Patmalniece v. Secretary of State for Work and Pensions

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Case Analysis

Social security—Right to reside—Person within the personal scope of Regulation 1408/71—Whether right to reside test contrary to EU law—Decision of Social Security Commissioner upheld by Court of Appeal


Introduction

In Patmalniec the Court of Appeal has considered the compatibility of the UK right to reside requirement with Regulation 1408/71 on co-ordination of social security for migrants [1971] OJ L149/2. The Court earlier upheld the compatibility of the right to reside rule with the EU Treaty in Abdirahman.1 However, this case was different in that—unlike previous cases—it clearly fell within the personal and material scope of Regulation 1408/71.2

Ms Patmalniec, a Latvian citizen born in 1938, had moved to the United Kingdom in 2000. After an unsuccessful asylum claim, she remained in the United Kingdom with no steps taken to deport her. However, she did not have any “right to reside” in UK law (within the meaning of the term for social security purposes). As her only income was a Latvian pension


2 The claimants in Abdirahman [2007] EWCA Civ 657; [2008] 1 W.L.R. 254 were: (a) a Swedish national who came to England in March 2004 with her three children for family reasons, who, at the relevant time, did not work or seek work in the UK, and who claimed income support and other benefits not within the material scope of Regulation 1408/71; and (b) a Norwegian citizen (over pension age) who travelled to the UK again for family reasons and claimed Pension Credit (which was not, at that time, listed as a special non-contributory benefit under Regulation 1408/71). It is not clear from the reported facts whether the claimants were not covered by Regulation 1408/71 or whether it was simply assumed that the Regulation was not relevant to their circumstances.
of about £50 per month, she claimed state pension credit in 2005. In order to qualify for state pension credit, she had to be “in Great Britain” which in turn required her to show that she was “habitually resident” in Great Britain or the Republic of Ireland. Since 2004, UK law requires that to be habitually resident, a person must have a right to reside in the United Kingdom or Ireland. Her claim for state pension credit was refused on the basis that she did not have the right to reside. Ms Patmalniece appealed on the basis that the right to reside requirement was discriminatory and in breach of Regulation 1408/71. Her appeal was rejected by a Social Security Commissioner and she appealed further to the Court of Appeal.3

Although she argued that her appeal could be distinguished from Abdirahman on the basis that she was within the personal scope of Regulation 1408/71, it is clear that both the Commissioner and the Court were influenced by the finding in that case that the right to reside requirement was not in breach of EU law.4 I have argued elsewhere that Abdirahman is wrongly decided as to the law (although it may well be that a correct application of EU law would lead to the same outcome on the facts of that case).5 In Abdirahman the Court held that the claim fell outwith EU law. This is incorrect. In the light of recent decisions of the Court of Justice, it is clear that the right to reside test constitutes a barrier to free movement of EU citizens.6 As such, it must be objectively justified. In Abdirahman, the Court, albeit obiter, did express the view that the test was objectively justified but it did not consider the issue in any depth.7 Unfortunately the approach in Abdirahman has arguably “infected” the outcome in subsequent cases.8

Decision

In Patmalniece the appellant argued that the right to reside test was directly discriminatory in that it could always be satisfied by UK nationals but not so by nationals of other countries. She further argued that this was contrary

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7 In coming to this conclusion it agreed with the Tribunal of Commissioners in CIS/3573/2005. I have argued that the Tribunal also applied a far too “relaxed” approach to the question of objective justification: M. Cousins, “The ‘Right to Reside’ and Social Security Entitlements” (2007) 29(1) Journal of Social Welfare and Family Law 67.
8 An argument for a somewhat more selective approach to the choice of “test cases”.

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to art.3 of Regulation 1408/71 which provides that persons covered by Regulation 1408/71

‘shall be subject to the same obligations and enjoy the same benefits
under the legislation of any member state as the nationals of that state’.

The Court of Appeal, arguably correctly, did not accept that the requirement was directly discriminatory but did hold that it had a disproportionate impact on nationals of other Member States and, therefore, required to be objectively justified.9 The Court followed the reasoning in Abdirahman to the effect that it was legitimate and proportionate to deny benefits to a non-economic migrant who could not otherwise support herself.10 Counsel for Ms Patmalniece attempted to distinguish these cases on the basis that they did not involve Regulation 1408/71. The Court, therefore, looked to the ‘‘purpose and effect’’ of that Regulation which it identified as being ‘‘to promote and maintain the Treaty rights of workers to freedom of movement’’.11 The Court argued that this purpose had not been changed by the widening of the scope of the Regulation to include special non-contributory benefits.12

The Court took the view that as Ms Patmalniece was not a migrant worker and that as state pension credit (despite its inclusion as a special non-contributory benefit in Regulations 1408/71) had ‘‘not lost its characteristics of social assistance’’, the case involved the denial of social assistance benefits to a non-economic migrant. Therefore, it would be inconsistent with previous decisions in Trojani (a European Court of

12 By Regulation 1247/92 discussed at Patmalniece [2009] EWCA Civ 621; [2009] 3 C.M.L.R. 36 at [37]–[43]. Though whether Regulation 1247/92, which was a response by the Member States to the expansive interpretation of the concept of social security by the Court of Justice, should be seen as a ‘‘widening’’ of the scope of the Regulation or attempt to restrict it, is another question. Moses L.J. at [44]) pointed out that it was only in 2005 that state pension credit had been listed by the UK as a special non-contributory benefit and suggested that Mrs Patmalniece’s claim would otherwise have been in the same position as that of Mr Ullusow (one of the Abdirahman [2007] EWCA Civ 657; [2008] 1 W.L.R. 254 claimants) as involving a claim for social assistance with fell outwith the EU Treaty. Leaving aside the broader issue as to whether a claim for social assistance falls outwith the Treaty (discussed above), one might also note that whether or not a benefit falls within the scope of the Regulation is a question of law and non-inclusion by a Member State in annexe IIa is not determinative of the issue. In other words, it is arguable that Mr Ullusow’s claim also involved a special non-contributory benefit (though it is not clear from the facts if he fell within the personal scope of the Regulation).
Justice decision)\textsuperscript{13} Abdirahman and Kaczmarek not to find that the right to reside requirement was objectively justified.\textsuperscript{14}

**Discussion**

Unfortunately, it is again arguable that the reasoning of the Court is flawed. First, although the case appeared to focus on the general ban on nationality discrimination in art.3 of Regulation 1408/71, it is arguable that the more specific provisions of art.10a are also relevant. That article provides that

‘persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4 (2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State’.

The Regulation defines ‘residence’ as ‘habitual residence’\textsuperscript{15}. In the Swaddling case, the Court of Justice considered the interpretation of the UK courts of the concept of ‘habitual residence’ in the case of a person covered by Regulation 1408/71.\textsuperscript{16} The Court pointed out that the concept must have a Community-wide meaning. Contrary to the approach of the UK courts, it held that the length of residence in the Member State in which payment of the benefit at issue is sought could not be regarded as an intrinsic element of the concept of residence within the meaning of art.10a of Regulation 1408/71. It was accepted that Mr Swaddling has shown a settled intention of residing in the United Kingdom. The Court therefore ruled that, on the facts of his case, art.10a of Regulation 1408/71 (read with art.1(h) thereof) precluded the United Kingdom from making entitlement to a special non-contributory benefit conditional upon a test of habitual residence in the United Kingdom ‘which presuppose[d] not only an intention to reside there, but also completion of an appreciable period of residence there’.\textsuperscript{17} A fortiori, if art.10a does not allow the term ‘habitual residence’ to include a requirement that the person be resident in the United Kingdom for an ‘appreciable period’ it must also prohibit habitual residence being defined so as to require a legal right to reside.\textsuperscript{18}


\textsuperscript{14} Patmalniece [2009] EWCA Civ 621; [2009] 3 C.M.L.R. 36 at [47]–[53].

\textsuperscript{15} Regulation 1408/71 art.1(h).


\textsuperscript{18} As will be recalled, for reasons which are somewhat unclear and which contribute greatly to the opacity of the current provisions, the UK drafters did not establish the right to reside requirement as a separate test but made it a component part of the habitual resident test.
If this argument is not accepted (or if the United Kingdom was to establish the right to reside test as a separate legislative requirement), the Court still misapplied the objective justification test. First, it misconstrued the purpose of Regulation 1408/71 as being to protect the rights of “migrant workers” understanding this as applying only to persons currently active in the labour force. In fact, it is clear that Regulation 1408/71 (and a fortiori the new Regulation 883/2004 on the co-ordination of social security systems [2004] OJ L166/1 which will come into force in May 2010) applies to all persons who are (or have been) covered by a social security scheme.19 Ironically the Court cited the Spruyt case in support of its understanding that Regulation 1408/71 applies to “workers”.20 However, Mr Spruyt had, in fact, not exercised his right of free movement until after his retirement. The Court of Justice clearly did not see this as a barrier to the application of the Regulation in that case.21 Because of this misinterpretation of the purpose of the Regulation, the Court of Appeal’s assessment of justification is flawed. The Court took the view that—because Ms Patmalniece is not “working”—making her right to a UK benefit subject to a right to reside test is not contrary to the objectives of Regulation 1408/71. In fact, however, she is an “employed person” for the purposes of the Regulation which purposes include protecting the social security entitlements of retired persons who wish to move to another Member State.

Secondly, the Court’s approach to objective justification has involved a repetition of error. The original Tribunal of Commissioners, while accepting that the right to reside requirement involved a legitimate aim, made little effort to assess the proportionality of such a rule (applying a test more akin to the “rational basis” test in US constitutional law than a correct application of proportionality in EU law).22 The Court of Appeal in Abdirahman paid, if possible, even less attention to proportionality and this approach has simply been accepted in Patmalniece.

Thus Ms Patmalniece who was, in ordinary words, “habitually resident” “in Great Britain” was (legally) not “habitually resident” in Britain nor even “in Great Britain” because she had no right to reside.

19 While Regulation 1408/71 art.2 states that the Regulation applies, inter alia, to “employed or self-employed persons”, art.1(a) defines this as any person who is insured under a national social security scheme.


21 See generally F. Pennings, Introduction to European Social Security Law (2001), p.63 who states that “pensioners who never worked in another Member State also benefit from the Regulation”.

Conclusion

It has been suggested that, rather than it being justified to reject a claim for a special non-contributory benefit under Regulation 1408/71 because a person does not have a right of residence, a person entitled to such a benefit under art.10a should automatically fulfill the subsistence requirement for obtaining residence rights under Directive 2004/38. Even if one might doubt that the Court of Justice would go so far as to accept this argument, it does show that it is by no means self-evident that the right to reside test, which, as the Court of Appeal accepted, clearly has a disproportionate impact on non-nationals can easily be justified as being in keeping with the objectives of Regulation 1408/71.

Given the precedential status of Abdirahman, in the absence of a reconsideration by the Supreme Court, it seems likely that only a reference on this issue to the Court of Justice will help to clarify the position under EU law. Unfortunately the very status of Abdirahman makes such a reference unlikely from the lower courts.

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23 See M. Couchier et al., The relationship and interaction between the Coordination Regulations and Directive 2004/38/EC (Tress, 2008), pp.33–4. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] L158/77 concerns the rights of EU citizens and their family members to move and reside freely within the territory of the Member States. Article 7 of that Directive provides that all Union citizens have the right of residence (for a period after the initial three months) if they are workers or self-employed persons in the host Member State; or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

24 The right to reside test was arguably in issue in Zalewska v Department for Social Development [2008] UKHL 67; [2008] 1 W.L.R. 2602. However, the focus of that case was on the worker registration scheme and the impact of the failure to register on the right to benefits rather than specifically on the right to reside test.

25 An alternative means by which the issue could be clarified would be through infringement proceedings by the European Commission.