Attendance Allowance – Exportability

CPAG

MJG/SH/10

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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow (to the limited extent indicated below) the claimant's appeal against the decision of the social security appeal tribunal dated 4 December 1990, as that decision is erroneous in law and I set it aside. My decision is that, in respect of claim for Attendance Allowance made on 3 September 1988, the claimant is not entitled to that Allowance because (i) the claimant was not at the date of claim, nor in respect of any relevant day, ordinarily resident or present in Great Britain and her absence from Great Britain was not temporary: Social Security (Attendance Allowance) (No. 2) Regulations 1975, S.I. 1975 No. 590, regulation 2; (ii) although the claimant was a "person covered" within the meaning of Article 2 of Council Regulation (EEC) No. 1408/71, her claim to Attendance Allowance is not assisted by that Regulation: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a woman born on 4 December 1927. The appeal is against the unanimous decision of a social security appeal tribunal dated 4 December 1990, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 2 July 1990 in the following terms,

> "There is no entitlement to Attendance Allowance. This is because the claimant has not been present in Great Britain and cannot be treated as being so present for a period of, or periods amounting in the aggregate to at least 26 weeks out of the past 12 months. .. Social Security Act 1975, section 35(1). Social Security (Attendance Allowance) (No. 2) Regulations, regulation 2(1)(c) and 2(2))."

3. That decision is in fact in similar terms to my decision in paragraph 1(i) above and is not contested. The claimant lives in Spain and has done so since 1985. There is no suggestion that her presence there is "temporary".

4. However, the adjudication officer made a detailed written submission to the tribunal on whether the claimant's case was assisted by Council Regulation (EEC) No. 1408/71. The local adjudication officer conceded that the claimant, having previously been employed in Great Britain but now retired, came within the Regulation (see Article 2). Nevertheless the tribunal held that, "the EEC Regulations (No. 1408/71) are not relevant as they apply to migrant workers, and [the claimant] is not working".

5. There is no doubt that that part of the tribunal's decision is incorrect in law, as is agreed by the parties. The claimant was a retired employed person and as such was within the Regulation. I confirm the correctness of the concurring submissions of the parties on that point and I therefore must set the tribunal's decision aside as being erroneous in law. There however remains for consideration the question of whether or not EEC Regulation No. 1408/71 assists the present claim. I have held that it does not for the reasons given in detail below.

6. The claimant's appeal to the Commissioner was the subject of an oral hearing before me on 24 May 1993 at which the claimant was not present but was represented by Mr M Rowland of Counsel. The adjudication officer was represented by Mr P Duffy of Counsel. Both Mr Rowland and Mr Duffy addressed me at length on the legal issues regarding the EEC 'claim'. I am indebted to them for their assistance to me at the hearing and for the trouble taking by those instructing them, to provide detailed documentary material relating to the case-law of the European Court.

7. The foundation of the claimant's case is Article 10.1. of Council Regulation (EEC) No. 1408/71, the English version of which reads as follows,

> "Article 10
> Waiving of residence clauses ...
> 1. Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory or a Member State other than that in which the institution responsible for payment is situated."

8. Attendance Allowance is undoubtedly within the phrase "invalidity ... cash benefits" in Article 10.1. That is conceded by the parties. In R(A) 4/75, Mr. Commissioner Monroe held that Attendance Allowance was not payable to a claimant not present in Great Britain but resident in an EEC Member State (Republic of Ireland), because the claim for Attendance Allowance had not been made until after the claimant had gone to live in the Republic of Ireland. In paragraph 14 of his decision the learned Commissioner, speaking of Article 10.1., said,

> "[This] provision on the widest possible interpretation (which does not seem to be affected expressly by any other provision of the regulation) would entitle every person in the European Economic Community who satisfies the medical conditions and other conditions not relating to residence to qualify for the British attendance allowance. Its benefit is presumably limited to workers who are in terms of the Regulation subject to the legislation of the United Kingdom. But in my judgment there is a further limitation on the 'exportability' of benefits provided for in the Article inherent in the phrase 'benefits ... acquired under the legislation of one or more Member States', viz. that the right to the benefits must be acquired before it can be exported. The time when benefits can be said to be acquired may vary as between different benefits, and especially as between contributory and non-contributory benefits, but in my judgment the right to the non-contributory attendance allowance cannot be said to be acquired before the medical conditions for such allowance are satisfied. As it is not in the present case suggested that the claimant satisfied the medical conditions at any time before his accident in January 1973, since when he has never been resident or present in the United Kingdom, Article 10 does not help him."

9. At this point I should pause to say that it is contended by Mr Rowland on behalf of the claimant that, unlike the claimant in R(A) 4/75, the present claimant could well have satisfied the medical conditions for attendance allowance before she left Great Britain for Spain in 1985. However Mr Rowland also conceded that the provisions of section 35(4) of the Social Security Act 1975 that "a person shall not be entitled to an attendance allowance for any period preceding the date on which he makes a claim for it" and of section 165A(1) of the 1975 Act that "no person shall be entitled to any benefit unless ... he makes a claim for it ..." preclude any suggestion that in fact the claimant was "entitled" to attendance allowance until she made her claim on 3 September 1988. There is therefore no distinction in principle between the present case and R(A) 4/75.

10. In R(S) 9/81 the same Commissioner who decided R(A) 4/75 (Mr Commissioner Monroe) stated (in paragraphs 10 and 11),

> "In decision R(A) 4/75 it was indicated that rights to benefit had to be acquired before they could be 'exported' under this provision. But no indication of what was meant

by 'acquired' was given beyond the conclusion that a right to attendance allowance, a non-contributory benefit, was not acquired before the medical conditions for an award were satisfied. The European Court of Justice had been invited in Case 51/73 Sociale Verzekeringsbank v. Smieja [1973] ECR 1213 to state the meaning of the word 'acquired' in the Article 10 but did not find it necessary to do so. More recently in Case 32/77 Giuliani v. Landesversicherungsanstalt Schwaben [1977] ECR 1857 that Court (in paragraph 6 of their decision) stated that 'the waiving of residence clauses pursuant to Article 10 of Regulation No. 1408/71 has no effect on the acquisition of the right to benefit'. This I think points to a simple way of ascertaining without defining the word 'acquired' in what circumstances a claimant can rely on Article 10 and incidentally of supporting the conclusion (if not the reasoning) in decision R(A) 4/75. The Giuliani decision draws a distinction between the conditions for the acquisition of a right to benefit (such as the conditions as to residence and presence commonly to be found in non-contributory benefits) and 'residence clauses' which deprive a person of the right to payment even though the general conditions of entitlement are satisfied, such as the disqualification under section 82(5)(a) of the Social Security Act 1975. Relief from the latter class of provision and from that class only is afforded by Article 10."

11. If R(A)4/75, as explained in R(S)9/81, is still good law (as I hold it is - see below) there would be no doubt that the present claim to Attendance Allowance must fail. Moreover, I look at the words of Article 10.1. providing that a relevant Benefit "acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation ..." It does not seem to me that any of the words "reduction, modification, suspension, withdrawal or confiscation" are apt to relate to a case where there is simply no initial entitlement to benefit. In answer to a question by me, Mr Rowland suggested that in fact the word "confiscation" was appropriate or alternatively the word "suspension". I do not read these words as having those meanings. All the words in the phrase, "reduction, modification, suspension, withdrawal or confiscation" naturally apply only to a situation where a claimant already has a benefit and it is then subsequently forfeited by reason of the claimant's going to reside in another Member State.

12. However, Mr. Rowland also submitted that since R(A) 4/75 and R(S) 9/81 were decided, there have been a series of decisions of the European Court which show that Commissioner Monroe's conclusions in those two reported decisions were wrong. Those cases are listed in paragraph 5 of the written submission by Mr Rowland on behalf of the claimant (dated 15 March 1993) and are as follows. Bestuur der Sociale Verzekeringsbank v Smieja (case 51/73) [1973] ECR 1213; Caracciolo (née Camera) v Institut National d'Assurance Maladie-Invalidité and Union Nationale des

Mutualités Socialistes (Case 92/81) [1982] ECR 2213, Caisse régionale d'assurance maladie Rhône-Alpes v Giletti (Cases 379 to 381/85 and 93/86) [1987] ECR 955; Winter-Lutzins v Bestuur van de Sociale Verzekeringsbank (Case C-293/88) [1990] ECR I-1623); and Newton v Chief Adjudication Officer (Case C-356/89) [1992] 1 CMLR 149. Mr. Rowland stated that he did not rely on the European Court's decision in the Twomey case (Appendix to decision CS/078/89, to be reported as R(S) 3/92. I note that the Commissioner there accepted that Article 10 had no application.

13. I note that the case of Smieja was in fact considered by Mr Commissioner Monroe in R(S) 9/81. The others are subsequent to Mr Monroe's decision in R(S) 9/81. At the hearing Mr Rowland and Mr Duffy took me in detail through each of these cases. The case of Newton is clearly distinguishable on the ground that the claimant was already receiving mobility allowance before he left Great Britain. The decision of the European Court was that the allowance could not be taken away from the claimant simply because he went to live in another Member State. The case does not therefore assist.

14. The remaining cases all concern situations where, before leaving the Member State the claimant already was receiving a Benefit from that State. What was in issue was an accretion, supplement, or 'follow on' to that benefit, of some kind or other. All those cases are in my view therefore distinguishable from the present case where the claim to Attendance Allowance was an initial claim and not in any sense an accretion etc. to the Retirement Pension that the claimant already had. Mr Rowland contended that the Giletti case was, when closely examined, not a case of an accretion etc. to an existing benefit but a case of a claim to a new benefit. However the account of the relevant benefit at pages 9.56-9.57 of the Giletti case [1987] ECR 955 is,

> "In France, a .. National Solidarity Fund was set up with a view to promoting a general welfare policy for old people, in particular by improving retirement and other pensions and old-age allowances. The fund grants an 'allocation supplémentaire'(supplementary allowance) to the recipients of old-age or invalidity benefits where their resources are inadequate. ... it appears from those provisions that the supplementary allowance is financed out of tax revenue and that there is no requirement that the person to whom it is granted should be a retired, employed or self-employed worker. The benefit is paid as a supplement to resources of any kind, including contributory benefits, so as to achieve what is regarded as the indispensable minimal level, having regard to the cost of living in France. ... the supplementary allowance is payable to foreign nationals residing in France only in accordance with reciprocal international agreements. [The relevant provision of French law] also provides that payment of the supplementary allowance is to cease where the recipient transfers his residence outside the territory of the French Republic."

15. At pages 976-977 of the Report, the Court first held that the supplement in question came within Article 10(1) and then held that Article 10(1) prevented its being denied to or withdrawn from French nationals who had gone to another Member State. At paragraph 15 of the Court's judgment the Court said,

> "According to the judgment of 10 June 1982 (case 92/81 Caracciola (Née Camera) v. INAMI [1982] ECR 2213), those considerations imply not only that the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated."

16. Prima facie those words in paragraph 15 might appear to cover the present case. However, when one examines the Caracciolo case it appears that what was in issue there was simply a ruling (to quote the headnote) that, "Article 10.1 [of an earlier EEC Regulation to similar effect] must be interpreted as meaning that the insurance institution of the competent Member State is not permitted to apply to invalidity benefits the principle of territoriality." However, the "invalidity benefit" involved was, it appears, like invalidity benefit in the United Kingdom, i.e. simply a 'follow-on' from or supplement to sickness benefit. But Attendance Allowance is not an accretion to or follow-on from any existing Benefit but is a benefit sui generis and subject to its own conditions. I therefore conclude that neither the Caracciolo case nor the Giletti case have any application to the present case and that the general principle stated by Mr Commissioner Monroe in R(A) 4/75, as explained in R(S) 9/81, still applies.

17. Lastly I would mention that submissions were made to me by Mr Rowland and Mr Duffy on the question of whether or not I should refer this matter to the European Court. Both submitted that the case should so obviously be decided in their favour that no reference was necessary! I have given due consideration to the case-law on references to the European Court. I am prepared to accept the combined submissions of Mr Rowland and Mr Duffy that, if there is to be a reference, it would be better for me

to make it now. I have borne all this in mind but in my view the matter is abundantly clear on the reported Commissioner's decisions I have cited. It is not altered by the decisions of the European Court. The principle is a clear one and I do not regard it as necessary to refer this matter to the European Court.

(Signed) M.J. Goodman
Commissioner

(Date) 11 June 1993