Trinity Term

[2015] UKSC 55

On appeal from: [2013] EWCA Civ 1471

JUDGMENT

Secretary of State for Work and Pensions (Appellant) v Tolley (deceased, acting by her personal representative) (Respondent)

before

Lady Hale, Deputy President

Lord Clarke

Lord Reed

Lord Toulson

Lord Hodge

JUDGMENT GIVEN ON

29 July 2015

Heard on 5 and 6 May 2015

Appellant	Respondent
Thomas de la Mare QC	Richard Drabble QC
Iain Steele	Tim Buley
(Instructed by The Government Legal Department)	(Instructed by Public Law Project)

LADY HALE: (with whom Lord Clarke, Lord Reed, Lord Toulson and Lord Hodge agree)

1.
The issue is whether the United Kingdom is precluded, by Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community ("the Regulation"), from imposing a requirement of residence in Great Britain as a condition of entitlement to disability living allowance ("DLA") and thus depriving a claimant who has gone to live in another Member State of that benefit. DLA is a non-contributory and non-means-tested benefit consisting of a care component and a mobility component. It is not an income replacement benefit, as the recipient may or may not be working. Its purpose is to cater for the extra costs of requiring certain types of care or being unable or virtually unable to walk.

The facts

2.
The claimant, Mrs Tolley, a British national, was born on 17 April 1952. She had paid national insurance contributions from 1967 to 1984 and been credited with some contributions thereafter, but none since the year 1993/94. Depending on whether she fulfilled the contribution conditions when she reached state retirement age, therefore, she might have been entitled to a state retirement pension. From 26 July 1993, she was awarded the care component of DLA on an indefinite basis, because she was unable to prepare a cooked meal for herself. On 5 November 2002, she and her husband moved permanently to live in Spain. She was not employed or self-employed there. In 2007, the Secretary of State for Work and Pensions decided that, as from 6 November 2002, she was not entitled to DLA.

3.
She appealed to the First-tier Tribunal, which held that she was entitled to continue to receive DLA by virtue of article 10 of the Regulation. She died on 10 May 2011 and her husband was appointed to continue the proceedings in her place. The Secretary of State appealed to the Upper Tribunal, which also held that Mrs Tolley was entitled to the benefit, but for a different reason: [2012] UKUT 282 (AAC). Because she was insured against the risk of old age by virtue of her national insurance contributions, she was an "employed person" within the meaning of article 1(a) of the Regulation; that expression had the same meaning wherever it occurred in the Regulation; and the situation fell within article 22 of the Regulation. The Secretary of State appealed to the Court of Appeal, which dismissed the appeal, holding that it was bound by that court's previous decision in Commissioners for Her Majesty's Revenue and Customs v Ruas [2010] EWCA Civ 291, applying Martinez Sala (Case C-85/96) [1998] ECR I-2708, to hold that Mrs Tolley was an "employed person" for this purpose: [2013] EWCA Civ 1471. The Secretary of State now appeals to the Supreme Court of the United Kingdom.

Relevant domestic law

4.
Section 71(6) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") provides that "A person shall not be entitled to a disability living allowance unless he satisfies prescribed conditions as to residence and presence in Great Britain". The conditions prescribed for this purpose by regulation 2(1) of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890) are that "(a) on that day … (iii) he has been present in Great Britain for a period of, or for periods amounting in the aggregate to, not less than 104 weeks in the 156 weeks immediately preceding that day". It is, therefore, common ground that, under domestic law, Mrs Tolley was excluded from entitlement to DLA following her permanent move to Spain in November 2002. The question is whether that domestic law is compatible with the Regulation.

European Union law

5.
Article 2.1 of the Regulation No 1408/71 provides that "This Regulation shall apply to employed or self-employed persons and to students 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 …." It is therefore common ground that Mrs Tolley falls within the personal scope of the Regulation.

6.
It is also common ground that DLA is one of the benefits falling within the material scope of the Regulation, as defined in article 4. Had it been categorised as an "invalidity benefit" within the meaning of article 4.1(b), it would have been covered by article 10. This precludes the withdrawal of such benefits "by reason of the fact that the recipient resides in the territory of a member state other

than that in which the institution responsible for payment is situated", in other words, it provides for full portability within the Union. However, in Commission v European Parliament (Case C-299/05) [2007] ECR I-08695, at para 68, following Molenaar (Case C-160/96) [1998] ECR I-843, para 25, and Jauch (Case C-215/99) [2001] ECR I-1901, para 25, the care component of DLA was categorised as a "cash sickness benefit" for the purpose of EU law.

7.
Nevertheless, in Da Silva Martins (Case C-388/09) [2011] ECR I-5761, para 48, the Court observed that benefits relating to the risk of reliance on care, unlike sickness benefits, were not intended to be paid on a short term basis and might, in the detail of their application, display characteristics resembling invalidity and old age benefits. This case is an example of the problems of applying provisions designed with short term benefits in mind to benefits which are capable of applying on a long term basis such as DLA.

8.
Article 13.1 lays down the general rule that persons to whom the Regulation applies shall be subject to the legislation of a single member state. "Legislation" is defined by article 1(j) in effect to mean all the legislation and other implementing measures of a member state relating to the branches and schemes of social security covered by article 4(1) and (2) or the special non-contributory benefits covered by article 4(2a). Article 13(2) defines the member state to whose legislation a person is subject, generally the lex loci laboris rather than where the person lives. Article 13(2)(a) refers to a "person employed" rather than an "employed person". Article 13.2(f) provides that:

"a person to whom the legislation of a member state ceases to be applicable, without the legislation of another member state becoming applicable to him in accordance with one of the rules laid down in the aforegoing sub-paragraphs or in accordance with one of the exceptions or special provisions laid down in articles 14 to 17 shall be subject to the legislation of the member state in whose territory he resides in accordance with the provisions of that legislation alone."

In Kuusijarvi (Case C-275/96) [1998] ECR I-3443, the court held that this did not preclude a member state from making the right to remain subject to its legislation of a person, who had ceased all occupational activity in its territory, dependent upon his continued residence there. The court observed that a person who has ceased all occupational activity in the territory of a member state no longer satisfies the conditions laid down in article 13(2)(a) (para 32).

9.
Article 89 provides that "special procedures for implementing the legislations of certain member states are set out in annex VI". Points 19 and 20 of the United Kingdom's entry in annex VI relate to article 13(2)(f). Point 19 defines the date when UK legislation shall cease to apply for this purpose, so far as relevant, as the latest of (a) the day on which residence is transferred; (b) the day of cessation of employment or self-employment, whether permanent or temporary, during which the person was subject to UK legislation; or (c) the last day of any period of receipt of UK sickness, maternity or unemployment benefit which began before the transfer of residence. Point 20 provides, so far as relevant, that the fact that a person has become subject to the legislation of another member state in accordance with article 13(2)(f) "shall not prevent (a) the application to him by the United Kingdom as the competent state of the provisions relating to employed or self-employed persons of Title III, Chapter 1 … if he remains an employed or self-employed person for those purposes and was last so insured under the legislation of the United Kingdom".

10.

Chapter 1 of Title III deals with the portability of sickness and maternity benefits. Article 19.1 provides that

“An employed or self-employed person residing in the territory of a member state other than the competent state, who satisfies the conditions of the legislation of the competent state for entitlement to benefits, …, shall receive in the state in which he is resident: (a) benefits in kind …; (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. …”

The Upper Tribunal held in this case that articles 19, 20, 21 and 22 contemplate different situations with no overlap between them. Article 19 did not apply to Mrs Tolley, because “on closer scrutiny it covers only the situation of a person who works in one member state and lives in a different member state” (para 84).

11.
Article 22.1 provides that

“An employed or self-employed person who satisfies the conditions of the legislation of the competent state for entitlement to benefits, … , and … (b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution … to transfer his residence to the territory of another member state; … shall be entitled … (i) to benefits in kind … (ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. …”

The Upper Tribunal held that article 22 did apply to Mrs Tolley. “She was an employed person for the purposes of the Regulation; she had become entitled to cash sickness benefits under the legislation of the United Kingdom; and she had transferred her residence to another member state” (para 86). Her ability to rely on article 22 could not be defeated when, had authorisation been sought, the circumstances did not fall within those where, under article 22.2, refusal is permitted (para 89).

12.
The definition of “employed person” is contained in article 1:

“For the purpose of this Regulation: (a) employed person and self-employed person mean respectively:

(i) 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 or self-employed persons …;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation … under a social security scheme for all residents or for the whole working population, if such person:

- can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or

- failing such criteria, is insured for some other contingency specified in annex I under a scheme for employed or self-employed persons … either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in annex I; …”

13.

The applicable definition is that in article 1(a)(ii), because DLA is a scheme for all residents, whether or not they are employed or self-employed. The United Kingdom's entry in annex I provides that "Any person who is an 'employed earner' or a 'self-employed earner' within the meaning of the legislation of Great Britain … shall be regarded respectively as an employed person or a self-employed person within the meaning of article 1(a)(ii) of the Regulation". Section 2(1) of the 1992 Act defines "employed earner" as "a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with general earnings". This would not cover Mrs Tolley, who was not gainfully employed at the time.

14.
In Dodl and Oberhollenzer (Case C-543/03) [2005] ECR I-5065, para 34, the Grand Chamber held that

"a person has the status of an 'employed person' within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in article 1(a) of that Regulation, irrespective of the existence of an employment relationship."

That case concerned Austrian women working in Austria but living in Germany with their German husbands who worked in Germany. They were on unpaid maternity leave and the issue was whether Germany or Austria was responsible for paying family benefits.

15.
The definition adopted by the Grand Chamber in Dodl was that in Martinez Sala (Case C-85/96) [1998] ECR I-2708, para 36, repeated in Kuusijarvi, para 21. Martinez Sala concerned a Spanish national living lawfully in Germany, who had previously been working there but was no longer employed or self-employed. The issue was whether she was entitled to a German child-raising allowance, a family benefit. Since her situation was not covered by any of the provisions of Title III, Chapter 7, relating to family benefits, the restriction in the German entry in annex I, did not apply. Hence her status as an employed person had to be judged solely on the basis of article 1(a)(ii), as defined above. It was for the referring court to decide whether this was established on the facts (para 45). If it was, then requiring her to produce a formal residence permit, which was not required of German nationals, was unequal treatment contrary to EU law (para 65).

16.
The definition adopted in Martinez Sala was itself derived from Pierik II (Case 182/78) [1979] ECR 1977, paras 4 and 7, where it was held that the status of "worker" for the purpose of article 22 was not restricted to active as opposed to inactive workers. The issue in that case was whether a person receiving an invalidity pension in the Netherlands was entitled to reclaim the cost of medical treatment in Germany. Such pensioners came within the provisions of the Regulation concerning "workers", including article 22, by virtue of their insurance under a social security scheme, "unless they are subject to special provisions laid down regarding them" (para 4).

The parties' arguments

17.
In very brief summary, the Government does not challenge the classification of DLA as a "sickness benefit" (although we comment that it would not have had the same problems had it been classified as an "invalidity benefit" and thus freely exportable under article 10). Its concern is with the implications of collapsing the categories of employed and self-employed persons, on the one hand, and unemployed

persons, on the other hand, for the purpose, not only of sickness benefits generally, but also for maternity and family benefits (to which the same or similar rules apply).

18.
The Government argues that Mrs Tolley cannot be an “employed person” for the purpose of Chapter 1 of Title III just because she is insured against the risk of old age under UK legislation and thus falls within the interpretation of article 1(a)(ii) in Dodl, Martinez Sala and other cases. So to hold makes nonsense of the careful distinctions drawn in that Chapter between people who are employed or self-employed and “unemployed persons”, covered by articles 19 to 22, whose rights to export sickness and maternity benefits are severely limited by article 25, read in combination with articles 69(1) and 71, dealing with the export of unemployment benefits. Chapter 7, dealing with family benefits, also makes special provision for persons who have become unemployed. The specific provisions in Title III are lex specialis overriding the general provisions in the Regulation. Martinez Sala was not concerned with the provisions about exportability of particular benefits but with the general EU principle of equality. The claimants in Dodl and in Borger were on maternity leave and Mrs Pierik was a pensioner. The cases did not, therefore, have to grapple with the issue arising in this case.

19.
Alternatively, a person such as Mrs Tolley falls within article 13(2)(f), because the legislation of the UK has ceased to be applicable to her, without the legislation of another member state becoming applicable under articles 13(2)(a) to (e), 14 to 17. In the light of Kuusijarvi, the UK is entitled to make her right to remain subject to its legislation dependent upon her continued residence here. Hence she is subject to the legislation of Spain, the member state in whose territory she now resides. Point 19 of annex VI does not apply because she was not entitled to receive the benefit once she moved to live in Spain. Point 20 does not apply because she is not an employed or self-employed person for the purpose of Title III, Chapter 1.

20.
On behalf of Mrs Tolley, it is argued that Commission v Parliament, following earlier case law, rejected the argument that the care component of DLA is a non-contributory cash benefit within article 4(2a), and thus not exportable at all. This shows that allowing persons such as Mrs Tolley to export their DLA is consistent with the policy of the Regulation.

21.
More importantly, Mrs Tolley clearly fell within the definition of an “employed person” in Martinez Sala and confirmed by the Grand Chamber in Dodl, because she was covered in respect of the risk of old age by the UK social security system. There cannot be different definitions for different purposes in the same Regulation. Article 25 is concerned with job-seekers, that is, persons who are currently unemployed but moving abroad to look for work. It is designed to link the sickness benefit scheme with the unemployment benefit scheme. It is not concerned with people like Mrs Tolley, who are wholly economically inactive owing to long term disability.

22.
Article 13(2)(f) does not apply, because Mrs Tolley remains subject to the UK legislation by virtue of Points 19 and 20 of annex VI: either UK legislation has not ceased to apply within the meaning of Point 19, because she was still in receipt of a sickness benefit which began before she moved to Spain; or, if UK legislation had ceased to apply and therefore article 13(2)(f) did apply, by virtue of Point 20, the UK was not prevented from applying the provisions relating to employed or self-employed persons

in Title III, Chapter 1 to her. For that purpose, according to the case law cited above, she clearly was an “employed person”.

23.
Alternatively, reliance is placed on the opinion of Advocate General Jacobs in Kuusijarvi, at para 65: Article 22 of the Regulation, being designed to ensure that people retain their sickness benefit entitlement if they move their residence to another member state, would be “entirely devoid of purpose” if it could be defeated by a residence requirement in national law. Hence he concluded that the right to continued payment of benefits conferred by article 22 could not be defeated by a residence requirement imposed by national legislation. It follows that the national legislation had not ceased to apply for the purpose of article 13(2)(f). The Court did not deal with the applicability of article 22 in the circumstances of that case, because it held that the benefit in question was a family, and not a sickness, benefit.

The Supreme Court’s view

24.
In this court’s view, although the matter was not argued before us, the principled solution to a case such as this would be to treat the care component of DLA as an invalidity benefit for the purpose of the Regulation, and thus freely exportable under article 10, leaving the detailed provisions of Chapter 1 of Title III to deal with sickness benefits stricto sensu. Then none of the current issues would have arisen: see Stewart (Case C-503/09) [2012] 1 CMLR 337. The broad characteristic of the benefits listed in article 10 is that they are long term or one-off payments in respect of permanent conditions, such as disability, old age or death, rather than short term benefits in respect of potentially temporary conditions, such as sickness, maternity or unemployment. Income replacement cannot be an essential feature of an invalidity benefit, because they include “those intended for the maintenance or improvement of earning capacity” (article 4(1)(b)).

25.
However, if DLA remains to be treated as a sickness benefit, the court agrees with the Government that none of the cases relied upon by Mrs Tolley and the English courts was concerned with whether, in the light of the specific provisions of Title III relating to unemployed persons, the broad definition in Dodl could apply to the provisions relating to “employed persons”. It might be thought surprising if people who are wholly economically inactive were treated more favourably than people who are actively seeking work in a Regulation which is designed to facilitate the free movement of workers.

26.
Logically, article 13(2)(f) comes before articles 19 to 22. Mrs Tolley ceased to be subject to the legislation of the United Kingdom concerning DLA, because she was no longer resident here. On the other hand, she remained subject to the legislation of the UK for the purposes of any potential entitlement to a state retirement pension. So when article 13(2)(f) speaks of the legislation of a member state ceasing to be applicable, does it mean all that legislation, or (notwithstanding the definition in article 1(j)) only the legislation relating to the particular benefit in question? If the latter, how are Points 19 and 20 of annex VI to be interpreted? In particular, does Point 19(c) refer to actual receipt of or to entitlement to DLA? And does Point 20 merely permit, as opposed to require, the UK to continue paying DLA in accordance with Chapter 1 of Title III?

The questions referred

27.

Hence we refer the following questions to the CJEU:

1. Is the care component of the United Kingdom's Disability Living Allowance properly classified as an invalidity rather than a cash sickness benefit for the purpose of Regulation No 1408/71?

2. (i) Does a person who ceases to be entitled to UK Disability Living Allowance as a matter of UK domestic law, because she has moved to live in another member state, and who has ceased all occupational activity before such move, but remains insured against old age under the UK social security system, cease to be subject to the legislation of the UK for the purpose of article 13(2)(f) of Regulation No 1408/71?

(ii) Does such a person in any event remain subject to the legislation of the UK in the light of Point 19(c) of the United Kingdom's annex VI to the Regulation?

(iii) If she has ceased to be subject to the legislation of the UK within the meaning of article 13(2)(f), is the UK obliged or merely permitted by virtue of Point 20 of annex VI to apply the provisions of Chapter 1 of Title III to the Regulation to her?

3. (i) Does the broad definition of an employed person in Dodl apply for the purposes of articles 19 to 22 of the Regulation, where the person has ceased all occupational activity before moving to another member state, notwithstanding the distinction drawn in Chapter 1 of Title III between, on the one hand, employed and self-employed persons and, on the other hand, unemployed persons?

(ii) If it does apply, is such a person entitled to export the benefit by virtue of either article 19 or article 22? Does article 22(1)(b) operate to prevent a claimant's entitlement to the care component of DLA being defeated by a residence requirement imposed by national legislation on a transfer of residence to another member state?