Trinity College Dublin, Ireland

From the Selected Works of Mel Cousins

2008

The Right to Reside and Access to Social Security in the Courts of Appeal

Mel Cousins, *Glasgow Caledonian University*

Available at: https://works.bepress.com/mel_cousins/37/

This article was downloaded by: [Mel Cousins]

On: 17 February 2012, At: 05:09

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK

Journal of Social Welfare and Family Law

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rjsf20>

The right to reside and access to social security in the Courts of Appeal

Mel Cousins^a

^a School of Law and Social Sciences, Glasgow Caledonian University, Glasgow, UK

Available online: 27 Nov 2008

To cite this article: Mel Cousins (2008): The right to reside and access to social security in the Courts of Appeal, *Journal of Social Welfare and Family Law*, 30:2, 147-153

To link to this article: <http://dx.doi.org/10.1080/09649060802469835>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.tandfonline.com/page/terms-and-conditions>

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae, and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand, or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

CASES

Edited by Emma Hitchings

The right to reside and access to social security in the Courts of Appeal

Mel Cousins

School of Law and Social Sciences, Glasgow Caledonian University, Glasgow, UK

Keywords: income-related benefits; right to reside – interpretation of the term – whether compatible with EU law

***Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657;
Zalewska v Department for Social Development, [2007] NICA 17**

This case note looks at two recent decisions of the English and Northern Irish Courts of Appeal in relation to the right to reside requirement for access to certain social security benefits. The background to this issue has been discussed recently (Cousins 2007a, see also Larkin 2007). In brief, in the context of the expansion of the European Union in 2004, the United Kingdom – unlike most other Member States – allowed access to the UK labour market for the nationals of the Accession countries, subject to a worker registration requirement. At the same time the UK government strengthened the existing habitual residence test by requiring that, in order to be considered habitually resident, a claimant must have a ‘right to reside’ within the UK. The definition of the right to reside test and its compatibility with EU law was considered by the English Court of Appeal in *Abdirahman*, while the validity of certain restrictions on access to social security benefits stemming from the worker registration scheme, and the right to reside test, was considered by the Northern Ireland Court of Appeal in *Zalewska*.

Abdirahman

Background

The appellants were Swedish and Norwegian nationals who had entered the UK (as they were entitled to do as European Economic Area (EEA) nationals) and were living there without having to obtain permission from the UK authorities (Norway is not, of course, an EU Member State, but the relevant provisions of EU law also apply to nationals of the EEA, which includes Norway). Neither was economically active and both claimed social security benefits shortly after arrival. Their claims were refused on the basis that neither had a right to reside in the UK. This refusal was upheld by a Tribunal of social security commissioners. The issues before the court were: (1) the meaning of the term ‘right to reside’ and

whether the appellants had such a right; and (2) the compatibility of the right to reside test with EU law.

'Right to reside'

The appellants argued that they were lawfully present in the UK and that this should be equated with a right to reside (which term was not denied in the regulations in force at that time). However, the court was not persuaded by this argument. It took the view that UK law distinguished between a right to reside and lesser statuses involving lawful presence (*Abdirahman* at para 19). The Court also – unsurprisingly, given the facts – found that neither appellant had a right to reside under EU or national law. It was argued that a broad interpretation should be given to the term 'right to reside' in order to avoid the UK being in breach of its obligations under the Council of Europe European Convention on Social and Medical Assistance (ECMSA).

The ECMSA provides that the parties to the Convention must ensure that nationals of other contracting parties who are 'lawfully present in any part of its territory' and who are without sufficient resources 'shall be entitled equally with its own nationals and on the same conditions to social and medical assistance ... provided by the legislation in force from time to time in that part of its territory' (Article 1 of the Convention). However, this Convention has never been fully implemented in UK law and, unsurprisingly given the weak legal status of such Conventions in UK law (see *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116 and *Boake Allen Ltd v HMRC* [2007] UKHL 25), the Court was not persuaded by this argument. The right to reside test has, in any case, subsequently been defined in the Social Security (Persons from Abroad) Amendment Regulations 2006.

Compatibility with EU law

The court then turned to the more important issue of whether the right to reside test is compatible with EU law. The Tribunal of commissioners had held that the right to reside test involved indirect discrimination because it was more easily satisfied by United Kingdom nationals than by non-nationals and it required objective justification (CIS/3573/2005 at para. 24). The Tribunal had, however, ruled that such justification existed. The court took a different approach in considering, first, whether the issue fell within the scope of application of the EU Treaty. The court, perhaps misled by its consideration of the issue of the meaning of the right to reside in national law, took the view that the scope of application of Article 12 of the EU Treaty applied only where a right of residence arose directly under the Treaty, or where it existed separately under the law of a Member State. Article 12 provides that: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited.' The Court held that EU law did not extend to cases where no right of residence exists under either the Treaty or the relevant domestic law and, therefore, that the right claimed by the appellants was not within the scope of application of the Treaty. This is clearly incorrect. Article 18.1 of the EU Treaty provides that:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

The European Court of Justice has previously ruled, in *Martinez Sala* (Case C-85/96, [1998] ECR I-269), that a national of a Member State lawfully residing in the territory of another Member State comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship. Such a national can therefore rely on the rights laid down by the Treaty attaching to the status of citizen of the Union, including the right not to suffer discrimination on grounds of nationality (see also *Grzelczyk* (Case C-184/99, [2001] ECR I-6193) at para. 30). Ms Martinez Sala was, however, resident for a long period in Germany and in subsequent cases the Court appears to have modified somewhat its wording.

In *Trojani* (Case C-456/02, [2004] ECR. I-7573, para. 43) the Court stated, instead, that a Union citizen (who is not economically active) may rely on Article 12 'where he has been lawfully resident in the host Member State for certain time or possesses a residence permit'. This approach was followed in *Bidar* (Case C-209/03, [2005] ECR I-2119, para. 33), although *Bidar* also repeats the earlier broader statement from *Martinez Sala*. The reference to a residence permit should be seen in the context of national legislation which requires such a permit and should not be equated to the concept of a 'right to reside' in UK national law. Indeed, in a number of recent cases the Court has emphasised that the exercise of the right to free movement is itself sufficient to bring an issue within the scope of the Treaty, regardless of whether the issue actually in dispute involves a question of Community law (Case C-406/04 *De Cuyper* [2006] E.C.R. I-6947; Case C192/05 *Tas-Hagen* [2006] E.C.R. I-10451; see Cousins 2007b).

It would appear clear that the right to reside test does potentially act as a barrier to the exercise of the right by EU citizens to freedom of movement. As such, it requires objective justification. I have argued elsewhere that the Tribunal applied an incorrect standard as to the level of justification required and that, even assuming that the right to reside requirements could be considered to be independent of the nationality of the persons concerned, and that the national provisions involved a legitimate aim, the Tribunal made no effort whatsoever to assess whether the provisions were proportionate (see Cousins 2007a). However, the Court of Appeal, albeit *obiter* as the need for justification did not arise, upheld the Tribunal's approach of giving the issue the most cursory consideration.

Zawelska

Background

The *Zawelska* case raises the issue of restrictions on *workers* from Accession countries in terms of access to social security benefits. Ms Zawelska was a Polish national who came to Northern Ireland in July 2004. From July 2004 until January 2005 she worked for a company in Northern Ireland and registered her employment under the worker registration scheme. Following termination of that employment, she immediately secured new employment through a recruitment agency. This led to her working in a variety of jobs, but she failed to register her change of employment, as required under the scheme. She ceased work in July 2005 and applied for income

support. This claim was refused on the grounds that she did not have a right to reside in the UK and, therefore, failed the habitual residence test. This decision was upheld by a social security commissioner (C6/05-06) and, on appeal, by the Northern Ireland Court of Appeal.

The law

As the provisions of the Accession Treaty are critical in this case, it is necessary to set them out in some detail. Annex XII of the 2003 Treaty of Accession provides that:

1. Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC [posted workers] between Poland on the one hand, and ... the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of Accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of Accession.

Polish nationals legally working in a present Member State at the date of Accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.

Polish nationals admitted to the labour market of a present Member State following Accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

The Polish nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State in question.

Polish nationals legally working in a present Member State at the date of Accession, or during a period when national measures are applied, and who were admitted to the labour market of that Member State for a period of less than 12 months shall not enjoy these rights.

The scope of the derogation is extended by paragraph 9, which provides:

9. Insofar as certain provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Poland and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8.

The UK Accession (Immigration and Worker Registration) Regulations 2004 (the 2004 Regulations) provide that a national of an Accession state working in the UK between 1 May 2004 and 30 April 2009 will be treated as a 'qualified person' (i.e. a person with a right to reside in the UK) only during a period in which she is working for an 'authorised employer'. This is in contrast to the normal situation, whereby a worker from an EU Member State may remain a 'qualified person' even

after loss of employment (Regulation 14 of the Immigration (European Economic Area) Regulations 2000). The 2004 Regulation provides, in effect, that the worker must hold a registration certificate authorising her to work for that employer. This registration certificate is invalid if the worker ceases working for that employer. If an employer employs an Accession state worker during a period in which the employer is not an authorised employer, the employer (but not the employee) is guilty of an offence under Regulation 9.

Regulation 4 of the 2004 Regulation specifically states that it derogates from Article 39 and Articles 1 to 6 of Regulation EEC No 1612/68 on freedom of movement. Regulation 4(2) provides that:

A national of a relevant Accession state shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an Accession state worker requiring registration if he began working in the United Kingdom.

Although Ms. Zalewska had worked in the UK for 12 months, she had not been registered for all of this period and so was not 'admitted to the UK labour market'. She did not, thereby, acquire full rights of access to the labour market. Under Regulation 4(2) of the 2004 Regulations she did not have a right to reside in the UK and, therefore, was refused income support.

The issues

The issues involved in this case were:

- (1) the scope of Annex XII of the Accession Treaty and whether the right to reside of Accession workers can be restricted under EU law;
- (2) if so, whether this restricted right to reside has implications for the right to social security;
- (3) if so, whether the right to reside test is objectively justified and was applied in a proportionate manner in this case.

Scope of Annex XII

Annex XII relates, in general, to *access to the labour market*. The worker registration scheme, insofar as it relates to access to the labour market, appears to be entirely within the scope of the derogations allowed by Annex XII. If a Member State may refuse access to its labour market, it is surely entitled to allow such access subject to a registration requirement. Nor does the worker registration scheme, in itself, restrict access to social security.

However, as set out above, paragraph 9 of Annex XII does allow some (unspecified) derogation in relation to Directive 68/630 'to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8' (of the Annex). Directive 68/630 concerns the abolition of the restriction on the free movement of workers and relates to access to the labour market only insofar as those issues are necessary preconditions for such access. Article 7.1 provides that:

A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work

as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.

It is rather unsatisfactory to have to deduce the purpose of the derogation set out in paragraph 9 (of Annex XII), but if that provision is to have any substantive meaning it would appear that it must have been intended to allow Member States to derogate from provisions such as that in Article 7.1 of Directive 68/630, i.e. requiring states not to withdraw residence rights from formerly employed persons. Thus it is arguable that Annex XII *does* intend to allow certain derogations in relation to the residence rights of Accession workers and that this option has been validly exercised by the UK in the 2004 Regulations.

Implications for social security

Annex XII makes *no* reference to social security entitlements, nor to any EU law relating to social security. Although the Annex allows for derogation from Articles 1–6 of Regulations 1612/68, it does *not* provide for any derogation in relation to Article 7 (in particular Article 7.2) which provides that a worker shall be entitled to ‘social advantages’ on the same basis as national workers. Nor does it appear that one can, by implication, extend the existing derogations to social security benefits, contrary to what Collins J suggested in *R (on the application of ‘D’) v The Secretary of State for Work and Pensions* (C4/2004/1117) at paras. 28–29 (an approach that appears to have been approved by the Court of Appeal in that case, and see also C6/05-06 at para. 50). However, in this case it is arguable that the UK is *not* attempting to derogate from Article 7.2. Formerly employed Accession workers do, in theory, have access to social security on the same basis as national workers, i.e. subject to a right of residence. The key question, I would suggest, is whether the right to reside test is justified, given that it cannot be fulfilled by an Accession worker in the position of Ms Zalewska.

Is the right to reside test justified?

In order to be objectively justified, the requirement in question must ‘be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions’ (see, for example, Case C-138/02, *Collins* [2004] ECR I-2703 at para. 73). However, the difficulty is that the issues involved have not yet been adequately canvassed in any of the decisions considered here. It would seem likely that the right to reside test must have a more adverse affect on non-UK nationals than it does on nationals, who, by definition, have a right to reside whereas must non-nationals do not. If and when the issue of objective justification falls to be considered correctly, it would seem that it may be difficult for the UK to justify it. This is particularly so in the case of a person who has worked in the UK for some time.

This was, of course, the situation of Ms Zalewska, who was in a much stronger legal position than the claimants in *Abdirahman*. She was an EU worker. She did not lose that status (or the rights arising from it) because she became unemployed (see R(IS) 12/98 applying Case 36/86 *Lair* [1988] E.C.R. 3161), nor as a result of any provision of the Accession Treaty. While, in accordance with the Accession Treaty, Polish nationals ‘admitted to the labour market’ of a Member State for 12 months

‘enjoy access to the labour market’ of that state, contrary to what the Court of Appeal appears to suggest in *Abdirahman* (at paras. 20–21), an EU worker does not have to satisfy some further national test of admission to the labour market in order to rely on Article 7.2 of Regulations 1612. She *does* however lose her right to reside under national law and (arguably) this is allowed by paragraph 9 of Annex XII. But is it legitimate for the UK to deny social security benefits to a person (in the circumstances of Ms Zalewska) who is habitually resident on its territory because she has no right to reside?

As we have seen, Ms Zalewska worked legally in the UK for one year. There is no question in this case of ‘benefit tourism’ (the alleged justification for the right to reside requirement). As Commissioner Rowland has suggested:

It is one thing to apply a ‘right to reside’ test to put pressure on people to leave the United Kingdom when they have never been economically active here and have not been here for very long but it may be less clear that the blanket application of the test represents a proportionate response to the problem that concerns the Government if it results in pressure to leave the United Kingdom being placed on people who have been economically active in the past or have been established here for many years but for some reason or other have not acquired a permanent right of residence. (CIS/3182/2005 at para. 15)

Conclusion

It seems inevitable that the right to reside test will eventually reach the European Court of Justice. If and when it does, the Court’s approach may depend critically on the facts of the case involved. It may be that the Court’s view will revolve around the proportionality of the test and that it may uphold its application where it can clearly be linked to benefit tourism, but strike it down insofar as its application is overbroad – as it arguably was in *Zalewska*.

References

- Cousins, M. 2007a. The ‘right to reside’ and social security entitlements. *Journal of social welfare and family law*, 29 (1), 65–73.
- Cousins, M. 2007b. Citizenship, residence and social security. *European law review*, 32, 386–395.
- Larkin, P. 2007. Migrants, social security and the ‘right to reside’: A licence to discriminate. *Journal of social security law*, 2, 61–85.