

RETIREMENT PENSION

Whether there is a “minimum benefit” under UK legislation for the purpose of Article 50 of Regulation (EEC) No 1408/71—Effect of Declaration under Article 5 of that Regulation—Relevant change of circumstances.

The claimant, an Irish national now permanently resident in Great Britain, worked for part of his life in the Republic of Ireland and for part in the United Kingdom. Having retired in Great Britain from 31.5.73 and being entitled to old age benefit in accordance with Article 46 of Council Regulation (EEC) No. 1408/71 under both British and Irish legislation, he was on 27.3.73 awarded a British retirement pension calculated under Article 46. He was also awarded a supplement under Article 50 of that Regulation on the basis that United Kingdom legislation provided for minimum benefits as envisaged by that Article. The supplement represented the difference between the amount of the British and Irish pensions combined and the “theoretical amount” which would have been payable by way of a British retirement pension had the claimant in fact spent all his working life in the United Kingdom; this “theoretical amount” was regarded as the United Kingdom “minimum benefit” having regard to successive declarations of the United Kingdom on 18.6.73 and 25.10.75 under Article 5 of the Regulation to the effect that minimum benefit under British legislation was the minimum retirement pension (or equivalent widow’s benefits) provided by respectively the National Insurance Act 1965 and the Social Security Act 1975.

Subsequently the insurance officer took the view that there was no minimum benefit under United Kingdom legislation and, following a change in the rate of the Irish pension, he took the opportunity to review the award and to revise it with effect from 6.1.77 so as not to include the supplement.

The claimant appealed unsuccessfully to the local tribunal and made a further appeal to the Commissioner. In the light of a decision by the European Court of Justice (Case 35/77) *Beerens v Rijksdienst* [1977] ECR 2249, the Commissioner concluded that the withdrawal of the existing declaration and the issue of a revised United Kingdom declaration on 14.4.77 that there are no minimum benefits under British legislation was a relevant change of circumstances justifying the review of the award as from 14.4.77. Nevertheless, he found that there was a minimum benefit for purposes of Article 50 of the Regulation and so he ruled that the award should not be revised.

The insurance officer applied for judicial review of the Commissioner's decision and the High Court decided to refer, for a preliminary ruling by the European Court of Justice, the question whether United Kingdom legislation did provide for a minimum benefit for purposes of Article 50. The Court held (Case 22/81) *R v Social Security Commissioner, Ex parte Browning* [1981] ECR 3357:

“Article 50 of Regulation No. 1408/71 is to be interpreted as meaning that a “minimum benefit” exists only where the legislation of the State of residence includes a specific guarantee the object of which is to ensure for recipients of Social Security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions.”

In the light of that ruling the High Court (see [1982] 3 CMLR 177) accepted that there was no minimum benefit in Great Britain for the purposes of Article 50, but refused to grant the relief sought by the insurance officer, the Court holding that the Commissioner could have found in favour of the claimant on different grounds.

The insurance officer then appealed to the Court of Appeal (see [1984] 3 CMLR 192) which held that the award of a supplement was correct until the revised United Kingdom declaration of 14.4.77; that the change in the declaration was a relevant change of circumstances justifying review, and that there was no minimum benefit in Great Britain. The Commissioner's decision was accordingly quashed. The Commissioner gave a fresh decision.

Held in paragraph 1 that:

1. with effect from 14.4.77 the insurance officer's decision of 27.3.73 awarding a retirement pension (including a supplement) is to be reviewed under the Social Security Act 1975 section 104(1)(b) on the ground of a relevant change of circumstances; and
2. that decision is revised so that from 14.4.77 no supplement under Article 50 of Regulation (EEC) No. 1408/71 is payable.

1. My decision is that with effect from 14 April 1977 the decision of the insurance officer dated 27 March 1973 awarding to the claimant a retirement pension (including a supplement under Article 50 of Council Regulation (EEC) No 1408/71) is to be reviewed on the ground that there has been a relevant change of circumstances since the decision was given; and that on such review the decision is revised so as to exclude from 14 April 1977 any such supplement as aforesaid.

2. This appeal is one of a number of appeals arising out of the change that took place when the United Kingdom Government published a fresh declaration under Article 5 of the above EEC Regulation on 14 April 1977. I have given my reasons for the decision in the statement of reasons relating to this and other appeals which is annexed hereto.

(Signed) J. G. Monroe
Commissioner

REASONS FOR THE DECISIONS GIVEN IN THE APPEALS
ON THE FILES LISTED BELOW

Case A CP 33/78
Case B CP 33/79
Case C CP 29/81
Case D CP 30/81
Case E CP 43/81
Case F CP 31/81
Case G CP 32/81
Case H CP 34/81
Case J CP 39/81

1. In each of the above cases the claimant is a person who has worked for part of his life in the United Kingdom and for part of it in the Republic of Ireland and is now permanently resident in the United Kingdom. In consequence he has become entitled to retirement pensions in both the United Kingdom and in Ireland computed under domestic law but with the modifications provided for in Chapter 3 of Title III of Council Regulation (EEC) No. 1408/71 (Regulation 1408/71). One of the Articles in that Chapter (Article 50) provides for a person who is permanently resident in a Member State whose legislation provides for a minimum benefit for certain periods of insurance or residence, to have his pension supplemented to bring his aggregate pension in the two (or more) states to the level of that minimum. Article 5 of the Regulation required Member States to specify among other things such minimum benefits in Declarations to be notified to the President of the Council of the European Communities, such notifications to be published in the Official Journal of the European Communities.

2. The Government of the United Kingdom has in fact made three such Declarations in relation to minimum benefit, all of which were published in the Official Journal. The first such publication appeared in the Official Journal of 18 June 1973 (OJ 18.6.73 No. C 43/1-7) and was broadly to the effect that the rates of flat-rate old age and survivors pensions depending on the yearly average of contributions under the legislation then in force were the minimum benefit. The second publication was in the Official Journal of 25 October 1975 (OJ 25.10.75 No. C 245/1-3) and was broadly to the same effect taking account of the enactment of the Social Security Act 1975. The third was published in the Official Journal of 14 April 1977, (OJ 14.4.77 No. C 89/2) and was to the effect that there was no minimum benefit.

3. It is obvious that there was a change in the official view of the effect of Article 50 between the time of the second and third Declarations. In fact an award of retirement pension was in each case made to the claimant at some date before 1977 the rate of pension including a supplement under Article 50. This was followed by review well in advance of the publication of the third Declaration. The insurance officer in each case sought to take advantage of the fact that there had been a change in the Irish element in the claimant's pension, which affected the amount of the supplement, to review and revise the awards of pension so as to eliminate the supplement altogether in each case with effect from 6 January 1977. The claimant in each case appealed unsuccessfully to the local tribunal and in each case has now further appealed to the Commissioner. From this point the appeals have followed slightly differing courses.

4. The claimant's appeal in Case A above came before me along with another similar appeal (on file CP 7/79) as long ago as the year 1979. I allowed the appeal in both cases considering in substance that the original awards could not be reviewed at all with effect from 6 January 1977 and

could be reviewed, but not revised, with effect from 14 April 1977. The further history of the Appeal in Case A down to the present is summarised more fully in paragraphs 8 to 11 below. As there recounted my decision in Case A was in the end quashed on judicial review by Order of the Court of Appeal; and the matter now comes before me for fresh decision. The appeal in the case on file CP 7/79, which was also the subject of an application for judicial review, is still in suspense, no order quashing it on the same grounds having yet so far as I am aware been made.

5. The insurance officer never questioned that part of my first decision in Case A refusing review in respect of any period before 14 April 1977. When the appeals in Cases B, C, D and E came before me it was known that the matter was to come before the High Court and in each of these cases I gave an interim decision covering the period down to immediately before 14 April 1977 reserving the question in relation to any period from that date. In each of those cases therefore I need to deal only with the period from 14 April 1977.

6. The remaining cases (F, G, H and J) have not previously been considered by me. They differ from the others also in that it has now emerged that in each case the claimant had at some time before 1977 become entitled in Ireland to a contributory old age pension in lieu of his previous non-contributory pension, with the result that the amount of the Article 50 supplement should have been less than was in fact received even in the period before 6 January 1977; and that the pension to be awarded in respect of the period from the change of pension until immediately before 14 April 1977 will be less than it would have been if this change had not taken place. Effect can be given to this change, as it represented a relevant change of circumstances justifying review and revision of the decision from its date under section 104(1)(h) of the Social Security Act 1975. In consequence of such revision there has in these cases been an overpayment of benefit in respect of the period to 2 February 1977 the amount of which is stated in paragraph 1 of the substantive decisions in those cases. It is not suggested that the claimants were in any way lacking in due care and diligence in the matter and repayment of the amount overpaid is not required.

7. In order that I may give my reasons for the foregoing conclusions it is now necessary to go at somewhat greater length into the facts relating to the appeal in Case A, the claimant in which I shall refer to as "claimant A". When in or about the year 1976 there was a change in the official view as to the effect of Article 50 of Regulation 1408/71 the insurance officer waited to review the original award of retirement pension (which included an Article 50 supplement) until there had been a change in the rate of Irish pension that affected the amount of the supplement. On the basis of this he reviewed the award on the ground that there had been a relevant change of circumstances (within the meaning of section 104(1)(b) of the Social Security Act 1975) since the date when the decision was given. And he revised the decision not just to give effect to the change in the Irish rate, but also to provide that from 6 January 1977 no supplement was payable under Article 50. Claimant A appealed to the local tribunal. By the time of the local tribunal hearing the British Government had on 14 April 1977 substituted for the declaration of 25 October 1975 the declaration to the effect that there was no British minimum benefit. The local tribunal did not consider that this affected the matter and they dismissed the appeal. Claimant A then appealed to the Commissioner.

8. By the time the matter came before me (in Case A and in the case on file CP 7/79), the European Court of Justice's ruling in Case 35/77 *Beerens*

v Rijksdienst [1977] ECR 2249 had been promulgated. The terms of the ruling were as follows:—

“The fact that a Member State has specified a law in its declaration under Article 5 of Regulation No 1408/71 must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of the said regulation.”

The Court made it clear in paragraph 9 of their decision that the converse did not apply, so that the omission of a law from a declaration is not of itself proof that the law does not fall within the field of application of the regulation. The resulting conclusions that I reached may be summarised as follows:—

- (1) the changes in the Irish rates of pension fell to be dealt with (by virtue of Article 11 of Regulation 1408/71 relating to Member States' rules for revalorisation) in the same way as changes of rates of British pensions, i.e. without review under Schedule 14 to the Social Security Act 1975; and that accordingly such Irish changes could not be used as a basis for revision of the awards of pension. (This made it unnecessary to decide whether, as had been argued, it was not permissible to revise an award on a review based on a relevant change of circumstances further than was warranted by that change).
- (2) that in any case having regard to the *Beerens* ruling the awards must be taken as correct down to the date of the substitution of the fresh declaration on 14 April 1977 and that no revision on review could be effected before that date;
- (3) that whether or not any other matter was a relevant change of circumstances the publication of the fresh declaration was such a change justifying review from the date of its publication;
- (4) that, however, the first declarations were right, and there actually was a minimum benefit of the kind mentioned in Article 50 in Great Britain so that the awards were not to be revised.

9. The insurance officer applied for judicial review of my decision in the two cases questioning conclusions (1) and (4) above, but, seemingly, accepting conclusions (2) and (3). The High Court decided (on the question of the correctness of conclusion (4)) to refer in case A only (proceedings in the Case on file CP 7/79 being adjourned) questions to the European Court of Justice. The ruling of that Court in Case 22/81 *Regina v Social Security Commissioner, Ex parte Browning* [1981] ECR 3357 was as follows:—

“Article 50 of Regulation No. 1408/71 is to be interpreted as meaning that a “minimum benefit” exists only where the legislation of the State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions.”

10. The matter in Case A then came back to the High Court (see [1982] 3 CMLR 177) where it was accepted that the effect of the European Court's ruling was that there was no minimum benefit in Great Britain for the purposes of Article 50 and that my conclusion (4) was wrong. Davies J. however concluded also that conclusion (3) was also wrong and that the insurance officer had wrongly reviewed the original award on the ground of mistake of law. He would appear by implication to have considered that conclusion (1) was, for one reason or another, correct and he refused the application for judicial review.

11. The insurance officer appealed to the Court of Appeal (see *The Times* 13 May 1983) who expressed no opinion on conclusion (1), accepted conclusions (2) and (3), reversing *Davies J.* on the latter, and accepting that the effect of the European Court's decision was that there was no British minimum benefit in terms of Article 50, they reversed conclusion (4). In confirming conclusion (2) they alluded to a possible argument that the *Beerens* ruling only laid down the rule that a State's declarations were proof of the matters mentioned in that ruling in cases where the Court of one Member State was considering the legislation of another Member State; but they pointed out that such an argument would not, since the subsequent decision of the European Court of Justice in Case 237/78 *Caisse Regionale d'Assurance Maladie v Palermo, nee Toia* [1979] ECR 2645, be maintainable. They accepted conclusion (2) that until the revocation of the 1975 declaration the insurance officer was bound to award the supplement under Article 50 and conclusion (3) that with the publication on 14 April 1977 of the revocation he was no longer bound to do so and that this was a relevant change of circumstances authorising review on which the insurance officer's decision fell to be revised from this last-mentioned date only. The actual Order of the Court of Appeal was that the decision of the Commissioner that there was a supplement due to that claimant after the 14th day of April 1977 be removed into the Queen's Bench Division of the High Court and quashed. The reported colloquy between their Lordships and counsel after judgment had been given suggests that it may have been their intention that the decision should be quashed only in so far as it decided that there was such a supplement. But that part of the decision was not readily severable from the rest and the entire decision has been marked by the Crown Office as quashed by the Order of the Court of Appeal.

12. The effect in Case A must be that a fresh decision must be given by me giving effect to the decision of the Court of Appeal. There is however a small matter not quite covered by the decision. 14 April 1977 was a Thursday, the day fixed for the payment of pensions, and there is a question whether the revision of the decision in that case and analogous cases should be from and including 14 April or from after 14 April. There is a difference between the two of one week's supplement. In the leading judgment in the case *Eveleigh L.J.* indicated that in the circumstances the Commissioner now had to hold that that claimant was not entitled to any supplement *as from* the date of the changed declaration namely 14 April. The word "after" (not "as from") was used in a part of the Order that has been treated as descriptive of the Commissioner's decisions and not as a limitation on the operation of the Order. It is doubtful whether the Court were asked to give any consideration to the matter. I have reached the conclusion that I should follow the words used by *Eveleigh L.J.* and hold that from and including 14 April the supplement is not payable. I think that this is in accordance with what has been decided by the European Court of Justice in relation to publication of regulations in the Official Journal. Thus in Case 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69 it was held in the absence of evidence to the contrary a regulation is to be regarded as published throughout the Community on the date borne by the issue of the Official Journal containing the text of that regulation; and that (see paragraph 7 of the judgment) where the regulation is to come into force on the date of its publication it comes into force on such date. As the *Palermo (nee Toia)* case shows that regard may have to be had in any Member State to any other Member State's Declarations published under Article 5 I consider that the rule about the publication of regulations must apply to such Declarations. My decision in Case A accordingly is to the effect that there is to be no revision on review down to 13 April 1977, but that with

effect from 14 April 1977 the award of pension is to be revised so as to provide that no supplement under Article 50 is payable from that date.

13. In conformity with the foregoing I have already given interim decisions in Cases B, C, D and E that there is to be no review down to 13 April 1977 and I now give a decision in each case that the decisions are to be revised with effect from 14 April 1977 so as to exclude any Article 50 supplement. In Cases F, G, H and J my decision is that the original awards can be reviewed from the date of the change in the nature of the Irish pension so as to give effect in the computation of the Article 50 supplement, but until 13 April 1977, not further or otherwise. The full particulars of the effect of this conclusion are set out in the individual decisions; and there is no requirement of repayment of the amount overpaid. As for the period from 14 April 1977 the decisions are further revised so as to exclude any Article 50 supplement, so that the change in the nature of the Irish pension becomes irrelevant.

(Signed) J. G. Monroe
Commissioner
