes that come within the material scope of the Directive because they provide protection against certain risks listed under 1(a) of Article 3, e.g. sickness, invalidity, old age. There are a line of cases establish what benefits fall within Art 3.

Richardson [Case C-137/94 R v Secretary of State for Health, ex parte Richardson [1995] ECR 1-3407] established that free prescriptions scheme fell within Article 3 and the difference in treatment between men and woman for those over retirement age unlawfully discriminated against men. This is the sort of area where may believe there is no issue (i.e. no property risk) but see ***Taylor*** which held that winter fuel payments under the Social Fund was within the material scope of the directive and that the refusal of winter fuel payments to men aged between 60 and 64 was in breach of 79/7.

When it came to the big means-tested schemes the ECJ held that neither Housing Benefit not Income Support came under Article 3. They are poverty relief schemes. In ***Jackson & Cresswell*** [C-63/91 & C64/91 Jackson and Cresswell v CAO [1992] ECR 1-4737 (reported as R(IS) 10/91)] the ECJ held that Income Support constitutes social assistance. ***Smithson*** [C-243/90 R v SSSS ex p Smithson [1992] ECR 1-467] decided that Housing Benefit did not fall within the scope of the directive (79/7).

In ***Hockenjos***, thē UK government sought to separate out JSA from IS by means of the distinction between contribution-based JSA and means-tested JSA. But the ECJ have decided that JSA (including the income-based JSA) falls within the scope of the directive since the purpose of JSA is protection against the risk of unemployment. The UK government accept despite the change in name, non-contributory JSA is really IS.

Article 4 – prohibits direct and indirect discrimination. There is a sophisticated case law, and the principles in 79/7 are very closely related to 76/207 in the employment field. The concepts of justification and the disproportionate impact of measure revealed by statistics are well developed.

A recent example is ***R(JSA) 3/02*** the calculation of hours of work for part-time female workers in schools and collages – the follow up to ***CAO v Stafford and Banks*** [2001] UKHL 33. It was argued before the Commissioners that the law as declared by the House of Lords in Stafford and Banks discriminates indirectly against women under Direction 79/7. Stafford and Banks held that a classroom assistant that worked more than 16 hours per week during school terms should be treated as in remunerative work over the whole of the year. A particular provision (reg.51(2)(c) provides that periods of school holidays are disregarded in the calculation. In other words the calculation took account of the average time worked over the whole of the year, including periods of no work during the school holidays. This produced an entirely false average and the Commissioners agreed that the provision operated to the disadvantage of disproportionately more women than men.

The second example, is ***Hockenjos*** [Hockenjos v SSSS [2001] EWCA Civ 624 referred back to the Commissioners - ***CJSA/4890/1998]*** in which the claimant shared care of his two daughters for half of the time with his separated partner. Although the children spent equal periods of time with each parent, only the mother received the additional amount of income based JSA for the children because she was in receipt of Child Benefit. Under regulation 71 of the JSA Regs, you only get the dependent addition if you get Child Benefit for the child. You do not look any further; it is an automatic draconian rule. The Claimant said, I can prove more women get CB. CB discrimination cannot be justified but its effect is to force men to live below the poverty line. The man has 50% of the care but gets nothing ėxtra. Whereas his partner gets the lot. In the split CB cases, this was justified in terms of administrative convenience [***R (Barber) v SSWP*** [2002] All ER 262]. The argument is more powerful in Mr Hockenjos's case. He is left some £40 worse off. Mr Commissioner Mesher in ***CJSA/4890/1998*** held that the automatic link between CB and the dependent's addition in JSA was discriminatory and not justified. The rule had to apply to men and woman alike. Look at who child normally with. Receipt of CB

should not therefore be the determining factor. But this amounts to practically the same effect as the child usually lives with the mothers. The decision has been appealed to the Court of Appeal again. It is being argued that the basic idea that benefit cannot be split cannot be justified and that the remedy is to equalise up i.e. pay both the mother and the father.

There are a line of cases under Article 7 of the Directive 79/7 concerning the equal treatment for claimants of different pensionable age. The defence that the benefit is non-contributory will not work – see winter fuel case ***Thomas*** [Case C-328/91 Thomas v SSSS [1993] ECR 1-1247]. The REA case lost at Luxemburg but the ongoing discrimination in the REA may succeed at Strasbourg so long as there is some link with contributory scheme.

2. - RESIDENCE CONDITIONS

Regulation 1408/71 is the great co-ordination regulation for the equality of treatment of workers. There is a great nervousness on the part of government about benefits becoming exportable – that the state would have to go on paying the benefit once the person has left the UK. The government is particularly keen to avoid any argument that sickness benefit falls within the scope of the Regulation – because of the problems of monitoring the conditions of entitlement.

There is a line of cases trying to exclude means-tested benefits i.e. social assistance from the scheme. The UK pressed for special category of special non-contributory benefits which could only be paid to anyone resident in UK (defined as habitual residence).

In ***Perry*** [Perry v CAO (R(IS) 6/99] the claimant argued that he was entitled to receive IS when he was temporarily living in Portugal beyond the statutory 4 weeks because of the finding that he remained habitually resident in the UK. The Court of Appeal ruled that the domestic rule of "presence" in Great Britain trumped the EU concept of habitual residence. RD submitted that this ruling was flat wrong. The domestic rule could have been applied parallel to the EU concept but it should not take precedence. Therefore advisers should consider bringing a 'Perry look-alike case' to test this rule again.

In ***Swaddling*** [R(IS) 6/99] the claimant was an English national who worked in France and then became unemployed and wished to return and settle in UK. JSA was refused on the basis that he was not habitually resident because no appreciable period had elapsed. This rule was a clog on services moving around EU. If someone exercised his right to work in France but was faced with the problem of being barred from benefits on his or her return this would be a disincentive to movement. ECJ agreed. It analysis the problem in terms of a permanent change of base or centre of interest changed.

In ***Nessa*** [Nessa v CAO - R(IS) 2/00] was an appeal against Mr Commissioner Mesher and represented an attempt to get rid of the "appreciable period of time test" (see Re J (A Minor) (Abduction) [1990] 2 AC 562) using domestic law. The key passage is from Lord Slynn's judgment: -

If Parliament had intended that a person seeking to enter the United Kingdom or such a person declaring his intention to settle here is to have income support on arrival, it could have said so. It seems to me impossible to accept the argument at one time advanced that a person who has never been here before who says on landing "I intend to settle in the United Kingdom" and who is fully believed is automatically a person who is habitually resident here. Nor is it enough to say I am going to live at X or with Y. He must show residence in fact for a period which shows that the residence has become "habitual" and, as I see it, will or is likely to continue to be habitual.

I do not consider that when he spoke of residence for an appreciable period, Lord Brandon meant more than this. It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence, and many other factors have to be taken into account.

The requisite period is not a fixed period. It may be longer where there are doubts. It may be short (as the House accepted in *In re S. (A Minor) (Custody: Habitual Residence)* [1998] AC 750, my speech at p. 763A; and *Re F. (A Minor) (Child Abduction)* [1994] FLR 548, 555 where Butler-Sloss, LJ "A month can be ... an appreciable period of time."

RD said this passage contains the central point to ***Nessa***. Lord Slynn uses the term "a period" and does not use phrase "appreciable period". This is the key to the decision – there is no fixed periods.[2] It is a question of fact but the "period" may be short.[3] It is arguable that refugees arriving from Zimbabwe should not have to wait any period at all. RD said the interpretation given to ***Nessa*** is too conservative.[4] There is nothing in EU law about 'appreciable periods'. The decision should also be read against the background of references to case law from the Hague Convention on child abduction. This concerned the competing jurisdiction for family law matters it was clear that residence could be acquired quickly. [see Re S – acquired in two days.] By the same token, it was essential that someone should not be left without a benefit of last resort if it is clear that they have moved permanently to another. Only if the evidence is equivocal then a delay may be justified to see if there has been a change in the centre of interest [Di Paolo v Office National de l'Emploi (Case 76/76) [1977] ECR 315

3. FREEDOM OF MOVEMENT FOR WORKERS

In ***O'Flynn*** [O'Flynn v CAO (R(IS) 4/98)] the Court of Appeal accepted that a social fund payment is a social advantage within the Regulation. Mr O'Flynn was an Irish national resident in the UK. His son died in the UK but the burial took place in Ireland. The legislation required O'Flynn to be buried in the UK as opposed to Ireland. The ECJ held that the rule that the funeral took place in the UK indirectly discriminated against the nationals of other Member States and so was in breach of Art. 7(2) of 1612/68.

[2] Sue Willman stated that there was still a tendency for the DWP to think in terms of 3 to 6 months when making habitual residence decisions.
[3] See CIS/376/2002 at para 12, post Nessa; cf R(IS) 6/96 para 29, pre-Nessa.
[4] See DMG Vol 2 para 07035-40.

There are a line of cases on whether you are a "worker" for the purposes of 1612/68.

The fundamental lynch pin case on worker status is ***Lebon*** [Case C-316/85] which holds that a work seeker is not a worker. If you have worked in the UK and you then lose the job you still count as a worker, you get the protection of Regulation 1612/68 [see R(IS) 12/98 and R(IS) 9/99 cf R(IS) 3/97]. This is an intermediate position. But is you have never worked in the Member State you do not get any protection: This is an anti-abuse concept to combat benefit tourism.

In ***Cowen*** [Cowan v Tesor Public (Case C186/87 [1989] ECR 195 The Times 13 February 1989] a tourist has been run over in France. The protection in treatment of workers against discrimination based on nationality was applied so that they were entitled to an interpreter in the French courts. The activity of a tourist was still linked to the idea of people moving due to an economic activity. RD said that the importance of Sala is that it cuts through that link

The traditional analysis of worker status was thrown into doubt by ***Sala*** [Case C-85 Martinez Sala [1998] ECR 1-2691 on a reference from a Commissioner ***CJSA/4065/1999***]] riding on the back of EU citizenship. The case concerned a Spanish national who lived in Germany since she was 12 years old. She had various part time jobs and received social assistance at various times. In 1993, during a period when she did not have residence permit, she claimed a child-rising allowance for her child. This was rejected on the grounds she did not have residence permit. The ECJ set out the classic definition of a worker but concluded that it was unable to determine whether Mrs Sala was a worker since did not know whether, for example, she was seeking employment. It therefore left the matter to the national court to resolve, point out that the status of worker is not necessarily lost where an employment relationship has ended and secondly, that anyone genuinely seeking work must also be classified as a worker. RD said that the ECJ appears to be saying that when it comes to a family benefit covered by 1408/71, the discrimination not justified – and that's the end of it. No analysis. This has profound implications. A Northern Ireland Commissioner extended O'Flynn – cross the boarder – but did consider 1612/68. In context of article person for certain period of time. Once employment ended. Person seeking work also seen as worker [do not cite La bon]

Collins concerned an Irish-American with duel nationality. His centre of interest had been in the USA but he claimed JSA on arrival in the UK. It was argued that in the light of ***Sala***, the rule in ***Lebon*** is no longer good law. ***Collins*** put the case in an extreme form; he has no real connection with EU at all. He spent one semester in the UK in 1978 and between 1980 1981 he spent approximately 10 months in London doing casual and part-time work. In 1981 he returned to the USA. He decided to settle in the UK in 1998. A Commissioner referred the question to ECJ whether a person in the circumstances of Mr Collins was a worker for the purposes of Regulation No 1612/68. The Advocate General has said no. He held that the comments in ***Sala*** should not be taken out of context and was not intended to overrule earlier decisions.

Q & A

PR & SW: Asked about EU accession in May and the position of Polish Roma who have claimed asylum but who will become EU citizens in May. What prospects do they have of being categorised as work seekers? RD said that asylum seekers do not get the protection of 1612/68. If they cease being asylum seekers they will not be work seekers under the ***Lebon*** analysis – because they have never worked in UK. But the analysis in ***Sala*** implies that a citizen of the EU may be entitled to JSA/IS without ever having been a worker. It is enough if they are genuine work seekers. If they came to UK to claim asylum – this gives them a reason for being residence in UK. As they are here anyway – as was the case in ***Sala*** – do you in that context discriminate against them?

DR and PS drew attention to the recent case of ***Poirrez v France*** (Application 40892/98 30 September 2003) which concerned entitlement to an "allowance for disabled adults" which was refused on the grounds of nationality. The Court held that entitlement to a non-contributory social benefit can give rise to a pecuniary right for the purposes of Article 1 of Protocol No 1. This extends the law as it was previously understood but the English text was not available so it was difficult to comment at this stage.

PS referred to a recent hearing concerning the application of regulation 104 to overpayments of HB and CTB prior to October 2000. PS was arguing that the ratio in ***ex parte Lord*** was wrong and the local authority should not recover the whole of the overpayment without making a deduction for any underlying entitlement during the period of the overpayment. PS said the hearing appeared to go well. [The appeal has subsequently allowed see ***Adan (Jamila Ali) v LB of Hounslow & SSWP*** [2004] EWCA Civ 101.]

The meeting went on to hold the AGM and the Chair's Annual Report and the accounts were distributed. The Chair explained that SSlawPA has been covering its basic outgoings but actual payments to Professional Briefings had been deferred. Following a meeting with Professional Briefings on 23rd January 2004, invoices for the years 2000/2001 2001/2002 and 2002/2003 have been provided. The AGM formally agreed payment of the fees due to Professional Briefing for the period 2000-2003 to be transferred into their account. The meeting came to an end with the next meeting to be announced.

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