



29 July 2015

PRESS SUMMARY

Secretary of State for Work and Pensions (Appellant) v Tolley (deceased, acting by her personal representative) (Respondent) [2014] UKSC 55
On appeal from [2013] EWCA Civ 1471

JUSTICES: Lady Hale (Deputy President), Lord Clarke, Lord Reed, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

The issue in this appeal is whether as a matter of European Union law the United Kingdom may impose a requirement of residence in Great Britain as a condition of entitlement to disability living allowance ('DLA').

Mrs Tolley, had worked in the UK, paying national insurance contributions, from 1967 to 1984, with some further contributions up to 1993/94. From 1993 she was awarded the care component of DLA on an indefinite basis, because she was unable to prepare a cooked main meal for herself. She moved permanently to Spain in November 2002. The Secretary of State for Work and Pensions decided that she was no longer entitled to DLA by reason of s 71(6) Social Security Contributions and Benefits Act 1992 and the regulations thereunder, which required her to be resident in Great Britain. Mrs Tolley appealed against this decision on the basis that UK domestic law was incompatible with the EU law laid down in Council Regulation (EC) No 1408/71 ('the Regulation').

The Regulation provides that certain benefits (including those categorised as an 'invalidity benefit') are fully portable within the EU. The care component of DLA has, however, been categorised in a number of EU cases as a 'cash sickness benefit'. Mrs Tolley's entitlement to receive it when she no longer resided in the UK depended on whether she was an 'employed person' for the purposes of the Chapter 1 of Title III of the Regulation. The meaning of 'employed person' in article 1 of the Regulation has been broadly defined by the Court of Justice of the European Union (CJEU) in cases involving other benefits as extending to anyone who is insured under a social security scheme irrespective of the existence of an employment relationship. Within Title III, the rights of 'unemployed persons' to export sickness benefits are severely limited.

Mrs Tolley argued that she was an employed person as she was insured by reason of her national insurance contributions against the risk of old age under UK legislation. Alternatively, she remained subject to the legislation of the UK for the purposes of article 13, which lays down the general rule that a person should only be subject to the legislation of a single member state. The Secretary of State argued that Mrs Tolley could not be an employed person for the purpose of the specific provisions of Chapter 1 of Title III, or that she fell within article 13(2)(f) because the legislation of the UK had ceased to be applicable to her, and she had therefore become subject to the legislation of Spain.

Mrs Tolley's appeal was allowed by the First-tier Tribunal. She died shortly afterwards and her husband was appointed to continue the proceedings in her place. The Secretary of State appealed against the First-tier Tribunal's decision but his appeal was rejected by the Upper Tribunal and by the Court of Appeal. He now appeals to the Supreme Court. The Supreme Court is obliged to refer questions of EU law to the CJEU if the application of the Regulation in the circumstances of this case is not clear.

JUDGMENT

The Supreme Court unanimously decides to refer three questions to the CJEU. The terms of the reference are set out by Lady Hale.

REASONS FOR THE JUDGMENT

In the view of the court, the principled solution to the case would be to treat the care component of DLA as an invalidity benefit for the purpose of the Regulation. Unlike sickness benefits, DLA is not intended to be paid on a short term basis and is more akin to invalidity and old age benefits. This would have avoided the issues which had arisen in this case [7, 24].

However, if DLA remains to be treated as a sickness benefit, none of the cases relied on by Mrs Tolley address the question of whether, in the light of the specific provisions of Title III relating to unemployed persons, the broad definition of ‘employed persons’ under article 1 should apply [25]. It is also unclear how article 13 (and the special procedures for implementing the legislation of the UK in annex VI) apply when a person remains subject only to the legislation of a member state relating to a particular benefit, in this case potential entitlement to a state retirement pension.

The questions referred are therefore as follows [27]:

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 and Oberhollenzer* [2005] ECR I-5065 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?

References in square brackets are to paragraphs in the judgment

NOTE

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

<http://supremecourt.uk/decided-cases/index.shtml>