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SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Pamela Mace (Mrs)

Appeal Tribunal: Cambridge

Case No: 2/04/11328

[ORAL HEARING]

1. This is an appeal by Mrs Pamela Mace ("the claimant") against the decision of the Cambridge social security appeal tribunal dated 2 June 1993 confirming the decision of an adjudication officer that the claimant was entitled from 2 March 1992 to retirement pension only at the rate of £54.52.

2. I held an oral hearing of the appeal. The claimant attended and was represented by Mr A. James of Cambridge Citizens Advice Bureau. The adjudication officer was represented by Ms E. Sharpston of Counsel who also represented the Secretary of State.

3. The claimant was born in February 1932. She married in 1954. She continued to work until about 1956 when she had the first of her two children. She did not return to work until 1970 having until then been at home with the children. She and her husband were divorced in 1979. She re-married in 1983. She turned 60 on 24 February 1992, retired and became entitled to her retirement pension on 2 March 1992. Then the trouble began.

4. She had been at home looking after the children from 1956 to 1970 and during that time was not able to add to her contribution record. From 1970 to 1979 she paid the reduced rate married woman's contributions which apparently do not count towards retirement pension. She paid full rate contributions after the divorce until her retirement. It is common ground that her own contributions record as I have just described it did not entitle her to a full pension. That is what the adjudication officer decided. Before the tribunal the claimant's representative contended that she was entitled to have her first husband's contributions treated as hers by virtue of what is now section 48 of the Social Security Contributions and Benefits Act 1992. It was accepted that on the face of it section 48 did not assist her because of sub-section (3) which said in effect that only the last marriage counted for this

purpose. But the submission was that that provision created an indirect discrimination against women and was thus contrary to Council Directive 79/7 EEC.

5. The tribunal held that section 48(3) did produce an indirect discrimination against women but that " ... there was objective justification for that Statute, in that it would be inequitable to allow the contributions of a previous spouse or spouses ... ".

6. It is not in issue that the tribunal's decision is erroneous in law if only because their reasons for holding that the discrimination was objectively justified were insufficient. Nor does it appear that they had sufficient material on which to base a conclusion as to whether section 48(3) was discriminatory.

7. It is now appropriate to set out in full section 48 of the Contributions and Benefits Act. It is not I think necessary to set out any of the provisions of the legislation concerning satisfaction of the contribution conditions as there is no issue in respect of them. Section 48 provides -

> "Use of former spouse's contributions
>
> 48-(1) Where a person -
>
> (a) has been married, and
>
> (b) in respect of the tax year in which the marriage terminated or any previous tax year, does not with his own contributions satisfy the contribution conditions for a Category A retirement pension,
>
> Then, for the purpose of enabling him to satisfy those conditions (but only in respect of any claim for a Category A retirement pension), the contributions of his former spouse may to the prescribed extent be treated as if they were his own contributions.
>
> (2) Sub-section (1) above shall not apply in relation to any person who attained pensionable age before 6 April 1979 if the termination of his marriage also occurred before that date.
>
> (3) Where a person has been married more than once this section applies only to the last marriage and the references to his marriage and his former spouse shall be construed accordingly."

There appears to be no problem about the meaning and effect of that provision. The question is whether sub-section (3) is in conformity with Article 7 of the Directive. But before I get to that question there is another which was raised before me, but not before the tribunal, namely whether the adjudicating authorities including the Commissioner have jurisdiction to determine that first question.

8. In the written submissions to the Commissioner the point was put in this way -

> "18. Also I submit that a question concerning the satisfaction of the contribution conditions is for the Secretary of State and not the adjudicating authorities to answer (see Scrivner v CAO [1990] and S of S v Scully [1992]). The adjudication officer's decision on a person's entitlement to benefit is based upon the contribution record provided by the Secretary of State. If the Commissioner decides that a question has arisen in this case concerning the satisfaction of the contribution conditions I respectfully suggest that he direct the adjudication officer to obtain a formal decision from the Secretary of State as to whether this claimant satisfies the contribution conditions for entitlement to retirement pension."

The statutory basis for that contention is now to be found in section 17 of the Social Security Administration Act 1992 which lists a number of questions which are reserved for determination by the Secretary of State. The item on the list relevant to this case is (b) which reads -

> "subject to sub-section (2) below, a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions or his earnings factor;"

It is common ground that sub-section (2) has no relevance. Ms Sharpston submitted that the question in the present case concerned the satisfaction of the contribution conditions relating to retirement pension.

9. Ms Sharpston pointed out that the Administration Act provided for two quite separate systems for determining social security matters, each with its own appellant structure -

> "(a) determination by an adjudication officer under section 20 with appeal to a social security appeal tribunal then, with leave, to the Commissioner and from there to the Court of Appeal;
>
> (b) adjudication by the Secretary of State under section 17 with a right of reference of a question of law to the High Court."

Section 20, so far as conceivably relevant, provides -

> "20-(1) Subject to section 54 below, there shall be submitted forthwith to an adjudication officer for determination in accordance with this Part of this Act -
>
> (a) any claim for a benefit to which this section applies;

(b) subject to sub-section (2) below, any question arising in connection with a claim for, or award of, such a benefit; and

(c) not relevant

(2) Sub-section (1) above does not apply to any question which falls to be determined otherwise than by an adjudication officer.

(3) not relevant

(4) If -

(a) a person submits a question relating to the age, marriage or death of any person; and

(b) it appears to the adjudication officer that the question may arise if the person who has submitted it to him submits a claim to a benefit to which this section applies,

the adjudication officer may determine the question.

(5) Different aspects of the same claim or question may be submitted to different adjudication officers; and for that purpose this section and the other provisions of this Part of this Act with respect to the determination of claims and questions shall apply with any necessary modifications.

(6) not relevant"

Mr James' case is that the question whether section 48(3) of the Contributions and Benefits Act is bad for indirect discrimination is, so to speak, its own question arising in connection with a claim for or award of benefit and is for determination by the adjudication officer in accordance with section 20(1)(b) above; it is not, he submits, a question whether contribution conditions are satisfied or otherwise relating to a person's contributions.

10. Mr James and Ms Sharpston both referred to Scrivner v Chief Adjudication Officer 1 C.M.L.R. 637 and to Secretary of State for Social Security v Scully 1992 4 All ER 1. In Scrivner the Court of Appeal, on appeal from the Commissioner, held that the question whether contributions to social security funds of other Member States should count towards the contribution qualification for United Kingdom social security benefits is, under section 93 of the Social Security Act 1975 (now section 17 of the Administration Act) in the first instance a matter for the Secretary of State. In Scully the Court of Appeal, again on appeal from the Commissioner, held that questions as to the meaning of "the relevant past year" and "period of interruption of employment" in paragraph 1 of Part I of Schedule 3 to the Social Security Act 1975 (which specifies the contribution conditions for unemployment benefit and sickness benefit) were

questions for the Secretary of State and not the adjudicating authorities.

11. In Scrivner Dillon L.J. said (641-642) -

> "So far as the 1975 Act goes "contributions" means "contributions under that Act", that is to say, payments in this country under this country's national scheme of social security. There is nothing said about the contributions of those working in Member-States of the EEC under those States' schemes. The substantive question is therefore whether EEC law, and particularly EEC Directives, which have direct effect as part of English law, require them to be taken into account."

In Scully Sir Christopher Slade said (7g-h) -

> "In my judgment, there can be no justification for drawing the fine distinction sought to be drawn between sub-paras (2) and (3) of para 1 of Part I of Schedule 3 to the 1975 Act on the one hand and sub-para (4) of the other hand, and treating them as giving rise to separate issues. Paragraph 1(4) does no more than contain a series of definitions for the purpose of "the first condition" set out in para 1(2) and "the second condition" set out in para 1(3). The language of s93(1) is quite general. It allots to the Secretary of State the exclusive functions of determining not only any question as to "whether the contribution conditions for any benefit are satisfied", but also "any questions otherwise relating to a person's contributions or his earnings factor". In my judgment, these functions must necessarily include those of applying the definitions in sub-para (4) to sub-paras (2) and (3) and of determining any question that may arise in the course of such application. The application of these definitions is an essential part of a function of determining whether the contribution conditions are met. In my judgment, the dichotomy suggested by Mr Howell would not only place a quite unduly restrictive construction on s 93(1)(b) but might well cause practical difficulties for adjudication officers, since in any given case where questions of jurisdiction arose, they would be required to differentiate between questions as to what the relevant contribution conditions were, and questions whether those conditions were satisfied. As Mr Pannick submitted, the broad language of s 93(1)(b) read according to its ordinary and natural meaning, plainly intended to leave it to the Secretary of State to make all determinations relevant to the "contribution conditions" as set out in para 1 of Pt 1 of Sch 3 to the 1975 Act."

I have set out those passages from the two judgments because they show plainly the way the Court of Appeal dealt with the matter of jurisdiction. In those two cases it seems to me that the issues were inextricably bound up with contributions issues. Scrivner essentially concerned the meaning to be given to the

word "contributions" in the 1975 Act. Scully concerned the meaning to be given to technical expressions actually contained in the contribution conditions applicable to unemployment benefit and sickness benefit. Neither case, as it seems to me, concerned any general question of law that could be disentangled from the technicalities of the law relating to contributions. Section 48 of the Contributions and Benefits Act does of course concern and only concern the use of a former spouse's contributions. But various issues of general law, not special to contributions, can arise on that provision for example whether, under sub-section (1)(a) there was a valid marriage, whether under (1)(b) and (2) there was a valid termination of marriage and whether (3) is bad for discrimination. While accepting that the answers to such questions in the end concern contribution matters, the questions are not in themselves, in my view, questions whether the contribution conditions are satisfied or otherwise relating to a person's contributions.

12. Ms Sharpston said that it was wrong to treat the sorts of questions arising under section 48 to which I have just referred as questions arising for determination in the case, as, she said, they were purely hypothetical in that the answers did not of themselves produce a final outcome; the essential and only question was whether certain contributions could be counted. It seems to me however that section 20 of the Administration Act contemplates that the adjudication officer will on occasion determine "hypothetical" questions in that for example sub-section (1)(b) requires him to determine "any question arising in connection with a claim for or award of benefit" and sub-section (4) appears to require him to determine questions submitted to him concerning the age, marriage or death of any person even before a claim for any benefit has been made. They are certainly not hypothetical in the sense that nothing turns on them; the answers are crucial to the outcome.

13. Whether or not a question, in a case such as this, is for the Secretary of State or the adjudicating authorities might seem to depend on how the question is framed. In this case it seems to me the question is whether section 48(3) is bad for discrimination; although the provision concerns contributions that question does not. No doubt the logic of reserving questions concerning contributions to the Secretary of State is that contribution records are kept by him and he is the best person to know whether the contribution conditions are satisfied and related matters. It does not appear to me that the Secretary of State could have been thought to be the best person to decide whether a provision is bad for discrimination (or for any other reason), or for example whether a particular marriage or divorce would be recognised under English law. I do not read Scrivner or Scully as binding me to the contrary and I hold that the question, as I have identified it, is not a question for the Secretary of State.

14. Is section 48(3) discriminatory against women? In this connection it is accepted that the claimant is a person who falls under Article 2 (personal scope) of the Directive and that

retirement pension, being within a statutory scheme providing protection against old age, falls within Article (1)(a). Article 4(1) provides that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status in relation in effect to the operation of such a scheme. Section 48(3) of the Contributions and Benefits Act does not contain any overt gender bias. The argument is that it creates an indirect discrimination because, in the nature of things, more women are disadvantaged by it than men. It may be asked whether, even so, the provision could be discriminatory against women, because, equally, more women than men are advantaged by sub-section (1) and sub-section (3) merely curtails the advantage. Ms Sharpston submitted that that point fell to be considered in relation to objective justification.

15. Ms Sharpston referred to a number of cases on indirect discrimination including Jenkins v Kingsgate Clothing [1981] ECR 911, Ruzius-Wilbrink v Bestuur etc [1989] ECR 4311, Enderby v Frenchy etc [1993] IRLR 591, Jones v Chief Adjudication Officer [1990] IRLR 533, R. v Secretary of State for Education ex parte Schaffter [1987] IRLR 53 and Jones v University of Manchester [1993] IRLR 218. She also produced statistics which showed that, comparing men and women with deficient contribution records, whereas only 9% of the male population of retirement age numbering 23,866 had deficient records, 64% of women of retirement age numbering 191,879 had such records. The statistics further showed that 73,671 divorced men and 72,334 divorced women remarried before respectively 65 and 60. Assuming that 9% of such men and 64% of such women had deficient records the result would be that 6,630 men would be prevented by section 48(3) from having the benefit of section 48(1) compared to 46,300 women. Mr James contended that that result showed that the provision was discriminatory against women contrary to Article 4(1).

16. Ms Sharpston submitted that the cases to which she had referred showed that it was necessary to go further than absolute numbers; she said that, having identified the relevant starting pools for each gender, discrimination had to be considered by reference to the proportions in each pool. So, she said, in regard to the men's pool, 6,630 as a percentage of 23,866 produced 28% and, in the women's pool, 46,300 as a percentage of 191,879 produced 24% thus showing that the provision far from discriminating against women in fact discriminated in their favour. I find that submission surprising. Given that the population is roughly equally divided between men and women I should have thought that if a provision bears disproportionately against women it is prima facie discriminatory and it should be no answer to say that as the proportion of men and women in their own gender pools is roughly the same there is no discrimination; the prima facie discrimination might appear to have vanished by sleight of hand, or of numbers. I do not however propose to decide this point because, for reasons to which I will next come, I am of the view that even if section 48(3) is discriminatory against women such a discrimination is permitted under the

Directive.

17. Article 7 of the Directive provides -

> "1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:
>
> (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
>
> (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
>
> (c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
>
> (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
>
> (e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme."

Ms Sharpston submitted that if section 48(3) was contrary to Article 4 then that was permitted by (c) or perhaps (e) of Article 7.

18. Mr James referred to the words at the beginning of Article 7(1) " ... shall be without prejudice to the right of Member States to exclude ... " and submitted that as Article 7 merely allowed Member States to exclude from the Directive the various matters on the list, there had to be some positive action on the part of the Member State to show that the permitted derogation had, so to speak been activated; at the very least, Mr James said, the provision should in clear terms show a positive intention to discriminate. I do not accept that submission. It seems to me that all that is required is that the provision complained of should be one to which an item on the list corresponds. That I think is consistent with the very recent judgment of the European Court in Bramhill and Chief Adjudication Officer (7 July 1994). Next, Mr James submitted, as I understood it, that Article 7(1)(c) did not apply because this claimant's case did not concern entitlement "by virtue of the derived entitlements of a wife" but rather of an ex-wife. It is true that the claimant's relevant status, in relation to her first husband, is now that of ex-wife but I should have thought that it is entitlement derived from

her first husband's contributions when she was his wife and by virtue of her being so that is in issue. Accordingly I also reject that submission and I agree with Ms Sharpston that any discrimination in this case falls within Article 7(1)(c) as relating to the granting of old-age entitlements by virtue of the derived entitlements of a wife and is thus excluded from the scope of the Directive. I understood Mr James to accept that, if the two points I have mentioned failed, the alleged discrimination in this case was permitted by Article 7(1)(c). I do not need to consider Article 7(1)(e).

19. The outcome is that the claimant scores what I am afraid is a hollow victory. The tribunal's decision is erroneous in law for the reasons referred to above. But my decision in substitution for theirs is to the same effect namely that section 48(1) of the Contributions and Benefits Act does not, because of sub-section (3), assist the claimant.

(Signed) R A Sanders
Commissioner

Date: 26 August 1994