Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 Supreme Court

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Case Analysis

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Social security—right to reside—whether right to reside test compatible with EU law [2011] UKSC 11

Introduction

This Supreme Court decision concerns the right to reside test in UK social security law. In brief, UK law has since 1994 had a requirement that, in order to be entitled to various non-contributory benefits, one must be habitually resident in the country. In 2004 in response to the accession of a large number of new Member States to the EU, a new right to reside test was incorporated into the habitual residence test. This means that in order to be habitually resident it is necessary to have a legal right to reside in the United Kingdom. All UK citizens have such a right while only certain non-UK nationals do so. Therefore, it has been argued that the right to reside test discriminates (either directly or indirectly) on grounds of nationality contrary to EU law. The test has been upheld in a number of decisions by the Court of Appeal but, I have argued elsewhere, these decisions are all legally flawed. The issue has now reached the Supreme Court which, by a 4–1 majority, has upheld the right to reside test.

The wording of the relevant provisions is perhaps less clear than it might be. In short, in order to qualify for relevant benefits a person must be “in Great Britain”. In order to be “in Great Britain” one must be “habitually resident” in the United Kingdom and, in order to be habitually resident, one must have a right to reside in the United Kingdom.

Ms Patmalniece is a Latvian national (of Russian origin). She came to the United Kingdom in June 2000 (before Latvia acceded to the European Union in May 2004). She claimed asylum but this was refused in January 2004. However, no steps were taken to deport her. She was in receipt of an old age pension from the Latvian social security authorities and, in August 2005, she claimed the UK state pension credit. Her claim was refused on the ground that she did not have a right to reside in the United Kingdom.


3 Or, as Lady Hale less charitably put it, “of mind-numbing complexity” at [84]. Lord Walker, in argument, apparently stated that the wording of the provision was “so obscure that it looks as if it is trying to cover something up”.

4 The full detail is set out at [7]. The habitual residence and right to reside tests are also satisfied by persons residing or (or having a right to reside in) the Channel Islands, the Isle of Man or the Republic of Ireland. Lord Hope shortly dismissed a challenge to the right to reside test on the basis of the differential treatment of Irish nationals in ruling that this was allowed by art.2 of the Protocol on the Common Travel Area which is now annexed to the TFEU (at [56]).
The applicant relied on various rules of EU law requiring equality of treatment on the grounds of nationality including both the general Treaty provisions, arts 12, 18 and 42, (now arts 18, 21 and 48 TFEU) and the more specific provision of reg.1408/71. Article 3 of reg.1408/71 provides:

“… persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.”

The Supreme Court’s decision

Direct or indirect discrimination

The first question considered by the Supreme Court was whether the right to reside involved direct or indirect discrimination against foreign nationals. Obviously if the legislation had referred to nationality, this would have involved direct discrimination and, the Secretary of State accepted, could not be justified. On the other hand, a rule such as the habitual residence test simpliciter applies irrespective of nationality and, although it is likely to have a disproportionate effect on non-UK nationals (as proportionately fewer non-EU nationals will be habitually resident in the United Kingdom than will UK nationals), this amounts only to potential indirect discrimination. The right to reside test, however, falls somewhere between these two examples in that it is automatically satisfied by UK nationals but only by some non-EU nationals.

The Court of Appeal had ruled that, looking at the requirement that a claimant be “in Great Britain” as a whole, there was no overt or direct discrimination as other nationals could satisfy the requirement albeit “with greater difficulty”. Lord Hope, who gave the main judgment, appeared inclined to take a similarly broad view of the issue rather than focusing narrowly on the “right to reside” aspect. However, the issue appeared to have been put beyond much doubt by a recent decision of the European Court of Justice, Bressol there, the Court was faced with Belgian legislation concerning access to higher education. Like the right to reside test, this set out a composite set of conditions which included having one’s principal place of residence in Belgium and having the right to remain permanently in Belgium. Belgian nationals automatically had this right. Advocate General Sharpston gave considerable attention to whether these conditions amounted to direct or indirect discrimination. She took the view that,

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5 It was conceded that Ms Patmalniec was within the personal scope of the Regulation and the pension credit which she claimed is a “special non-contributory benefit” (SNCB) within the scope of that Regulation. Regulation 1408/71 has now been superseded by Regulation 883/2004 but nothing turns on this point.
6 Court of Appeal at [23].
7 And with whom Lord Rodger and Lord Brown agreed (the latter also agreed with the judgment of Lady Hale).
8 At [35]. Lord Walker (dissenting), who agreed that any discrimination was indirect, did “not see why the fact that there is more than one condition makes it necessary to focus on the conditions ‘as a whole’, if it is only one condition that produces unequal treatment” at [65].
“[nationality] discrimination can be considered to be direct where the
difference in treatment is based on a criterion which is either explicitly that
of nationality or necessarily linked to a characteristic indissociable from
nationality.”

She concluded that the “residence” test was only indirect as it could be satisfied
by Belgians and non-Belgians. In contrast, she ruled that the “right to remain”
condition did constitute direct discrimination as it was “necessarily linked to a
characteristic indissociable from nationality”. The Court of Justice did not,
however, follow this analysis and indeed did not explicitly discuss the issue (an
omission of which their Lordships were rightly critical). The Court, first, did not
isolate out the “right to remain” condition but treated the composite condition as
a whole (as a “residence” condition) and, second, treated the condition as one
which was potentially indirectly discriminatory. Thus, even if—as Lord Walker
said—we don’t understand its reasoning, it must be assumed that,—at least for the
present—the Court of Justice has treated a right to reside condition as only
potentially indirectly discriminatory.

**Objective justification**

It was, however, conceded that the right to reside test would amount to indirect
discrimination unless it would be justified on objective considerations independent
of the nationality of the persons concerned and proportionate to the legitimate aim
of the national provisions. This was really the critical issue in the case. The
objective of the right to reside test (although presented in somewhat different ways
different times) was,

“to safeguard the United Kingdom’s social security system from exploitation
by people who wished to come to this country not to work but to live off
income related benefits …”

Counsel for the Secretary of State put this in a more EU-compatible form by
saying that,

“[a] person would be eligible to receive state pension credit if he could show
economic integration in the United Kingdom or a sufficient degree of social
integration here.”

On the basis of earlier Court of Justice decisions such as *Collins* and *Bidar* it
was clearly legitimate for the United Kingdom to wish to limit access to benefits
to those with a “genuine link” with the employment market in question (*Collins*)
or, more relevant here, “a certain degree of integration into the society” of the
United Kingdom (*Bidar*). Thus, in principle it appeared that the right to reside rule
was based on objective considerations, but was it independent of nationality and

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11 Bressol, opinion at [53].
12 Bressol at [57].
13 Bressol, judgment at [40]–[46].
14 Lord Walker at [73].
15 At [38].
16 Quoted at [42].
17 *Case C-138/02 Collins v Secretary of State for Work and Pensions* (C138/02) [2004] E.C.R. I-2703; C-209/03
   *R. (on the application of Bidar) v Ealing LBC* (C-209/03) [2005] E.C.R. I-2119.
proportionate? Strangely, Lord Hope stated that the parties were agreed that the proportionality of the condition was “not in issue”. Rather he focused on whether the requirement was independent of nationality.

He concluded that the justification advanced was,

“relevant because the issues that arise with regard to the grant of a right of residence are so closely related to the issues that are raised by the appellant’s claim to state pension credit. They are, at heart, the same because they are both concerned with a right of access to forms of social assistance in the host Member State.”

It was also a sufficient justification, in view of the importance that is attached to combating the risks of “social tourism”. Finally, he concluded that the rule was independent of nationality because its aim was to deter social tourism by persons who were not socially or economically integrated with the UK based, not on their nationality, but “where they come from”.

Lady Hale took rather a different route to arrive at the same result, focusing on European law on the right to reside. She argued that it was logical, in answering the question as to whether it is legitimate to impose a residence requirement, to look at the European law on the right to reside. She argued:

“If nationals of one Member State have the right to move to reside in another Member State under European Union law, it is logical to require that they also have the right to claim these ‘special non-contributory cash benefits’ there—in other words that the State in which they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there. But if they do not have the right under European Union law to move to reside there, then it is logical that that State should not have the responsibility for ensuring their minimum level of subsistence.”

She pointed out that in Trojaní, the Court of Justice had ruled that a citizen of the Union who had been lawfully resident in the host Member State for a certain time or possessed a residence permit, and who satisfied the conditions required of nationals of that Member State, could not be denied such benefits. She took this to mean that where a national of another Member State has the right to reside (emphasis added) under the national law of the host country, he or she is also entitled to claim benefits on the same terms as nationals of the host country. She did “not find anything in Trojaní to suggest that mere presence, without any right to reside in the host country, is sufficient.” She took the Court’s ruling that,

“once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on article 12 EC in order to be granted a social assistance benefit”

as giving,

18 At [37]. See also Lord Walker at [75]. The point is discussed further below.
19 At [51] citing what Advocate General Geelhoed said in Trojaní at [18] of his opinion as to social tourism.
20 At [52]. Though the difference is arguably rather fine.
21 At [103].
23 At [106].
24 Trojaní at [46].
“a fairly clear indication that it is open to Member States to make entitlement to such benefits dependent on the right to reside in the host country.”

Lord Walker took a very different view. While agreeing that Bressol meant that the case must be viewed as involving indirect discrimination, he concluded that a distinction on the basis of the right to reside was intrinsically based on nationality: “Even though classified as indirect discrimination, [he said] it is not capable of justification because the proposed justification, once examined, is founded on nationality.”

Discussion

The Supreme Court has, at least, focused on the issue of objective justification and avoided the more obvious errors of the lower courts. However, the Court can be criticised, first, for relying too heavily on a link in EU law between a right of residence and a right to social assistance and, second, for ignoring the issue of proportionality. The Court, in particular Lady Hale, suggests that in deciding whether a Member State may link access to social assistance to a right to reside, it is logical to look at EU law on the right of residence. However, EU law does not, in fact, draw a clear link between a right of residence and a right to benefits. It might be logical that it should do so but neither the Council nor the Court has in fact consistently done this. Article 24(2) of Directive 2004/38 provides for three specific instances where persons are not entitled to social assistance: if they are persons resident for up to three months, if they are jobseekers (but see Vatsouras), or where they are students (effectively upheld in Förster). The Council could have—but did not—provide that all persons not having a right of residence had no right to benefit. Rather the Directive provides that persons, to establish a right of residence under EU law, must have sufficient resources so as not to become an unreasonable burden on the host state. Thus EU law does not provide that there is no right to social assistance unless that person has a right to reside. Conversely Directive 2004/38 clearly envisages that—in certain circumstances—a person may still establish a right to reside even though claiming social assistance. The Supreme Court’s attempt to read Trojani in reverse is obviously rather speculative as it is an equation of the Court of Justice’s reference to “legal residence” or possession of a residence permit under Belgian law with a “right to reside” under UK law.

25 At [106].
26 At [79].
27 In reality, however, the Court does seem to have had some regard to proportionality issues. Lord Hope, for example, asked whether the justification “could be regarded as sufficient given the effect of the rules” at [50].
28 Indeed, as Advocate General Kokott pointed out in her opinion in, Teixeira v Lambeth LBC (C-480/08) (October 20, 2009) at [48] Directive 2004/38 “does not contain comprehensive and definitive rules to govern every conceivable right of residence of … Unions citizens and their family members”.
The general principle set out in the Directive is that persons should not become an unreasonable burden on host states. However, it is simply silent as to when migrants may claim benefits (other than in the three cases specifically referred to above).

The Court of Justice has made it clear that Member States may confine access to social assistance to persons who have established an economic or social link with the state concerned. Is a right to reside (under EU or UK law) an appropriate condition to establish such a link? One would be inclined to suggest that, by analogy with Collins, the ECJ would answer that it is a sufficient condition (indeed the link between habitual residence and a genuine link with the labour market is arguably more tenuous than that between a right of residence and economic and social integration).

But as in Collins, the Court would also be likely to insist that such a provision be applied in a proportionate manner. Is it proportionate to deny benefits to a person such as Ms Patmalniece who has been legally resident in the country for over five years? As Lord Walker pointed out Ms Patmalniece did not satisfy the right to reside test and “no amount of effort on her part to achieve social integration (whatever that means) will change the position”.

Arguably a rigid reliance on the right to reside as the only way of proving social integration would not be proportionate in a case such as this (although it might well be on the facts in Abdirahman which involved a much shorter period of residence). Commissioner Mesher, following the reference in Collins, suggested that that the result of the Court of Justice’s decision was that the habitual residence test should be applied subject to the proviso that it could not be applied to deny entitlement to benefit beyond the date at which therelevant national authority has become satisfied of the genuineness of the claimant’s search for work.

Similarly, in this case, an appropriate approach might be to apply the right to reside test in the normal manner but that decision makers should also direct themselves, in cases covered by EU law and in the absence of such a right to reside, to whether a claimant had shown sufficient economic or social integration into UK society.

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31 The Court’s reliance on Advocate General Geelhoed’s opinion is also rather questionable given that—as Lord Hope does not mention—it was not followed by the Court. See, to the contrary, the comments by Advocate General Kokott in Teixeira at [82] that “a certain degree of financial solidarity by the host Member State with nationals of other Member States has, until now, already been inherent in all Community instruments relating to the rights of free movement and residence, not least in regard to persons not gainfully employed. This idea finds renewed expression...” The Court, in that case, generally followed her analysis.

32 In that case, the Court ruled that the right to equal treatment in the EC Treaty “does not preclude legislation which makes entitlement to a jobseeker’s allowance conditional on a residence requirement in so far as that requirement may 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.”

33 503/09, Stewart v Secretary of State for Work and Pensions C-503/09 (March 17, 2011) Advocate General Villalón has suggested that EU law should be interpreted as not precluding a residence test for incapacity benefit in youth “provided that such condition, … first, serves only to provide a connection between the claimant and the social security scheme of which the benefit forms part and, secondly, is unenforceable against persons having a comparable connection” such as her status as a member of the family of a person who is a pensioner entitled to a pension within the meaning of art.28 of reg. No. 1408/71. Although both the nature of the benefit and the residence test are different to that considered here, the approach of the Advocate General is consistent with what I suggest here. The judgment of the Court is awaited.

34 At [77].

35 CISA 4065/1999 at [45]. The Court of Appeal (arguably incorrectly) rejected this interpretation holding in effect that the reference to proportionality was meaningless: Collins v Secretary of State for Work and Pensions, [2006] EWCA Civ 376; [2006] 1 W.L.R. 2391.
It must be accepted that the developing concepts of EU citizenship, rights of residence and the implications for solidarity are rather unclear. The Court, in its case law (such as Vatsouras and Förster) has tended to take two steps in one direction followed by one in a different direction. This makes it difficult to predict the answer which the Court of Justice might give to the compatibility of the right to reside test were it to reach it. The answer which the majority of the Supreme Court arrived at could be correct as to the outcome. In fact, there are perhaps three possible answers. First, the Court takes a “bright line” approach as in Förster and the test is objectively justified. Second, the test is not objectively justified, either (as Lord Walker ruled) because it is too closely bound up with nationality or, more likely, because it is not proportionate. Finally, I would think the most likely answer to come from the Court of Justice, is that the right to reside test is not justified unless it is applied in a proportionate manner (to be determined by the national courts).

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37 As noted in the Supreme Court judgment, the Commission has taken the initial steps in possible infringement proceedings on this issue. One might have thought that the Supreme Court would have considered making a reference on the point. Lord Hope at [37] hints at a reason why they did not do so when he says that issues concerning objective justification are matters for the national court to determine. Lord Walker states that as he “differ[ed] from the majority only on the issue of justification, which is for the domestic court, a reference to the Court of Justice would not be appropriate” at [81]. However, the principles on which a national court is to assess justification are a matter for the Court of Justice. In the Bressol case, for example, the Court of Justice ruled that the legislation in question was incompatible with EU law unless the national court found that it was “justified in the light of the objective of protection of public health” On the other hand, it ruled out the burdens on the financing of higher education as a potential justification.

38 See, for example, M. Jesse, “The Value of ‘Integration’ in European Law—The Implications of the Förster Case on Legal Assessment of Integration Conditions for Third-Country Nationals” (2011) 17(2) European Law Journal 172–189 who argues that the result of Förster is that “‘actual’ integration into the host society … has … become legally insignificant” at [173]. As shown by the approach adopted by Advocate General Villalón in Stewart, I believe that this conclusion is far too sweeping.

39 It has been suggested that the absence of any reference in the co-ordination Regulation to the person’s status under the Residence Directive means that entitlement to SNCBs depends only on being actually resident in a Member State and not on the legal nature of this residence and that persons entitled to special non-contributory benefits under the co-ordination Regulation automatically fulfil the subsistence requirement for residence rights under Directive 2004/38: M. Couchier et al., The relationship and interaction between the coordination Regulations and Directive 2004/38/EC, (Tress, 2008). Personally I doubt that the Court would accept this argument but it highlights the fact that the relationship between residence and benefits under EU law is by no means as self-evident as assumed by the Supreme Court.

40 Or to reverse this, the right to reside test is compatible with EU law if applied in a proportionate manner (as in Collins).