



PRESS SUMMARY

16 March 2011

Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent) **[2011] UKSC 11**

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale, Lord Brown,

BACKGROUND TO THE APPEAL

The issue in this appeal is whether the conditions of entitlement to State Pension Credit (SPC) are compatible with a rule of EU law which prohibits discrimination between nationals of different Member States.

State Pension Credit is a means tested non-contributory benefit. Section 1(2)(a) of the State Pension Credit Act 2002 provides that a claimant is entitled to SPC if he or she is “in Great Britain”. The State Pension Credit Regulations 2002 (“the Regulations”) provide when someone is or is not to be treated as being “in Great Britain”. This is not just a matter of where the person is. In outline, a person is treated as not in Great Britain if he or she is not “habitually resident” in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (“the Common Travel Area”). And no person is to be treated as habitually resident in the Common Travel Area if that person does not have a right to reside in the Common Travel Area. (Cumulatively, these are “the conditions”.)

Regulation 1408/71 (EC) (“the EU Regulation”) provided for the application of social security schemes to employed persons and their families moving within the European Community. (It has now been replaced by other EU legislation.) The Regulation applies to SPC. One of the categories of person to which it applies is “employed person”. This includes EU nationals who have retired from employment but who remain insured by the social security system of a Member State because of contributions paid during their working life. The dispute in this case relates to the effect of Regulation 3. It provides that “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 nationals of that State”. This prohibits both direct discrimination (in broad terms, where people are treated differently because of their nationality) and indirect discrimination (broadly, where an apparently neutral test is applied to nationals and non-nationals and places non-nationals at a particular disadvantage).

Mrs Patmalniece is Latvian pensioner, now 72 years of age and in receipt of a Latvian retirement pension. She came to the UK in June 2000. Her asylum claim was unsuccessful, but she was not removed from the UK. She has never worked in the UK. Latvia joined the EU on 1 May 2004. In August 2005, Mrs Patmalniece claimed SPC. But her claim was refused on the ground that she was not in Great Britain because she did not have a right to reside in the UK. She appealed against the refusal of SPC, arguing that the requirement that she have a right to reside in the UK was directly discriminatory on the grounds of her nationality, in breach of Regulation 3 of the EU Regulation. The Social Security Appeal Tribunal allowed her appeal. However, the Social Security Commissioner allowed the Secretary of State’s appeal and held the conditions to be indirectly discriminatory but justified. The Court of Appeal upheld that decision. Mrs Patmalniece appealed to the Supreme Court.

JUDGMENT

The Supreme Court, by a majority, dismisses the appeal. It holds unanimously that the conditions are indirectly discriminatory. But the majority (Lord Walker dissenting) hold that this discrimination is justified because the Regulations are a proportionate response to the legitimate aim of protecting the

UK public purse and that this justification is independent of the claimant's nationality. The court also holds unanimously that the different treatment afforded to Irish nationals is protected by the Protocol on the Common Travel Area. Lord Hope gives the main judgment, with which Lord Rodger agrees. Lady Hale gives a separate judgment. Lord Brown agrees with both Lord Hope's and Lady Hale's judgments. Lord Walker gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The court considers three issues: (1) do the conditions of entitlement for SPC give rise to direct discrimination? (2) If they give rise only to indirect discrimination, is that discrimination justified? (3) Is that conclusion undermined by the favourable treatment that the Regulation gives to Irish nationals?

Direct/indirect discrimination

All UK nationals would automatically satisfy the "right to reside" element of the test, whereas nationals of other Member States would not automatically do so. However, UK nationals still had to satisfy the requirement of "habitual residence". The result is that the "in Great Britain" test would be satisfied by some, but not all, UK nationals, and some, but not all, nationals of other Member States. It was more likely to be satisfied by UK nationals than nationals of other member states: [25] – [28]. The court applies the decision of the Grand Chamber of the European Court of Justice in *Bressol v Gouvernement de la Communauté Française* (Case C-73/08). In *Bressol* the ECJ had considered a Belgian law which set down eligibility criteria to study in Belgium which were similarly structured to the entitlement conditions for SPC. Although Advocate General Sharpston in *Bressol* had proposed that the ECJ treat the provisions of the Belgian law as directly discriminatory on the grounds of nationality, the ECJ did not follow her approach. Although the reasons for the ECJ's position were not fully explained in its judgment, the court has decided that it should follow its conclusion and hold that the entitlement conditions for SPC were only indirectly discriminatory: [30] - [35], [73], [89] - [92].

Justification

A difference in treatment which amounts to indirect discrimination can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to a legitimate aim: [36], [94]. The parties were agreed that the measures here were proportionate. The issues were whether the conditions pursued a legitimate aim and whether it was "independent of the nationality" of the persons affected. The majority holds that both tests are satisfied. The aim was to ensure that claimants were economically or socially integrated in the UK, or elsewhere in the Common Travel Area, thereby protecting the social security system against the risk of "benefit" or "social" tourism: [38], [46], [51] – [52], [96]. This justification was independent of nationality. Lady Hale notes, additionally, that the Government's aims in introducing the "right to reside" test were consistent with the aims of Regulation 1408/72 and that it is logical that if a person does not have a right under EU law to reside in a particular state, that state should not have the responsibility under EU law for ensuring their minimum level of subsistence: [103]. Lord Walker dissents on the issue of justification. He would have held that the provisions were probably aimed at discriminating against economically inactive foreign nationals on the grounds of their nationality: [79].

The relevance of the treatment of Irish nationals

The Appellant argued that, as entitlement to SPC was extended to Irish nationals, it was discriminatory not to extend it to nationals of other Member States. The court rejects that argument. The provision for Irish nationals in the conditions is protected by Article 2 of the Protocol on the Common Travel Area, which provides that the UK and Ireland "may continue to make arrangements between themselves relating to the movement of persons between their territories": [54] – [60], [80].

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html