CP 12/1979

JGM/JW

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.P. 2/81

1. My decision is that an increase of retirement pension is payable to the claimant for his children Elsa, John and Yolanda at the rate hereinafter in paragraph 13 mentioned for the inclusive period from 3 to 16 July 1975 for his children John and Yolanda only from the inclusive period from 17 July 1975 to 29 June 1977 and for his child Yolanda only for the inclusive period from 30 June 1977 to 26 March 1980.

2. The claimant worked in Great Britain as a self-employed person (paying contributions as such from 1948) down to the year 1964 when he went to the Netherlands and worked there as an employed person at least until he attained the age of 70 on 29 June 1975, when under section 27(5) of the Social Security Act 1975 he was deemed to have retired on that date. He had elected voluntarily to pay non-employed contributions from the time that he left this country until he attained the age of 65 and the retirement pension to which he was entitled subject to retirement and claim was at the full rate.

3. The claimant who was already drawing pension in the Netherlands claimed retirement pension from 3 July 1975 the Thursday following his 70th birthday, and the pension was awarded to him together with an increase thereof for his wife (with whom he was and is residing) which was payable to him notwithstanding that he was in the Netherlands; (see regulations 4(1) and 13 of the Social Security Benefit (Persons Abroad) Regulations 1975 [SI 1975 No 563]). But he was refused an increase of that pension for his children, who were also in the Netherlands, substantially on the ground that they were not in Great Britain.

4. Under section 41 of, read together with Schedule 20 to, the Social Security Act 1975 as originally enacted it was a condition of title to an increase of (among other benefits) a retirement pension for a child that the claimant should have a family which included that child in terms of the Family Allowances Act 1965. Under the same section and Schedule as amended with effect from 4 April 1977 by the Child Benefit Act 1975 it was a condition of such title that the

claimant should be entitled or treated under the Act or in accordance with regulations as entitled to child benefit in respect of that child. It is not in doubt that if Elsa, John and Yolanda had been in Great Britain at the relevant time all the conditions of title to child benefit in respect of them would have been satisfied for so long as they were respectively under the age of 16 or under the age of 19 and satisfying the requisite conditions as to being educated. But as they were in the Netherlands (a) they could not be treated as members of the claimant's family under the Family Allowances Act 1965 (see section 20(3) of that Act); and (b) child benefit was and is not in general payable in respect of a child who is not in Great Britain under the Child Benefit Act 1975 (see section 13(2) of that Act). It was for this reason that the insurance officer basically disallowed the claim for the increase.

5. In reaching his conclusion the insurance officer took account of Article 35 of the convention between the United Kingdom and the Netherlands (to which I shall refer as "the reciprocal convention") scheduled to the National Insurance and Industrial Injuries (Netherlands) Order, 1955[SI 1955 No 874] (to which I shall refer as "the 1955 Order"). This provides as follows:-

> "In all cases where, under the legislation of one Contracting Party, any cash benefit would have been paid in respect of a dependant if the dependant had been in the territory of that Party, such benefit shall be paid if the dependant is in the territory of the other Party".

The insurance officer considered that this provision did not apply on the ground that its operation was excluded (since the accession of the United Kingdom to the European Economic Community) by Article 6 of Council Regulation (EEC No 1408/71) (to which I shall refer as "Regulation 1408/71"), which provides so far as material as follows:-

> "..... this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either;
>
> (a) two or more Member States exclusively, or
>
> (b) ..... "

6. Article 77 of Regulation 1408/71 legislates for the provision to pensioners of benefits (defined so as to include family allowances and the like and increase of benefits for children) to persons receiving pensions for old age "irrespective of the Member State in whose territory the pensioner or the children are residing". Despite these last words however Article 77(1)(b) provides that in the case of a pensioner who (like the claimant) is drawing pension in two Member states he is entitled to draw "benefit" (defined as above so far at least as the Article goes) only in the Member State in which the pensioner is residing. This was of no assistance to the claimant on his present claim and the insurance officer concluded that Article 35 of the reciprocal convention was displaced by it and that the claim for an increase of pension for the claimant's children must fail. The local tribunal confirmed this decision.

7. The claimant now appeals against this decision to the Commissioner. His main ground of appeal was that Regulation 1408/71, by Article 1(a) applies to workers and that he was not, within the meaning of that Article a worker in any relevant sense, since his British pension was derived solely from his insurance as a self employed person, whereas a worker is basically a person who has been insured as an employed person. But a further point had become apparent. Although the European Court of Justice decided in Case 82/72 Walder v Sociale Verzekeringsbank [1973] ECR 599 that Article 6 of Regulation 1408/71 was as a matter of interpretation mandatory and replaced reciprocal conventions even those whose provisions are more beneficial than Regulation 1408/71 itself, yet the Advocate General (Warner) in Case 32/77 Giuliani v Landesversicherungsanstalt Schwaben [1977] ECR 1857 expressed the opinion (reported together with his opinion in other cases at page 1669) that Article 51 of the Treaty of Rome did not empower the Council of Ministers in this context to legislate to the detriment of workers who exercise their freedom of movement, an opinion which was shared by the Advocate-General (Mayras) in Case 110/79 Coonan v Insurance Officer [1980] ECR 1445 at page 1465. For this reason I directed an oral hearing of the appeal at which the insurance officer was represented by Mrs G S Kerrigan of the solicitor's office of the Department of Health and Social Security. Mrs Kerrigan invited me to refer this question to the European Court for a preliminary ruling. I decided to refer to the Court three questions viz (briefly) (1) whether the claimant was a worker within the meaning of Article 1(a) of Regulation 1408/71 and (2) whether he was a pensioner in terms of Article 77 of that Regulation and (3) whether Article 6 of that Regulation was valid so far as it operated to take away the right to benefit derived from national law. The decision on these questions is dated 31 March 1981.

8. As to question (1) the European Court in paragraph 9 of their decision (the point not being referred to in the operative part (or dispositif) of the decision) indicated that a person who has been compulsorily insured as a self-employed worker in one Member State but is compulsorily insured as an employed person in another Member State must be considered as a worker within the meaning of Articles 1(a) and 2(1) of Regulation 1408/71 throughout the Community. It follows that the claimant is in terms of Article 6 of Regulation 1408/71 a person covered by the Regulation, and that Article 6 is capable of applying to him.

9. As to question 2 the European Court's decision was as follows:-

> "Since Article 77 of Regulation No 1408/71 governs family allowances for old age pensioners and increases in or supplements to such pensions in respect of dependent children it must be interpreted to mean that the expression "pensions for old age" does not cover old-age benefits granted in a Member State to a person who is insured there under a social security scheme applicable to self-employed persons if such benefits are based on the legislation of that Member State alone without the application of the provisions of the said regulation."

In other words they decided, in my judgment, that the present matter is not, in terms of Article 6 of Regulation 1408/71, a matter covered by

that Regulation; so that the reciprocal convention (which, being given effect to by the 1955 Order, confers benefits that are in terms of the Court's decision based on the legislation of the United Kingdom alone) applies to the claimant in this case and the claimant can rely on Article 35 of that convention. The insurance officer now concerned has made a submission in this sense. That being so, the European Court did not find it necessary to answer question (3), though the Advocate-General (Warner) retracted the opinion previously expressed by him in the Giuliani case. Consequently unless and until the European Court otherwise decides, Article 6 will have to be treated as fully valid.

10. As was stated in paragraph 4 above the claimant's title to an increase of pension for his children depends in part on the question whether down to April 1977 he had by reference to the Family Allowances Act 1965 a family which included the children and since April 1977 on whether he was or could by reference to the Child Benefit Act 1975 and associated provisions be treated as entitled to child benefit in respect of them. Under these Acts and provisions alone the conditions of entitlement were not satisfied in relation to any of the children because at all material times they were outside Great Britain in the Netherlands. But Article 35 of the reciprocal convention, which applies to an increase of retirement pension but not to family allowances or child benefit (the 1955 Order was not made under the Family Allowances Act 1945 then in force) requires me to proceed on the hypothesis that the children were in Great Britain. There is thus a question whether I can make the assumption that the children were in Great Britain so as to establish a hypothetical title to family allowances or child benefit (to which the reciprocal convention does not apply) in order to arrive at title to an increase of pension for the children, to which that convention does apply. It was decided in Commissioner's Decision R(S) 1/80 at paragraph 15 that a comparable double assumption could be made, and I hold that it can be made in this case.

11. I have not overlooked that in relation to the period for which child benefit was the relevant benefit the condition was satisfied only if the claimant would have been entitled to child benefit in the hypothetical circumstances mentioned in Article 35 of the reciprocal convention, and there is in that Article no expressed hypothesis that the necessary claim has been made. The question whether a person can be regarded as entitled to child benefit for the purpose of establishing title to an increase for children without having claimed the child benefit was left open in Decision R(S) 3/80. In that case the Secretary of State for Social Services had in exercise of the power conferred by regulation 5(2) of the Child Benefit (Claims and Payments) Regulations 1976 [S.I. 1976 No 964] to treat the claim for the increase as a claim for child benefit. I do not however think it necessary in this case to call for a similar exercise of that power, because I am here dealing with entitlement to child benefit in hypothetical circumstances in which an actual claim could not be expected to be made, and I think the hypothesis of the necessary claim being made must be implied where it is not expressed. It will be noted that the draftsman of section 14(2)(b) of the Social Security Act 1975 did not (in contrast with the more cautious draftsman of section 19(3)(b) of the National Insurance Act 1965) think it necessary to postulate a hypothetical claim expressly. I reached a similar conclusion in Decision R(S) 1/80 at paragraph 5.

And, when questions arising out of that decision were referred to the European Court for a preliminary ruling in Case 41/77 Regina v National Insurance Commissioner, Ex parte Warry [1978] Q.B. 607, the Advocate-General (at page 616) took the same view. The European Court found it unnecessary to determine this question because they held in effect that a claim actually made in another Member State could (by virtue of Council Regulation (EEC) No 574/72 implementing Regulation 1408/71) in any event constituted the relevant claim. I hesitate to apply such a principle in this case where the claim has been held to fall outside Regulations 1408/71.

12. It follows that the claimant is entitled to an increase of pension for his children to precisely the same extent as he would have been if they had been in Great Britain. Of his four children the eldest had attained the age of 19 well before the claimant became entitled to retirement pension. As the age of 19 has always been the highest age at which a child could be included in a family for purposes of family allowances or could be the subject of an award of child benefit there is no question of an increase being payable for the eldest child. However the increase is payable for the remaining three children down to the Wednesday following the date on which they attained the age of 19 so long as they fulfilled the relevant condition about receiving education down to that age. The condition about education was differently worded for the purpose of the Family Allowances Act 1965 and the Child Benefit Act 1975, but there is no real dispute about the matter and I do not set them out. Suffice it to say that under the Child Benefit Act (but not under the Family Allowances Act) the education must be at a recognised educational establishment, defined in section 24(1) as an establishment recognised by the Secretary of State as being or as comparable to a university college or school. All the establishments at which at the relevant times the claimant's children have attended have been so recognised.

13. The claimant's daughter Elsa attained the age of 19 on 15 July 1975, her education at an appropriate establishment continuing down to and beyond that day and accordingly payment of the increase for her came to an end at the Wednesday following i.e. 16 July 1975. The claimant's son John attained the age of 19 on 28 June 1977 and his education similarly so continued so that the payment of the increase for him came to an end at Wednesday 29 June 1977. The claimant's daughter Yolanda attained the age of 19 on 22 March 1980. Her education continued at least to the end of the school year 1980/81. In consequence the increase for Yolanda ceased at Wednesday 26 March 1980. I give my decision accordingly.

14. The claimant has raised two other matters. The increases are awarded at the rates in force as they fell due. As the result of the matter having to be referred to the European Court there has been long delay in paying the increases, and the claimant suggests that they should be paid at the rates now in force. I have no jurisdiction to direct this, though I appreciate that the long delay has reduced the value of the award. Secondly the claimant asks for payment of family allowances (or child benefit) back to 1964 when he left this country. That question is not before me, as I am dealing only with an appeal against the disallowance of the increase of pension. I do not know whether the requisite claims for family allowances and/or child benefit

have been made. In any case, as is pointed out in paragraph 10 above, the reciprocal convention brought into force by the 1955 Order does not apply to family allowances or its successor child benefit and it is unsafe to assume that because the claim for the increase of pension has succeeded a comparable claim for family allowances must also succeed. I express no opinion on that point.

(Signed) J G Monroe
Commissioner

Date: 21 July 1981

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