Commissioner Jurisdiction On Jurisdiction * 54/97
Forum ECJ's Ruling On Indirect
JMe Discrimination

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SOCIAL SECURITY ACTS 1975 TO 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: John O'Flynn

Social Security Appeal Tribunal: Central London

Case No: 7/03494

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the Central London social security appeal tribunal dated 17 July 1989 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute my decision having made further findings of fact (Social Security Administration Act 1992, section 23(7)(a)(ii)). That decision is that the claimant is entitled to a funeral payment of £900, made up as explained in paragraph 22 below.

2. The claimant is an Irish national, who originally came to the United Kingdom in 1944 and has resided here since. He was employed in the United kingdom until his early retirement in 1982. In August 1988 his son, Michael, died in the United Kingdom. The claimant took responsibility for the costs of the funeral. A religious service was held in the local parish church in London, then the coffin was flown to Eire and the burial took place in the family grave in the Kilpatrick Cemetery, Tipperary. On 1 September 1989 the claimant, who was at that date entitled to housing benefit, claimed a funeral payment from the social fund, submitting an estimated invoice for £1000.50 from funeral directors in London. In addition, the charge for the use of the church in London and the priest's services was £70.

3. The adjudication officer on 15 November 1988 decided that the claimant was not entitled to a payment because the funeral took place outside the United Kingdom. Under regulation 7(1)(c) of the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 (the 1987 Regulations) it was a condition of entitlement to a funeral payment that the funeral took place in the United Kingdom. That condition has remained part of the regulation 7 through the many changes in form down to today. On appeal, the appeal tribunal confirmed that decision, noting that regulation 3(1) defined "funeral" as "a burial or a cremation"

and that in this case the burial took place outside the United Kingdom.

4. On further appeal, Mr Commissioner Sanders on 8 March 1991 found that the appeal tribunal had erred in law by not dealing with the claimant's argument that regulation 7(1)(c) discriminated against Irish nationals in a way which was contrary to Article 7 of the Treaty of Rome. However, he reached the same result as the appeal tribunal, because he concluded that regulation 7(1)(c) did not discriminate against Irish nationals. That decision was set aside by the Court of Appeal on 29 July 1992, in O'Flynn v Chief Adjudication Officer. The appeal was remitted to a Commissioner for rehearing.

5. Following a further hearing Mr Commissioner Hallett adjourned the case pending the reference of four questions to the European Court of Justice (the ECJ) for a preliminary ruling. The ECJ, in paragraph 12 of its judgment (given on 23 May 1996), now reported at [1996] ECR I-2617 as O'Flynn v Adjudication Officer, summarised the questions as follows:

> "12. The order for reference shows that the Social Security Commissioner wishes to know whether Article 7(2) of [Council Regulation (EC) No 1612/68] precludes a provision, such as that in Regulation 7(1)(c) of the 1987 Regulations, which makes a grant of a payment to cover funeral expenses incurred by a migrant worker subject to the condition that the funeral takes place within the territory of the Member State whose legislation provides for that payment. Having regard to the arguments advanced before him, the Commissioner wishes to know in particular whether he should take account of the following factors: the proportion and nationality of the migrant workers who actually satisfy the condition at issue; how difficult it is in practice for migrant workers to satisfy that condition; and the reasons why a migrant worker fails to satisfy the condition at issue in a particular situation."

Regulation 1612/68 concerns the freedom of movement for workers within the Community. Article 7(2) provides that a migrant worker "shall enjoy the same social and tax advantages as national workers".

6. The ECJ's ruling (in paragraph 30 of the judgment and in the operative part) was that Article 7(2) does preclude a provision such as regulation 7(1)(c) which makes a grant of a payment to cover funeral expenses incurred by a migrant worker subject to the condition that burial or cremation take place within the territory of the Member State concerned. The ECJ dealt with all of Mr Commissioner Hallett's questions together. For ease of reference I shall set out the reasoning in the judgment, omitting the references to the ECJ's previous case-law):

> "14. The first point to note is that an allowance such as the funeral payment constitutes a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 and,

in accordance with that provision, migrant workers must enjoy that advantage under the same conditions as national workers.

15. The United Kingdom says that the purpose of a funeral payment is to ensure, in the light of its civic responsibilities and in the interests of public health, the decent burial or cremation in the United Kingdom of all deceased persons. The allowance is granted in a non-discriminatory manner, being paid to migrant workers and national workers alike if the burial or cremation takes place within the United Kingdom, and refused to migrant workers and national workers alike if the burial or cremation takes place outside the United Kingdom.

16. It is, however, to be noted that an allowance such as the funeral payment covers not only the necessary costs of the burial or cremation of the body but also all the costs incurred by the responsible member in order to ensure that the deceased receives a modest but decent funeral at a place near his home. The costs of transporting the coffin to a place of burial or cremation distant from that home are not covered by the payment.

17. The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.

18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers.

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law.

20. It follows from the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

21. It is not necessary in this respect to find that the provision in question does in practice affect a

substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.

22. A migrant worker will, in his capacity as responsible member, incur costs of the same type as, and of comparable amount to, those incurred by a national worker. On the other hand, it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin.

23. To make payment of any expenses incurred by a migrant worker in his capacity as responsible member subject to the condition that burial or cremation take place within the United Kingdom therefore constitutes indirect discrimination, unless it is objectively justified and proportionate to the aim pursued."

7. The ECJ could have stopped there. That would have left the position that, in view of the clear conclusion expressed in paragraph 23 of the ECJ's judgment, the condition in regulation 7(1)(c) of the 1987 Regulations must be found by the Commissioner to be indirectly discriminatory against migrant workers such as the claimant in the present case. So much has been accepted on behalf of the adjudication officer and the Secretary of State. However, it would then have been for the Commissioner to determine, applying the appropriate tests as defined in Community law, whether or not the condition is objectively justified and proportionate to the aim pursued.

8. But the ECJ did not stop there. In the course of the proceedings it had requested the United Kingdom Government to state what the reasons were to justify the condition in regulation 7(1)(c). Paragraphs 24 to 29 of its judgment are as follows:

"24. Although, as the United Kingdom submits, the Social Security Commissioner has not expressly raised the question of justification for the national provision at issue, the first question is, as the Advocate General observes at point 33 of his Opinion, a general one on the point as to whether such a provision is directly or indirectly discriminatory.

25. The Court therefore considers that, in order to give as complete and as useful a reply as possible to the national tribunal, it is necessary to examine that aspect of the problem.

26. As regards protection of public health, it suffices to note that that objective is also safeguarded if the body is transported outside the United Kingdom for burial or cremation in another Member State.

27. The United Kingdom has further put forward a justification based on the prohibitive cost and practical difficulties of paying the allowance if the burial or cremation takes place outside the United Kingdom.

28. However, in such a case, leaving aside the cost of transporting the coffin outside the United Kingdom, the expenses incurred within the United Kingdom by a migrant worker will be no different from those that would be incurred if burial or cremation took place within the United Kingdom. The cost of transporting the coffin to a place distant from the deceased's home is not covered in any event.

29. With respect to the costs of burial or cremation in another Member State, there is nothing to prevent the United Kingdom from limiting the allowance to a lump sum or reasonable amount fixed by reference to the normal cost of a burial or cremation within the United Kingdom."

9. When the case was referred to me after the ECJ's ruling, I directed the parties to make written submissions on how the appeal should be disposed of in consequence of the ruling. It was submitted on behalf of the claimant that the ECJ had decided all the issues requiring that regulation 7(1)(c) be disapplied in the claimant's case, including that of justification, and that all that remained for the Commissioner was to determine the amount of the funeral payment to be awarded. However, the submissions of the adjudication officer and, in particular, the Secretary of State for Social Security (dated 20 December 1996) were that the question of objective justification remained to be determined by the Commissioner, who should find that the territorial limitation in regulation 7(1)(c) was objectively justified and proportionate to the social policy aim pursued. Accordingly, I directed an oral hearing of the appeal. The claimant attended and was represented by Mr Richard Drabble QC, instructed by Mr Carlos Dabezies of Kensington CAB Legal Service. The adjudication officer and the Secretary of State were represented by Miss Philippa Watson, instructed by the Office of the Solicitor to the Department of Social Security.

10. Miss Watson submitted that the ECJ had expressed the intention that it would be for the national court to determine whether or not the territorial limitation was objectively justified. The case was an important one as the first in which the question of justification had arisen in the context of discrimination on the ground of nationality. Objective justification is a subjective matter which can only be determined in the light of the particular circumstances and practices. Miss Watson said that both those reasons would have been behind the ECJ's leaving the question to the national court. She accepted

that the ECJ had analysed the points put forward by the United Kingdom in justification, but submitted that what the ECJ had stated as guidance could only be of persuasive effect on the national court, so that I was bound to look at the entirety of the question of justification. She referred to cases in which the ECJ had decided that objective justification did exist and to cases in which it had explicitly referred the question of justification back to the national court. She did not submit that the ECJ did not have the power, in appropriate circumstances, to decide that objective justification did not exist, but submitted that it had not done so in the present case.

11. Miss Watson adopted the three categories of justification put forward in the Secretary of State's submission of 20 December 1996, which echoed the answers given by the United Kingdom in reply to the ECJ's question on justification (see the document dated 14 November 1995 at pages 206 to 210). These were, first, to ensure that all persons dying within the national territory are provided with a simple burial or cremation, by supplementing the statutory duties placed on local authorities with the provision to assist persons who take responsibility for a funeral, but because of limited means cannot afford the costs. The second category was the need to hold a balance between fulfilling public health obligations and exercising control over expenditure in the context of competing needs within the national social security budget. There was reference to expenditure of £49 million on social fund funeral payments in 1995/96. It was said that allowing for payment of funeral expenses of EC nationals in other Member States would add considerably to administrative complexities and that costs would be impossible or difficult to verify. Finally, it was pointed out that other Member States appear to have in place territorial restrictions on payment of costs associated with a funeral.

12. Mr Drabble submitted that the question of objective justification had effectively been determined by the ECJ, in a way which the national court was bound to follow. He put forward a fourfold classification of the approaches which could be taken by the ECJ in cases where a question of justification arose:

(1) to determine that the provision in question was obviously unjustifiable;
(2) to determine that it was obviously justified;
(3) to determine that the circumstances required detailed examination, which had to be carried out by the national court;
(4) to determine that every reason so far put forward was not capable of justifying the provision in question, but to leave the question to the national court in the light of any further reasons which might be put forward.

Mr Drabble submitted that the present case fell within category (1), in which case I would be bound to apply the ECJ's ruling, or at least within category (4). There would be no difference in the practical result because the Secretary of State had put forward no reasons in justification beyond those rejected by the ECJ. I shall refer later to the ECJ case-law.

13. Mr Drabble stressed that the expenses claimed in the present case were limited to those incurred in the United Kingdom, and which had been agreed by the adjudication officer as falling within the expenses allowable under regulation 7(2) of the 1987 Regulations. The issue of the provision of flowers, which had ben raised in the submission following the ECJ's ruling, was expressly withdrawn. Mr Drabble submitted that what had to be justified was a blanket rule which disallowed meeting even normally allowable costs incurred within the United Kingdom when the burial or cremation occurred outside the United Kingdom. Public health considerations could not justify such a rule: they were met just as much when a London resident was buried in Tipperary as when a London resident was buried in Aberdeen. Nor could the need to limit expenditure justify such a rule: costs incurred within the United Kingdom were just as verifiable as when the funeral was within the United Kingdom. And budgetary considerations in themselves could not justify a discrimination on the ground of nationality. Finally, Mr Drabble submitted that the information on practice in other Member States (which he did not necessarily accept as fully stating the position) was irrelevant, since it could simply be that the practices of many Member States were contrary to Article 7(2) of Regulation 1612/68, as revealed by the ECJ's decision in the present case.

14. I accept Mr Drabble's submissions on the effect of the ECJ's ruling. Indeed, I consider that the position taken by the Secretary of State was completely unarguable, as a matter of the meaning of the plain words used by the ECJ and of Community law.

15. Looking first at the ECJ case-law, that in my view supports Mr Drabble's fourfold classification. It is relatively easy to find support for categories (2) to (4). I shall not burden this decision with long extracts from decisions or with elaborate citations, but make brief reference to some decisions. Category (3) - where the circumstances are still to be investigated by the national court - is quite common. Thus, for example, in Bilka-Kaufhaus (Case 170/84) [1986] ECR 1607, Kowalska (Case C-33/89) [1990] ECR I-2591 and Lewark (Case C-457/93) [1996] ECR I-243 (where there is a particularly helpful discussion by Advocate General Jacobs), the question of whether a measure which discriminated on the ground of sex was suitable and necessary for achieving a legitimate social policy aim was expressly left to the national court. There is also clear support for category (4), where the ECJ gives guidelines for the national court, for instance rejecting certain arguments in principle, but leaving the decision on the facts to the national court. That was done in Rinner-Kühn (Case 171/88) [1989] ECR 2743 and Ruzius-Wilbrink (Case 102/88) [1989] ECR 4311. An example cited by Mr Drabble was Thomas (Case C-328/91) [1993] ECR I-1247, where the question was whether a discriminatory provision was necessarily and objectively linked to the difference in statutory pensionable age, so as to fall within a derogation in Article 7(1)(a) of Council Directive 79/7/EEC. In paragraph 13 of the judgment, the ECJ said:

"13. Although it is for the national court, in preliminary-ruling proceedings, to establish whether such a necessity exists in the specific case before it, the Court of Justice, which is called upon to provide the national court with worthwhile answers, has jurisdiction to give guidance based on the documents before the national court and the written and oral observations which have been submitted to it, in order to enable the national court to give judgment."

The ECJ went on to give very firm guidance on arguments put forward on the question, but its actual ruling merely directed the application of the test of a necessary and objective link. In Freers and Speckmann (Case C-278/93) [1996] I-1165, the approach in paragraph 13 of Thomas was described as settled law. The general principle is not limited to cases under Article 7(1) of Directive 79/7.

16. Category (2), where the ECJ has decided that, although prima facie indirect discrimination exists, there is an objective justification, is also now firmly established. It is supported by Molenbroek (Case C-226/91) [1992] ECR I-5943 and by Nolte (Case C-317/93) [1995] I-4625 and Megner and Scheffel (Case C-444/93) [1995] ECR I-4741. The most recent confirmation is in Laperre (Case C-8/94) [1996] ECR I-273. All of those cases arose under Article 4(1) of Directive 79/7, which precludes discrimination on the ground of sex in certain state social security benefits. In Molenbroek and Nolte the ECJ's ruling was that Article 4(1) did not preclude the particular provision, and in Nolte that was expressly said to be because it was necessary in order to achieve a social policy aim unrelated to any discrimination on the ground of sex. In Megner and Scheffel the ruling was that the effects of the particular provision did not constitute discrimination on the ground of sex, even though considerably more women than men were affected, because the provision was necessary in order to achieve such a social policy aim. The matter was taken further in Laperre, where the particular provision was found not to involve discrimination because the national legislature was reasonably entitled to consider that the provision was necessary in order to achieve such a social policy aim.

17. Since it is clearly established that the ECJ may, in appropriate circumstances, determine that objective justification does exist, so that there is then no discrimination on the ground of sex, one would expect it to follow that it may also determine that objective justification does not exist. Thus in principle Mr Drabble's category (1) should exist. Examples are harder to find. At first sight, De Weerd, née Roks (Case C-343/92) [1994] ECR I-571 appears to be one. The ECJ's ruling was that Article 4(1) of Directive 79/7 precluded the application of an indirectly discriminatory provision even if the adoption of the national legislation was justified on budgetary grounds. But in paragraph 17 of the judgment in Postuma-van Damme (Case C-280/94) [1996] ECR I-179 the ECJ explained that that ruling in De Weerd was concerned solely with the question whether an indirectly

discriminatory provision could be justified on budgetary grounds and could not be taken as pre-judging how other possible justifications should be assessed. That seems to put De Weerd into category (4). Richardson (Case C-137/94) [1995] ECR I-3407 is much closer, although it is a case on the derogation in Article 7(1)(a) of Directive 79/7. The ECJ expressed its ruling on the question of whether Article 7(1)(a) applied in the circumstances of the case as follows:

> "Article 7(1)(a) of Directive 79/7 does not allow a Member State which, pursuant to that provision, has set the pensionable age for women at 60 years and for men at 65 years also to provide that women are to be exempt from prescription charges at the age of 60 and men only at the age of 65."

The reason for that ruling, as expressed in the judgment, was that it had not been shown that the discriminatory provision on prescription charges was objectively and necessarily linked to the permitted difference in pensionable age. Thus the ruling went significantly further, in relation to matters left for determination by the national court, than that in Thomas.

18. Whether or not Richardson is the only example of a case within category (1) (before the present case), I consider that in principle the ECJ may give a ruling in that form. Miss Watson did not, as I understood her submissions, submit otherwise.

19. I must now come to what the ECJ in fact decided in the present case. I am completely satisfied that the only legitimate reading of the judgment and, in particular the terms of the ruling, is that the ECJ's reply to the questions referred falls into Mr Drabble's category (1). The ruling, after an analysis of the reasons for justification put forward by the United Kingdom is simply and starkly that Article 7(2) of Regulation 1612/68 precludes a provision such as regulation 7(1)(c) of the 1987 Regulations. The reason why that is a reply to the questions asked by Mr Commissioner Hallett is explained in paragraph 33 of the Advocate General's Opinion:

> "33. The question of a possible justification for the discriminatory condition at issue has - as the United Kingdom correctly observes - not been expressly put by the national tribunal. In Question 1, however, the Court is asked to answer the question whether a condition such as that at issue here infringes the prohibition of discrimination on grounds of nationality. Since there is no such infringement if the discrimination is justified, it appears to me to be necessary also to address this question briefly, in order to enable the national tribunal to reach a proper decision in the case pending before it."

Miss Watson cited that paragraph in support of her submissions, but in my judgment it goes plainly against them. Especially in view of the terms of the rulings in the cases cited above as examples of category (2), the question whether a provision of a

particular kind infringes a prohibition of discrimination clearly encompasses the issue of justification, which issue may be decided by the ECJ one way or the other.

20. Thus, I conclude that the issue of justification has been decided by the ECJ. I am therefore bound to apply that decision. It does not matter if I am wrong about that, because, as Mr Drabble submitted, in that event the ECJ's decision must properly be interpreted as within his category (4) and no additional reasons have been put forward in justification of regulation 7(1)(c) beyond those considered and rejected by the ECJ. So in applying, as I would be bound to, such strong guidance given by the ECJ, the case for the adjudication officer and the Secretary of State would necessarily be rejected. It is true that the matter of the practice of other Member States was not expressly mentioned by the ECJ, but it had been mentioned in the United Kingdom's reply to the specific question about justification. That reason for justification was impliedly rejected by the ECJ, and in any event is not capable of constituting justification. I may add that, if I had had to consider independently the reasons for justification put forward by the Secretary of State, I would have found that objective justification had not been proved, for the reasons submitted by Mr Drabble.

21. For those reasons, and as the claimant is a person who as a migrant worker falls within the protection of Article 7(2) of Regulation 1612/68, regulation 7(1)(c) must be disapplied in his case. Consequently, the appeal tribunal of 17 July 1989 erred in law in giving effect to regulation 7(1)(c) (as well as in failing to deal with the argument on Community law made for the claimant) and its decision must be set aside. It is clearly expedient that I should substitute my decision on the basis of the facts found by the appeal tribunal plus further findings necessary to determine the amount of the claimant's entitlement.

22. It was a matter of agreement that the claimant satisfied the other conditions of entitlement in regulation 7(1) of the 1987 Regulations apart from subparagraph (c). He had taken responsibility for the costs of the funeral, he had been awarded a qualifying benefit for the relevant period and he had claimed within the prescribed time. It was also a matter of agreement that the expenses claimed, amounting to £900, fell within regulation 7(2). The issue of the cost of flowers has been taken out of consideration and the costs claimed for have been carefully limited to those incurred within the United Kingdom and not in connection with the transport of Michael's body to Eire. In view of that agreement and the very long time since the claim was made, it would be neither seemly nor profitable to attempt to examine the circumstances in any more detail. It is not entirely easy to tell against which heading the various figures on the funeral director's account are meant to be put, but I accept that all of them, except the £170.50 freight charges, fall within regulation 7(2)(b) and (e) as representing the cost of an ordinary coffin and the undertaker's fees for the tasks undertaken in the United Kingdom preparatory to the funeral. Those come to £830. The charge for the use of the parish church

in London and the priest's services was £70. I do not know the exact nature of the service conducted, but I accept in the circumstances that it reflected a requirement of Michael's religious faith and falls within regulation 7(1)(f). The amount is below the limit of £75. Therefore, the total amount of the funeral payment to which the claimant is entitled is £900. My decision to that effect is set out in paragraph 1 above.

23. A number of other matters were discussed at the oral hearing which do not in the event arise for decision in the present case. I mention two matters which may arise in the cases of other migrant workers where regulation 7(1)(c) is disapplied. My comments are based on the form of regulation 7 which was relevant to the present case, and I stress that the form of regulation 7 (which has changed several times) in force at the relevant time for each case must be carefully considered. The first is the cost of transporting a body to another Member State for burial or cremation there. It might appear that an argument could be made that, once the condition that the funeral must have taken place in the United Kingdom has gone, the cost falls within regulation 7(2)(c) - the cost of transport for the coffin and bearers and one additional car. However, in paragraph 9 of Commissioner's decision R(IS) 11/91 it was held that in order to be allowable such a cost "must necessarily arise as an integral part of the event of burial or cremation and not from any preparatory activity". Thus the cost of transporting the deceased from Cheltenham, which was his home at the time of his death, to Wishaw in Scotland, where the burial had been arranged, was not allowed under regulation 7(2)(c). Nor was it allowed under regulation 7(2)(e) - undertaker's fees etc for a simple funeral, because the cost of the transport, with the time, distance and complication involved, was not commensurate with a simple funeral. The approach taken in R(IS) 11/91 to transport within the United Kingdom will have to be taken to cases where transport outside the United Kingdom is involved.

24. The second matter is the costs of the funeral in another Member State. In the present case, the claimant did not wish to bring those costs within the scope of his claim and produced no evidence about them. In other cases, claimants may well wish such costs to be covered. In such cases, if regulation 7(1)(c) has been disapplied, it seems to me that regulation 7(2) must be applied to costs incurred in the other Member State in the same way as if the funeral had taken place in a part of the United Kingdom distant from the deceased's home. Any consequent difficulties of verification will have to be faced. I express no opinion at all on the question whether in such a case the reasonable travelling costs of the responsible member either to arrange or to attend the funeral under regulation 7(2)(h) are limited to the costs of travel within the United Kingdom, as the express terms of regulation 7(2)(h) are limited.

(Signed) J Mesher
Commissioner

Date: 19 June 1997