

SOCIAL SECURITY ACTS 1975 TO 1990
CLAIM FOR SICKNESS BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that -

(a) the unanimous decision of the Newcastle-upon-Tyne social security appeal tribunal given on 15 December 1988 is erroneous in point of law and is accordingly set aside;

(b) the claimant is entitled to sickness benefit with effect from 22 January 1988.

2. On 21 June 1990 I referred the case to the Court of Justice of the European Communities for a preliminary ruling, pursuant to Article 177 of the EEC Treaty. For the sake of clarity and completeness I set out paragraphs 2 to 7 inclusive of that reference -

"2. I held an oral hearing of this matter at Liverpool on 14 November 1989. The claimant did not attend and was not represented. The Chief Adjudication Officer was represented by Mr Michael Kent of Counsel, instructed by the Solicitor to the Departments of Health and Social Security. Following the hearing I came to the conclusion that the appeal raised a question of construction which required determination by the Court of Justice of the European Communities before I could proceed further with this appeal. I so informed the parties, from whom I invited comments, and I am greatly indebted to Mr Kent for his assistance in formulating the question for the Court.

3. The claimant, who is a woman now aged 26 and of British nationality, was employed as a home-help in London from a date in May 1986 until 3 July 1987. On 19 July 1987, following separation from her husband, she moved to the Republic of Ireland, where she has resided ever since. The claimant has not worked, either in employment or self-

employment, since 3 July 1987 and, on 22 January 1988, her doctor in Ireland certified her as being unfit for work due to low back pain. On the same day, 22 January 1988, the claimant applied to the Department of Social Welfare of the Republic of Ireland for disability benefit. The claim was referred by the Department of Social Welfare to the United Kingdom Department of Social Security, to whom the claimant formally applied for sickness benefit on 23 February 1988.

4. The claimant's United Kingdom application was referred by the adjudication officer to the Newcastle-upon-Tyne social security appeal tribunal who, on 15 December 1988, ruled that the provisions of section 82(5) of the Social Security Act 1975, as amended, precluded entitlement to such benefits as the claimant was absent from Great Britain and, moreover, that that statutory provision was not in conflict with the provisions of Regulation 1408/71 EEC. I note that the tribunal accepted the facts as set out in the preceding paragraph, and it is common ground that but for her absence from Great Britain the claimant would have been entitled to sickness benefit payable by the UK Department of Social Security.

5. In order, as I understand it, to clarify the law, the adjudication officer appealed against the tribunal's decision and, as I have set out in paragraph 2 above, the matter came before me on 14 November 1989. In summary Mr Kent's submissions to me were confined to the effect of European Community Law and in particular Articles 10, 19 and 25 of Regulation 1408/71 EEC, read in conjunction with Article 51 of the Treaty Establishing the European Economic Community, and the effect of those provisions upon the relevant United Kingdom legislation, namely section 82(5) of the Social Security Act 1975 and regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 [SI 1975/563] ('the Persons Abroad Regulations').

6. Section 82(5) of the 1975 Act provides that -

'(5) Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit, and an increase of benefit shall not be payable in respect of any person as the beneficiary's wife or husband for any period during which the person

(a) is absent from Great Britain; or

(b) is undergoing imprisonment or detention in legal custody'.

Regulation 2(1) of the Persons Abroad Regulation sets out certain circumstances in which section 82(5) is not to apply, none of which is relevant to the instant case.

7. The preliminary ruling of the Court of Justice of the

European Communities is accordingly requested on the following questions -

Whether, upon the proper interpretation of Article 51 of the Treaty establishing the European Economic Community and Article 19 of Regulation 1408/71 EEC, a national of a member State resident in one member State ('Member State A') who becomes unfit for work by reason of sickness while resident in that member State (member State A), who prior to becoming so unfit was unemployed and who was last employed (or self-employed) in another member State ('member State B'), where that person also then resided is entitled to sickness benefit payable by the competent institution of member State B (assuming that all conditions, other than those relating to residence, of the legislation of member State B are satisfied for the purposes of entitlement to such benefit), or whether such a person's entitlement is governed solely by Article 25 of Regulation 1408/71 EEC?"

3. The judgment of the European Court in case C/215/90 was delivered on 10 March 1992 and a copy thereof is annexed as an appendix to this decision.

4. The judgment of the European Court is, I believe, self-explanatory and in these circumstances I propose to deal with this matter shortly. Paragraph 7 of the judgment succinctly encapsulates the question as being -

" ... whether Article 19 of Regulation No 1408/71 must, in the light of Article 51 of the Treaty, be interpreted as applying to a national of a Member State, who after being in paid unemployment in one Member State, went to live in another Member State where she fell ill, even though she had not worked there before falling ill."

Having noted in paragraph 13 the Court's consistent definition of "worker" as covering -

" ... any person having the status of a person insured under the social security legislation of one or more Member States, whether or not pursuing a professional or trade activity ..."

and that the claimant in the instant case, Mrs Twomey, plainly has -

" ... the status of a person insured under the legislation of the United Kingdom, inasmuch as she would be entitled to sickness benefit if she resided in the United Kingdom",

the Court, in paragraph 18 of the judgment, answered the question in the affirmative.

5. In the light of the European Court's judgment the decision

of the tribunal, that -

"The appellant is disqualified for receiving UK Sickness Benefit from and including 22.1.88",

is plainly erroneous in point of law and accordingly must be set aside. I cannot leave this matter, however, without paying tribute to the exceptional thoroughness and care with which the tribunal considered this case, their reasons for their decision running to some 5 single-spaced typed pages. Nevertheless, while in my judgment they correctly interpreted the effect of Article 25, they clearly came to the wrong conclusion regarding the meaning of "an employed or self-employed person" in Articles 19 and 22 of Regulation 1408/71

6. In all the circumstances of this case it has not been necessary for me to resume the oral hearing. It is plainly expedient that, pursuant to my powers under section 23(7)(a)(i) of the Social Security Administration Act 1992, I should give the decision which the tribunal should have given, and I do so in paragraph 1(b) above. For the sake of completeness I accept the submissions in the letter dated 2 April 1992 from Mrs E A Saxon of the office of the Solicitor to the Departments of Health and Social Security, that Article 25 of Regulation 1408/71 does not assist Mrs Twomey and that no point arises on Article 10.

7. The adjudication officer's appeal is allowed.

(Signed) M H JOHNSON
Commissioner

Dated: 23 July 1992

APPENDIX

European Court's judgment in case C-215/90

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS
—
DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL
—
GERICHTSHOF
DER
EUROPAISCHEN GEMEINSCHAFTEN
—
ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
—
COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES
—



LUXEMBOURG

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES
—
CÚIRT
BHREITHIÚNAIS NA
COMHPHOBAL EORPACH
—
CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE
—
HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN
—
TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS
—

JUDGMENT OF THE COURT
(Fifth Chamber)
10 March 1992

(Social security - Sickness benefits - Recipients)

In Case C-215/90

REFERENCE to the Court under Article 177 of the EEC Treaty by a Social Security Commissioner, London, for a preliminary ruling in the proceedings pending before him between

Chief Adjudication Officer

and

Anne Maria Twomey,

on the interpretation of Article 51 of the EEC Treaty and Articles 19 and 25 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal L 230, p. 6),

THE COURT (Fifth Chamber),

composed of: Sir Gordon Slynn, President of the First Chamber, acting as President, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: G. Tesaurò

Registrar: H. A. Rühl, Principal Administrator,

after considering the observations submitted on behalf of

the Chief Adjudication Officer, by Michael Kent, Barrister,
instructed by P.K.J. Thompson, Solicitor,

the Commission of the European Communities, by Karen Banks, a member
of its Legal Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from the Chief Adjudication Officer, from the
German Government, represented by Claus-Dieter Quassowski, acting as Agent,
and from the Commission, at the hearing on 25 September 1991,

after hearing the Opinion of the Advocate General delivered at the sitting
on 24 October 1991,

gives the following

Judgment

1 By order of 21 June 1990, which was received at the Court on 23 July 1990, a Social Security Commissioner, London, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 51 of the EEC Treaty and Articles 19 and 25 of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation No 2001/83 of 2 June 1983.

2 That question was raised in a dispute between Anne Maria Twomey and the Chief Adjudication Officer.

3 Mrs Twomey, a United Kingdom national, was employed as a home help in London from May 1986 to 3 July 1987. On 19 July 1987 she settled in Ireland and on 23 February 1988 she applied to the United Kingdom Department of Social Security for sickness benefit. Until the latter date, Mrs Twomey had not engaged in any occupation in Ireland.

4 Her claim was referred to the Social Security Appeal Tribunal, Newcastle-upon-Tyne, which rejected it on the ground that United Kingdom law precludes payment of the benefits sought where the claimant does not reside in the United Kingdom.

5 In order to seek clarification on the applicable law, the Chief Adjudication Officer appealed against that decision to a Social Security Commissioner who decided to stay the proceedings in order to request the Court to give a preliminary ruling on the question:

"Whether, upon the proper interpretation of Article 51 of the Treaty establishing the European Economic Community and Article 19 of Regulation (EEC) No 1408/71, a national of a Member State resident in one Member State ('Member State A') who becomes unfit for work by reason of sickness while resident in that Member State (Member State A), who prior to becoming so unfit was unemployed and who was last employed (or self-employed) in another Member State ('Member State B'), where that person also then resided is entitled to sickness benefit payable by the competent institution of Member State B (assuming that all conditions, other than those relating to residence, of the legislation of Member State B are satisfied for the purposes of entitlement to such benefit), or whether such a person's entitlement is governed solely by Article 25 of Regulation (EEC) No 1408/71".

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 By its question, the national court seeks in substance to ascertain whether Article 19 of Regulation No 1408/71 must, in the light of Article 51 of the Treaty, be interpreted as applying to a national of a Member State, who after being in paid employment in one Member State, went to live in another Member State where she fell ill, even though she had not worked there before falling ill.

8 Article 19 (1) of the regulation provides as follows:

"1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

- (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in

accordance with the provisions of the legislation administered by that institution as though he were insured with it;

- (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State."

9 It is necessary in the first place to consider the German Government's argument to the effect that Article 13 (2) (a) of Regulation No 1408/71, which subjects persons employed in the territory of one Member State to the legislation of that State, does not apply to a person in Mrs Twomey's position, since she is no longer employed in the United Kingdom. In its view, therefore, she is subject to the legislation of the Member State in which she resides, with the result that Article 19 is inapplicable because Mrs Twomey resides within the territory of the competent Member State.

10 That argument cannot be upheld. As the Court stated in its judgment of 12 June 1986 in Case 302/84 (Ten Holder v Nieuwe Algemene Bedrijfsvereniging [1986] ECR 1821, at paragraphs 14 and 15), a worker who has ceased to carry on an activity in the territory of a Member State continues to be subject to the legislation of that State if he has not taken up employment in another Member State. Only workers who have definitively ceased all professional or trade activity fall outside the scope of Article 13 (2) (a) of Regulation No 1408/71 (see inter alia the Court's judgment of 21 February 1991 in Case C-140/88 Noij v Staatsecretaris van Financiën [1991] ECR I-387, at paragraphs 9 and 10).

11 The Chief Adjudication Officer considers that Article 19 applies only to persons who, at the time when they fell ill, were carrying on an activity as employed or self-employed persons in a

Member State other than that of their residence. He points out that a wider interpretation of Article 19, bringing within the scope of that provision any persons falling ill at a time when they were not in any kind of employment, would jeopardize the cohesion of the system applicable to unemployed persons. An unemployed person seeking employment in the territory of a Member State other than the competent State is entitled to unemployment benefit for only three months (Article 69 of Regulation No 1408/71), whereas sickness benefit would be paid to him without any limitation in time.

12 The Chief Adjudication Officer points out in this regard that if the objectives of Article 51 of the Treaty are achieved in relation to unemployment benefit by the aforesaid provisions, it cannot be argued that those objectives require more favourable provisions in relation to sickness and maternity benefit.

13 It should be noted first of all that, as the Court has consistently held, the definition of the concept of "worker" in Article 1(a) of Regulation No 1408/71 has a general scope and covers any person having the status of a person insured under the social security legislation of one or more Member States, whether or not pursuing a professional or trade activity (see inter alia the judgment in Case 182/87 Algemene Ziektefond Drenthe-Platteland v Pierik [1979] ECR 1977, at paragraph 4). Mrs Twomey does have the status of a person insured under the legislation of the United Kingdom, inasmuch as she would be entitled to sickness benefit if she resided in the United Kingdom.

14 Next, it should be noted that if the intention of the Community legislature had been to limit the scope of Article 19 of Regulation No 1408/71 to persons falling ill whilst employed, it would have made

express provision to that effect, as it did in Article 71(1) of that regulation.

15 To interpret Article 19 as applying to all workers within the meaning of Regulation No 1408/71 does entail the difference of treatment referred to by the Chief Adjudication Officer. However, as the Commission has rightly pointed out, such a difference can be explained by the fact that the scope of Article 19 differs from that of Article 25. Whilst the latter provision is applicable to unemployed persons temporarily seeking employment in a Member State other than the competent State, Article 19 applies to workers who reside in a Member State other than the competent State, that is to say workers who have their "habitual residence" in that State (Article 1(h) of the regulation).

16 Finally, it should be noted that, as the Court has consistently held (see the judgment in Pierik, cited above), the concept of "worker" in Article 22 of Regulation No 1408/71 covers pensioners. Since that article has been inserted in the same section of the regulation as Article 19, the same term used in the latter provision cannot be interpreted as referring only to workers in active employment.

17 It follows that a restrictive interpretation of the concept of "worker" for the purposes of Article 19, which would exclude a person in Mrs Twomey's position from the scope of that provision, cannot be justified.

18 The answer to the national court's question must therefore be that Article 19 of Regulation No 1408/71 applies to a national of a Member State, who after being in paid employment in one Member State

went to live in another Member State where he fell ill, even though he had not worked there before falling ill.

Costs

- 19 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by a Social Security Commissioner, London, by order of 21 June 1990, hereby rules:

Article 19 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal L 230, p. 6), applies to a national of

a Member State, who after being in paid employment in one Member State went to live in another Member State where he fell ill, even though he had not worked there before falling ill.

Slynn

Grévisse

Moitinho de Almeida

Rodríguez Iglesias

Zuleeg

Delivered in open court in Luxembourg on 10 March 1992.

Gordon Slynn

President of the First Chamber, acting
as President of the Fifth Chamber

J.-G. Giraud
Registrar

MHJ/1/LM

SOCIAL SECURITY ACTS 1975 TO 1990

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATIONS 24(1)

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Page 3 Paragraph 4 line 8 delete "unemployment"
insert "employment"

(Signed) M H Johnson
Commissioner

Date: 26 May 1993

Commissioner's File: CS/078/1989
Star No: 54/92