CP 2/1982

JGM/EFM

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.P. 3/82 ≡ R(P) 1/82

1. My decision is that retirement pension is payable to the claimant for the inclusive period from 24 April 1980 to 21 April 1981 (as well as thereafter) at the rate commensurate with that for which it has been awarded to the claimant by the review decision dated 1 July 1981 with effect from 23 April 1981.

2. The claimant attained pensionable age on 20 June 1979 and claimed retirement pension from that date. A graduated pension was in fact awarded to him from 21 June 1979 (the next following Thursday) but it was only at the rate of 8 pence per week, and basic retirement pension was refused on the ground in substance that the contribution conditions for an award of that pension were not satisfied. The claimant has spent much of his life in Australia and the question whether the contribution conditions were satisfied turned on certain provisions of the reciprocal convention between the United Kingdom and the Commonwealth of Australia scheduled to the Family Allowances and National Insurance (Australia) Order 1958 [S.I. 1958 No 422]. This the insurance officer concluded did not assist him, broadly on the ground that the claimant was not permanently resident in the United Kingdom. His decision was confirmed on appeal by the local tribunal on 28 August 1980 and the claimant appealed to the Commissioner. On 1 July 1981 the insurance officer gave a decision reviewing the decision of the insurance officer (sic) on the ground that there had been a relevant change of circumstances and by his revised decision (which operated from 22 April 1981) he decided that retirement pension was from this latter date payable at the weekly rate of £27.26 (including 11 pence by way of graduated retirement pension). The claimant however while expressing his gratitude for the review appears to maintain his appeal to the Commissioner. At all events he has not withdrawn it.

3. Two preliminary points arise. First the insurance officer in reviewing the insurance officer's decision after it had been confirmed by the local tribunal must be taken to have been reviewing the local tribunal decision. As he purported to revise it only from 22 April 1981 and the local tribunal decision might perhaps be taken only to have been a decision refusing the pension down to the date of their decision, it is arguable that no review was necessary. I assume however that review was necessary. I am thus confronted with an appeal against a decision which has been revised on review. It was held in Decision C.U. 42/54 (not reported), a decision recently approved in Decision C.S.B. 12/81 (to be reported as R(SB) 1/82) that if a decision was reviewed (meaning I think, revised on review) there was nothing left to appeal from and the appeal was at an end. That case concerned a decision which was wholly set aside when revised on review. In the present case the revision on review has left a part at least of the original decision standing; and I see no reason why the appeal should not continue. I may add that in decision C.S.B. 12/81 above referred to I alluded to the practice of not reviewing any decision against which an appeal was pending on the ground that such a review, unless it offered all that was being claimed in the appeal, might gratuitously delay the assertion of a claimant's rights. That objection is not relevant here and may well not be relevant in other cases where a continuing decision is revised as from a date after it first became operative; and it was in my judgment perfectly proper to review and revise the decision in the way it was done in this case, if indeed review was necessary.

4. The second preliminary question relates to the troublesome division of authority to decide questions between the so-called statutory authorities (the insurance officer, the local tribunal and the Commissioner) on the one hand and the Secretary of State for Social Services on the other. Questions for determination by the Secretary of State are listed in sections 93(1) and 95(1) of the Social Security Act 1975; and under section 94 an appeal lies to the High Court on questions of law which arise in connection with the determination of questions within section 93(1). It must be assumed that the draftsman thought that questions of law were capable of arising in connection with each class of section 93 questions. Among such questions falls by virtue of section 93(1)(b) "..... a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions ....." In the present case I am concerned with the effect of the reciprocal convention with Australia, Article 3(1) of which so far material provides as follows:-

> "For the purpose of any claim to receive a retirement pension, a person who is permanently resident in the United Kingdom shall be treated as if he ..... had paid contributions under the legislation of the United Kingdom for any period during which he was resident in Australia, and for any period during which he was proceeding from either country to the other, if he arrived in the latter country within thirteen weeks after leaving the former country."

It is not in dispute that, without invoking this provision, the claimant cannot succeed, or that at all material times the claimant has in fact satisfied all the conditions necessary to enable him to invoke it except the condition of being permanently resident in the United Kingdom. The insurance officer has by his review decision accepted that the claimant has been permanently resident in the United Kingdom from 22 April 1981. The issue is whether he was so resident earlier.

5. The reciprocal convention came up for consideration in the appeal on Commissioner's file C.P. 73/1973, where the Commissioner seemed (at paragraph 11) to be of opinion that the question when for this purpose a person was permanently resident in the United Kingdom was for the Secretary of State to determine if it arose. In the appeal on Commissioner's file C.U. 252/76 (reported in [1978] 2 CMLR 169) I decided in a case in which the question whether a claimant was entitled to have his German contributions counted under EEC Regulations turned on whether he was resident (i.e. habitually resident) in the United Kingdom while he was in Germany, that the question of his residence was for the Secretary of State to determine as part and parcel of the contribution question. Indeed I think that until recently it was the generally held view that these ancillary questions were for the Secretary of State to determine. Some dissatisfaction was felt about this because the Secretary of State made a practice even where the question turned on some quite difficult ancillary point of simply answering, without reasons, the question whether or not the contribution conditions were satisfied; and the generally held view was challenged recently and came before a Tribunal of Commissioners who gave Decision C.G. 4/81 (to be reported as R(G) 1/82). The question in that case turned on the ascertainment of the so-called relevant past year whose contributions governed the question whether the claimant satisfied the contribution conditions for maternity allowance. It was decided that this question was for the statutory authorities to determine and not the Secretary of State. In the light of this decision I have to decide whether the question when the claimant became permanently resident in the United Kingdom is for the statutory authorities or for the Secretary of State.

6. Where is the line between Secretary of State's contribution questions and statutory authorities' questions to be drawn? Presumably it is for the Secretary of State to count up the contributions actually paid or credited. In Department of Health and Social Security v Walker Dean Walker Ltd. [1970] 2 Q.B. 74 it was held that the question whether employers were right in saying that they had stamped certain employee's cards and posted them to the Department was for the Secretary of State to determine. How far beyond this does it go? In paragraph 8 of Decision C.G. 4/81 the Tribunal of Commissioners took the view that it was for the statutory authorities to determine whether a Secretary of State's question arose or not and to answer all questions necessary to enable them to determine this. In a sense I can say here without determining anything that a question whether the contribution conditions for the claimant's benefit are satisfied arises here. But this cannot be what

the Tribunal meant. I think that they had regard to the fact that there is no need to refer any question to the Secretary of State unless it actually arises, i.e. is put in issue (cf Regina v Westminster etc Rent Officer Ex parte Rendall [1973] Q.B. 959 at pages 975-6). One does not automatically refer every claim for contributory benefit to the Secretary of State when there is no doubt that the contribution conditions are (or are not) satisfied. In the Tribunal case there was no doubt, once the relevant past year was ascertained, on the contribution question that remained and so once the relevant past year was ascertained no contribution question arose. I have reached the conclusion that on this appeal there will be no doubt, once the question of the claimant's permanent residence has been determined, about the question whether the contribution conditions are satisfied. I accordingly hold that this is for me to determine. I do so with some hesitation as I am conscious that in the Walker Dean Walker case, there was probably no doubt about the contribution condition question once it was determined as a question of fact whether the employers had or had not stamped the cards and posted them. I also have some difficulty in seeing how on this narrow interpretation a contribution question that falls to be determined by the Secretary of State can ever give rise to a question of law. However I now proceed to determine the question about the claimant's permanent residence.

7. Before going into this I must set out part of Article 27 of the above reciprocal convention with Australia, which so far as relevant provides as follows:-

> "For the purpose of applying Article 3 .....
> a person shall be treated as permanently resident in one country and shall not be treated as temporarily absent from the other country -
>
> (a) if the competent authority of the former country is satisfied that he is likely to remain there for at least three years; or
>
> (b) if he has been temporarily resident in the former country for at least one year and the competent authorities of the two countries have not agreed that he should not be treated as permanently resident in that country."

As to this, nothing relevant has been done or agreed by any competent authority and the only possibly relevant provision is that in (b). The provision however must be an enlarging and not an exhaustive definition of permanent residence as (b) above has the effect of treating temporary residence that has lasted a year as permanent residence; and it can hardly have been intended that permanent residence should not have this effect even after a year. Further the Commissioner held in Decision on file C.P. 73/1973 above mentioned that no question could arise under Article 27 when a third country other than Australia and the United Kingdom was involved. In the present case as will appear the issue rests possibly between the United Kingdom and Gibraltar. I have thus to interpret the phrase "permanently resident" independently of the definition in the convention.

8. The claimant was born in England on 20 June 1914. His wife (to whom he was married in 1939) was born on 24 May 1918. The claimant qualified as a veterinary surgeon in England and practised as such in this country from 1940 until 1946 when he left for New Zealand where he remained for something over two years before settling in Australia. There he practised as a veterinary surgeon for the greater part of his working life giving it up only in 1973, when he sold his practice and returned with his wife to this country, retaining temporarily a seaside house in Australia. He says that he kept this for the use of his children and it was sold in 1976. He told the local tribunal that he had at all times intended to return here and had retained his United Kingdom domicile throughout.

9. On his return to England he took employment for a few months with the Ministry of Agriculture and Fisheries when he was given a national insurance number and contributions were paid by him and his employer. He then obtained employment with the Society for the Protection of Animals in North Africa (SPANA). This was a United Kingdom based employment (he paid United Kingdom tax and contributions) but the work was in Africa. While there he became acquainted with Gibraltar as a holiday place and he acquired a leasehold flat there. He completed his term of service with SPANA in February 1977 and retired to Gibraltar. His wife's father died in March 1977 leaving a widow then aged over 80, and he and his wife returned to England in April 1977. His wife's father's will was badly drawn inasmuch as, read literally, it left his entire residuary estate to both his widow and his daughter, the claimant's wife. I should myself have regarded it as reasonably clear that under the will the residuary estate was intended to belong to his widow if she survived her husband (as in fact she did) by more than one month. However a deed of family arrangement was entered into under which the claimant's wife assigned all her interest in the estate to her mother and in consideration her mother in substance declared herself trustee at her death for the claimant's wife of all that was left her by her husband that remained at her death. The assets so left included a leasehold flat at Bexhill on Sea where the mother lives and which will, if the mother does not first dispose of it, belong to the claimant's wife on her mother's death.

10. After this the claimant started to spend winters in Gibraltar (for the warm climate) and other parts of the year in England. At the time of the local tribunal hearing August 1980 he had spent rather more than half his time since retirement from work in Gibraltar. In April 1980 he had however decided to come back to England permanently. One reason for this was the desire to secure his pension (the right to which was being questioned). This is a perfectly legitimate reason for wishing to remain in England; but there was an additional reason for doing so in that the condition of his wife's mother had so deteriorated that she was beginning to need a great deal of attention. From 23 April 1980 they have lived in the Bexhill flat with the mother. They had always regarded this as their home when in England and it has now become their permanent home.

11. The insurance officer in reviewing the original refusal of basic pension concluded that from a period of 12 months from the time that they moved permanently to England the claimant had become permanently resident here and gave his revised decision accordingly. I am not clear why he thought it necessary to defer the effect of the change for twelve months. But I think that it must have been the mesmeric influence of Article 27(b) of the reciprocal convention, which, when it applies, requires temporary residence and temporary absence to be treated as permanent when it has lasted for a year. This does not preclude treating residence or absence which is from the outset or before the expiration of one year intended to be permanent as permanent from that time without waiting for the expiration of a year (cf Decisions C.I. 10/81 (not reported) and R(P) 6/59). The insurance officer now concerned submits that it is for consideration whether permanent residence has been established from 23 April 1980. I think that it can and that accordingly basic pension can be awarded at least from 24 April 1980, the Thursday next following such date.

12. The question whether it can be awarded from any earlier date back to 21 June 1979, when the claimant attained pensionable age, depends on whether he can be regarded as having become permanently resident in the United Kingdom earlier than April 1980. The insurance officer has referred me to Re Gape [1952] Ch. 743 at page 749 where Evershed MR used language suggesting that there might be some analogy between the concepts of permanent residence and of domicile. I doubt whether this can be pushed very far. I do not think that it is possible to be permanently resident in a country without being resident there, whereas it is undoubtedly possible to be domiciled in a country where one is not resident. Further one must at any given time have one domicile and one only, whereas I think that it is possible for a person at times to have no permanent residence. When the claimant returned to England in 1973 and was given a national insurance number he was presumably regarded as satisfying the prescribed conditions as to residence referred to in section 1 of National Insurance Act 1965 then in force. And it may be readily argued that he remained resident in England from then onwards although not always present there. Indeed I think it quite probable that he was resident there throughout. I am not however persuaded that (in the light of the fact that the claimant had a flat in Gibraltar) the claimant has established that he had before April 1980 the necessary fixity of purpose to establish permanent residence in the United Kingdom. I have not overlooked that the claimant never secured more than temporary permits to remain in Gibraltar while he had as a natural born British subject the unqualified right to remain in the United Kingdom. I question whether he was during those years permanently resident either in the United Kingdom or Gibraltar. I therefore limit the extent to which I allow the appeal to starting the award of basic pension in April 1980; and I give my decision accordingly.

13. There is one other matter that I should mention. There is a reciprocal convention between the United Kingdom and Gibraltar scheduled to the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974 [S.I. 1974 No 555] under which a person has the same rights and liabilities in relation to social security other than family allowances as if Gibraltar and the United Kingdom had been separate Member States of the European Economic Community. I do not think that this provision can affect the construction of the reciprocal convention with Australia so as to enable him thereby to acquire title to pension. But is is possible that this provision taken together with Article 10 of Council Regulation (EEC) No 1408/71 might protect him from the loss of the pension if hereafter the claimant should abandon his permanent residence in the United Kingdom in favour of Gibraltar (see Decision R(S) 9/81 at paragraphs 9-12). The claimant would be well advised to take advice before counting on this.

(Signed) J G Monroe
Commissioner

Date: 18 May 1982

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