SICKNESS BENEFIT

Disqualification for absence abroad—Effect of EEC Regulations.

The claimant, an American citizen married to a woman of British nationality had lived and worked in the United Kingdom since 1965 and had paid national insurance contributions. He went to France on 17 December 1979 to see his daughter but became incapable of work on 21 December 1979 and remained so incapable until after his return to the United Kingdom on 6 January 1980.

Held that:

1. the claimant's absence from Great Britain did not satisfy either regulation 2(b) or regulation 2(c) of the Social Security Benefit (Persons Abroad) Regulations 1975, in that he was not absent for the specific purpose of treatment nor was he incapable continuously for six months prior to the day on which absence began. He was therefore not relieved of disqualification under section 82(5)(a) of the Social Security Act 1975 on account of absence from Great Britain (paragraph 7);

2. the claimant was not in his own right a person to whom Regulation (EEC) 1408/71 applied (paragraphs 10 – 12);

3. the claimant was not assisted by Regulation (EEC) 1408/71 as a member of the family of his wife (paragraphs 13 to 19);

4. sickness benefit was not payable from 21 December 1979 to 5 January 1980 (paragraph 1).

NB. The Commissioner referred to the decision *Regina* v *Plymouth Justices ex parte Rogers* in which the High Court stated that where appeal lies to a higher court that it was better for questions of interpretation of EEC legislation to be referred to the European Court of Justice by the higher court (paragraph 9).

1. (1) My decision on this appeal follows an oral hearing on 23 September 1982 at which the appellant claimant attended and addressed me (but elected to withdraw before its conclusion) and the insurance officer was represented by Miss A. V. Windsor of the Solicitor's Office, Department of Health and Social Security.

(2) The appeal does not succeed. My decision is that sickness benefit is not payable for the period from 21 December 1979 to 5 January 1980 (both dates included) because the claimant was absent from Great Britain over that period in circumstances which preclude his qualifying for such benefit under the law in point, which is identified later below.

2. The claimant, a professional musician and teacher of music, although of Hungarian origin, has lived and worked in the United Kingdom since 1965; but he is a citizen of the United States of America. His wife is of British nationality, and their daughter was born in England. Over the course of his professional career in the United Kingdom he has been liable for and has made contributions to the National Insurance Fund as an employed earner on the same footing as would a British National also so resident and following the same profession. In the circumstances below summarised he claimed sickness benefit for a period of incapacity for work which occurred whilst he was temporarily in France. To his understandable chagrin he has been repeatedly informed by the Department of Health and Social Security ("the DHSS") that he was ineligible for the benefit so claimed by reason of his American nationality—although a British National in the same circumstances would have been eligible pursuant to the EEC Regulation below cited. He appealed to a local tribunal against the insurance officer's decision rejecting his claim, and from their decision—which upheld that of the insurance officer—now appeals to the Commissioner.

3. The facts are not in dispute. The claimant, with his wife, went to France on 17 December 1979 on a short holiday, intending to be away only over the Christmas period and to be back in Britain by 27 December at latest. The main purpose of their visit was to see their daughter, who was studying in France.

Whilst in France he made what was intended as a brief visit to the town of Menton, but whilst there had the misfortune to suffer a sudden and substantial heart attack, in consequence of which he was constrained to spend 13 days in hospital there, eventually arriving back in London only on the evening of 6 January 1980—and then only after travelling at some risk to his health despite breaking the journey in Paris to mitigate the strain of it.

4. The claimant was clearly "incapable of work" from 21 December 1979, the date of his heart attack, over and beyond 6 January 1980; and I understand that his claim for sickness benefit for a period from 7 January 1980 onwards has been allowed. But, as above indicated, his claim for sickness benefit for the period 21 December 1979 to 5 January 1980 was disallowed—as also (though not in issue on the present appeal) has, I understand, the claim for reimbursement of hospital charges under reciprocal EEC arrangements by the hospital at Menton at which he had been treated.

5. (1) There is, so far as I am aware, not the slightest doubt that had the claimant's incapacity for work over the period in issue occurred whilst he was present in Great Britain sickness benefit would have been payable.

(2) As I sought—I fear without success—to explain to the claimant at the outset of the oral hearing of his appeal, it does not lie within the discretion of the Department of Health and Social Security, or of the statutory adjudicative bodies of which a Commissioner is one, to award or withhold sickness benefit as the merits of the case may appear to them to warrant. All are required to act only in accordance with provisions of law in point which are collectively of considerable complexity.

6. (1) The obstacle which first confronts the claimant is the provision by section 82(5) of the Social Security Act 1975 ("the Act") 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...."

(2) At first sight that is fatal to any claim made in respect of a claim period in which the claimant has been absent from Great Britain unless the claimant can bring himself within an exception afforded by some so "prescribed" regulation; and that in turn means an exception afforded by the Social Security Benefit (Persons Abroad) Regulations 1975 as amended and in force at the material time ("the Persons Abroad Regulations")—for there are no other prescribed regulations in point. But in fact the operation of section 82(5)(a) has since the accession of Great Britain to the Treaty of Rome been modified, as provisions of EEC regulations may also effect relevant exceptions—and EEC Regulation 1408/71 in fact does so.

7. (1) Under reg 2 of the Persons Abroad Regulations it is provided that a person shall not in prescribed circumstances be disqualified for receiving (amongst other benefits) sickness benefit by reason of

being "temporarily absent from Great Britain"; and it is not in dispute that the claimant's relevant absence from Great Britain was temporary.

(2) The so prescribed circumstances are if—

"(a) the Secretary of State has certified that it is consistent with the proper administration of the Act that, subject to the satisfaction of one of the conditions in sub-paragraphs (b) and (c) below, the disqualification under section 82(5)(a) of the Act should not apply, and either

(b) the absence is for the specific purpose of being treated for incapacity which commenced before he left Great Britain, or

(c) on the day on which the absence began he was, and had for the past 6 months continuously been, incapable of work and on the day for which benefit is claimed he has remained continuously so incapable since the absence began."

(3) The Secretary of State in fact gave a certificate for the claimant's case under that regulation shortly before the insurance officer's decision of 25 April 1980—but it is of no practical assistance to the claimant since, as will be apparent from the factual circumstances I have already indicated, and as I now hold, the claimant cannot satisfy either of conditions (b) and (c) above.

And there is in my judgment nothing else in the Persons Abroad Regulations from which he could derive any material assistance.

8. Subject, therefore, to such if any residual possibilities of assistance as EEC Regulation 1408/71 ("Reg 1408") might afford to the claimant, his claim must founder upon the operation against it of section 82(5)(a) of the Act.

9. I am empowered by Article 177 of the Treaty of Rome to refer questions of interpretation of EEC regulations arising in the course of exercise of my decision for a ruling by the European Court at Luxembourg, pursuant to section 3 of the European Communities Act 1972. But in my judgment—and by parity of reasoning with that adopted in Commissioner's Decision R(S) 4/74, although the judicial remedy under English law against a Commissioner's Decision has since that decision and by virtue of the Social Security Act 1980 become appeal to the Court of Appeal (in place of *certiorari*)— I consider I am not *bound* to refer such questions.

Such questions do arise in the present case as later below indicated. But in the light of Decision R(S) 4/74 and of the more recent authority of *R* v *Plymouth Justices ex parte Rogers* (D.C) [1982] 3 W.L.R.1 (to the effect that where appeal lies (as here) to a higher court in the domestic legal system it is better to give a decision on such questions at the inferior level and leave the higher court to refer to the European Court if it thinks fit), I propose to tackle myself the questions of interpretation of Reg 1408 which I find to arise in the present case—not least because they are closely inter-related with questions of English (domestic) social security law.

10. (1) The scope of application of reg 1408 is laid down by Art 2 of reg 1408 in the following terms:

"

Article 2

Persons covered

1. This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who

are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of workers who have been subject to the legislation of one or more Member States, irrespective of the nationality of such workers, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

3. This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies."

(2) Art 1 of reg 1408 contains definitions which materially include:

"(a) 'worker' means:

(i) subject to the restrictions set out in Annex V, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons;

(ii) ....

(d) 'refugee' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Refugees, signed at Geneva on 28 July 1951:

(e) 'stateless person' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Stateless Persons, signed in New York on 28 September 1954:

(f) 'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided or, in the cases referred to in Article 22(1)(a) and Article 31, by the legislation of the Member State in whose territory such person resides; where however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the person is mainly dependent on that worker."

(3) "legislation" is also defined in terms which I need not set out verbatim but which clearly embrace the Social Security Act 1975 and the regulations made thereunder and for the time being in force.

11. (1) It is not in dispute that the claimant and his wife each fall within the above definition of "worker" in their own right, or that the claimant is neither a "refugee" nor a "stateless person" within the above definitions.

(2) It is also common ground that:

(a) both the claimant and his wife have been subject to the legislation of at least one Member State—Great Britain;

(b) the claimant's wife is a national of one of the Member States—Great Britain;

(c) the claimant is not a national of any Member State— he is a national of the United States of America;

(d) nothing in the circumstances of the case turns upon the provisions of Art 2 as to "survivors", or the provisions of Art 2.3.

12. Thus it follows, in my judgment, that the claimant is not in his own right a person to whom reg 1408 applies. The only remaining possibility is that he may fall within its scope by reason of being a member of the family of his wife—who in my judgment quite clearly is not only a worker but is one to whom by force of Art 2.1 reg 1408 *does* apply.

13. The possibility that the claimant might succeed on the foundation of membership of the family of his wife was not considered by the insurance officer originally concerned or put forward at the local tribunal. That it has come into play now is due wholly to the commendable assiduity of the insurance officer now concerned to find and raise any point of potential assistance to the claimant—an assiduity which belies the extravagant strictures by the claimant on the case file and at the oral hearing as to the Department's conduct of his claim.

14. (1) What the insurance officer had in contemplation was that if the claimant came within the scope of application of reg 1408 as a member of the family of his wife, sickness benefit for the material period would be payable under the combined effect of Art 4—by which reg 1408 applies to all legislation concerning specified branches of social security including:

"1....(a) sickness and maternity benefits"

—and of Article 22.

(2) I should here preface further reference to Art 22 by indicating that the references in it to the "competent state" and the "competent institution" fall to be interpreted by reference to specific definitions of those terms in Art 1 to which I need not refer in detail but in accordance with which I find it clear beyond doubt that in the circumstances of the case the "competent state" is the United Kingdom of which Great Britain forms part and the "competent institution" the Department of Health and Social Security administering the British social security scheme under the Act as regards, materially, sickness benefit.

(3) I should also indicate that under Annex V to reg 1408 ("Special Procedures for applying the legislations of certain Member States"—Point I: (now J) United Kingdom) para 10 materially provides:

"10. For the purpose of determining entitlement to benefits in kind pursuant to Articles 22(1)(a) and 31 of the Regulation, the expression 'member of the family' shall mean:

(a) as regards the legislation of either Great Britain or Northern Ireland, any person regarded as a dependant within the meaning of the Social Security Act 1975 or, as the case may be, the Social Security (Northern Ireland) Act 1975; and

(b) ...."

(4) Art 18, referred to in para 1 of Art 22, below concerns aggregation of periods of insurance, employment or residence of no materiality in the present case.

15. Art 22 of reg 1408 provides as follows:—

"

Article 22

1. A worker 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, and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State; or

(b) who, having become entitled to benefits chargeable to the competent institution, is authorized by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State; or

(c) who is authorized by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State;

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

2. The authorization required under paragraph 1(b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

The authorization required under paragraph 1(c) may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides.

3. The provisions of paragraphs 1 and 2 shall apply by analogy to members of the family of a worker.

However, for the purpose of applying paragraph 1(a)(i) and (c)(i) to the members of the family referred to in Article 19(2) who reside in the territory of a Member State other than the one in whose territory the worker resides:

(a) benefits in kind shall be provided on behalf of the institution of the Member State in whose territory the members of the family are residing by the institution of the place of stay in accordance with the provisions of the legislation which it administers as if the worker were insured there. The period during which benefits are provided shall, however, be that laid down under the legislation of the Member State in whose territory the members of the family are residing;

(b) the authorization required under paragraph 1(c) shall be issued by the institution of the Member State in whose territory the members of the family are residing.

4. The fact that the provisions of paragraph 1 apply to a worker shall not affect the right to benefit of members of his family."

16. (1) To take in the first instance a straightforward example, if A, a worker within the scope of application of Art 22 by virtue of Art 2 and of his being a British national, and qualified under the British scheme for entitlement to benefits, suffers a condition which necessitates an immediate benefit such as hospital treatment during a stay (=temporary residence: Art 1(i)) in France, then Art 22.1 will entitle him under 22.1(i) to hospital treatment in France under the French scheme in accordance with its tenor under French law and—subject to the embodied provision as to length of period of benefit—as though he were insured with the French scheme—and, additionally, under 22.2(ii) to cash benefits provided (subject to the alternative embodied by the provision which starts "However....") by the *British* scheme.

(2) It is on that basis that I have earlier above indicated that had the claimant been of British nationality I consider that his claim would clearly have succeeded, since his U.S. nationality is the only impediment to his ranking as a person to whom in his own right and by virtue of Art 2 reg 1408 is applicable.

17. As will be seen above, Art 22.3 provides that the provisions of (materially) Art 22.1 "shall apply by analogy to members of the family of a worker". In ordinary English usage "by analogy" may be paraphrased as meaning "by equivalency or likeness of relations": see sense 2 (sense 1 is a mathematical usage) in the Shorter Oxford English Dictionary.

Subject to the further legal question to which I will refer in para 19 below I would therefore interpret Art 22 as providing that if in the example in para 16 above A's position was precisely as there postulated save that A was by reason of his nationality *outside* the prescriptions of Art 2, and in consequence outside the scope of reg 1408 when considered "in his own right", he might nevertheless attain the position lastly indicated in that example if he was a "member of the family of a worker" *and* the worker of whose family he was a member was a person *within* the prescriptions of Art 2....for he would then be receiving equivalence of application of para 1 to that which such person would in like circumstances receive himself or herself if he or she satisfied the conditions for entitlement of the British scheme.

And, in this context, the claimant's wife clearly was, in her own right, a person *within* the prescriptions of Art 2.

18. (1) I have therefore next to consider whether or not the claimant was within the meaning of reg 1408 a member of the family of his wife.

(2) The starting point for that must be the definition of "member of the family" in Art 1(f), which—since Art 22.1(b) and (c) can have no bearing in the circumstances of the case—leads me to the provision in Art 1(f) "....or in the cases referred to in Art 22(1)(a) ..., by the legislation of the Member State in whose territory such person"—here the claimant—"resides" ....i.e. to the 1975 Act and regulations thereunder.

(3) However, in my judgment there is no provision of that code which defines or recognizes anyone to be a member of any family or designates any person as a member of any household.

Thus far, accordingly, I am driven to conclude that the claimant could not for the purposes of reg 1408 be regarded as a member

of the family of his wife, although in every day usage husband and wife are normally accepted as being members of the same family, and by logical extension each must in my view then be regarded as a member of the family "of" the other.

(4) I have, however, to consider in addition para 10 of Point I of Annex V, above cited.

(5) (A) Whether or not the opening words of that—"For the purpose of determining entitlement to benefits in kind pursuant to Articles 22(1)(a) . . ."—are such as to confine the force of para 10 to benefits in kind, to the exclusion of its application in determining entitlements to cash benefits under Art 22(1)(ii), would be a material further question were I to hold the claimant to be regarded as a "dependant" within the meaning of the Social Security Act 1975—and I can see considerable difficulty in regarding it as applying additionally as regards entitlement to cash benefits. But the necessity to decide that question does not in my judgment arise; for it is in my judgment quite clear that the claimant is *not* a "dependant" within the meaning of the Social Security Act 1975, and I so hold; and para 10 is accordingly of no avail to the claimant.

(B) My reasons for so holding are that:—

(i) Sections 44 and 47 of that Act, which deal with increase of benefits for dependants, are the only material provisions as to who shall be treated as dependants, and section 44(3)(a) and section 47(1)(a) as in force at all material times (I belive an amendment is impending) both provide, in effect, that a husband may be treated as the dependent of his wife only whilst he is "incapable of self-support".

(ii) I have then to apply (pursuant to section 168(1) of the same Act) the definition in Schedule 20 of the Act of "incapable of self-support", namely:

"a person is 'incapable of self-support' if (but only if) he is incapable of supporting himself by reason of physical or mental infirmity and is likely to remain so incapable for a prolonged period"

—and whilst the claimant was no doubt "incapable of self-support" during the claim period directly in issue on this appeal, there is no evidence before me which would entitle me to hold that he was "likely to remain so incapable for a prolonged period".

19. I do not consider that the content of reg 1408 affords me any scope for reaching on grounds of "ordinary usage" a conclusion that the claimant was for the purposes of reg 1408 a member of the family of his wife.

20. In the circumstances it is unnecessary for me to go on to decide a further question which was the subject of legal submissions to me by Miss Windsor and is of even greater difficulty than the foregoing, namely whether having regard to the decision in *Kermaschek's* case (*Kermaschek v Bundesanstalt für Arbeit* 1976 E.C.R. 1669)—a case on reg 1408 but *not* arising in respect of Art 22—the benefits for which a person may qualify under Art 22 in the capacity of "member of the family of" a worker are confined to categories of "derivative" benefit, entitlement to which is exclusively confined to members of the family of a worker as such—for in

Kermaschek's case the European Court held there to be under Art 2(1) of reg 1408 two distinct categories—workers on the one hand and members of their families and survivors on the other, and concluded that "workers" benefits could not be obtained in right of belonging in the second category—a conclusion which might be considered reinforced by Art 22(4), which appears to me at least to be directed to preserving the independent right to benefits as a worker of persons who are both workers in their own right and members of the family of another worker.

21. Whilst sympathy is no substitute for an award of benefit, I would not wish to part with the case without indicating that I fully appreciate that having made his life here for many years throughout which he has paid contributions to the British social security scheme just as would have been required of a British National in comparable circumstances, the claimant is acutely aggrieved to find himself in this instance disadvantaged as regards claiming benefit which would have been clearly payable but for his retained U.S. nationality.

But that is not a grievance I have jurisdiction to redress.

22. My decision is as indicated in para 1 above.

(Signed) I. Edwards-Jones
Commissioner