JUDGMENT OF THE COURT (Fourth Chamber)

5 May 2011 *

In Case C-537/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (United Kingdom), made by decision of 15 December 2009, received at the Court on 21 December 2009, in the proceedings

Ralph James Bartlett,

Natalio Gonzalez Ramos,

Jason Michael Taylor

v

Secretary of State for Work and Pensions,

* Language of the case: English.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2010,

after considering the observations submitted on behalf of:

— Mr Gonzalez Ramos, by S. Penfold, Solicitor, and S. Cox, Barrister,

— the United Kingdom Government, by L. Seeboruth and S. Ossowski, acting as Agents, and by T. Ward, Barrister,

— the European Commission, by N. Yerrell and V. Kreuschitz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(2a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) ('Regulation No 1408/71'), and of Regulation No 1408/71, in the latter version, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 1408/71, as amended'), and the validity of Article 10a of Regulation No 1408/71 and of Regulation No 1408/71, as amended.

2 The reference has been made in separate sets of proceedings between Mr Bartlett, Mr Gonzalez Ramos and Mr Taylor, respectively, and the Secretary of State for Work and Pensions concerning the withdrawal of their entitlement to the mobility component of Disability Living Allowance ('DLA') on the ground that they no longer satisfy the conditions of presence and domicile in Great Britain.

Legal context

European Union law

3 Article 1(t) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, states:

"'*benefits …*" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.

4 Article 4(1) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, states:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

…'

5 Article 4(2a) of Regulation No 1408/71 provides:

'This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h); or

(b) solely as specific protection for the disabled.'

6 Article 4(2a) of Regulation No 1408/71, as amended, provides:

'This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned; or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned, and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone; and

(c) which are listed in Annex IIa.'

7 The first subparagraph of Article 10(1) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, provides:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any

reduction, modification, suspension, withdrawal or confiscation 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.'

8 However, Article 10a(1) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, states that the provisions of Article 10 and of Title III of those regulations are not to apply to the special non-contributory cash benefits referred to in Article 4(2a) thereof and that the persons concerned are to receive those benefits exclusively in the territory of the Member State in which they reside and in accordance with the legislation of that State, in so far as those benefits are mentioned in Annex IIa to those regulations.

9 DLA is mentioned in Annex IIa to Regulation No 1408/71 and to Regulation No 1408/71, as amended, to which Article 10a(1) of those regulations refers.

National law

10 Section 63 of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act') provides:

'Non-contributory benefits under [Part III] of this Act are of the following descriptions, namely:

(a) attendance allowance;

(b) severe disablement allowance (with age-related addition and increase for adult and child dependants);

(c) carer's allowance (with increase for adult dependants);

(d) [DLA];

…'

11 Section 71 of the 1992 Act, entitled 'Disability living allowance', describes the DLA scheme as follows:

'(1) [DLA] shall consist of a care component and a mobility component.

(2) A person's entitlement to a [DLA] may be an entitlement to either component or to both of them.

(3) A person may be awarded either component for a fixed period or for an indefinite period, but if his award of [DLA] consists of both components, he may not be awarded the components for different fixed periods.

(4) The weekly rate of a person's [DLA] for a week for which he has only been awarded one component is the appropriate weekly rate for that component as determined in accordance with this Act or regulations under it.

(5) The weekly rate of a person's [DLA] for a week for which he has been awarded both components is the aggregate of the appropriate weekly rates for the two components as so determined.

(6) A person shall not be entitled to [DLA] unless he satisfies prescribed conditions as to residence and presence in Great Britain.'

12 Section 73 of the 1992 Act lays down the conditions for the award of the mobility component of DLA in the following terms:

'(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of [DLA] for any period in which he is over the relevant age and throughout which:

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or

(b) he falls within subsection (2) below; or

(c) he falls within subsection (3) below; or

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

(1A) In subsection (1) above "the relevant age" means:

(a) in relation to the conditions mentioned in paragraph (a), (b) or (c) of that subsection, the age of three;

(b) in relation to the conditions mentioned in paragraph (d) of that subsection, the age of five.

(2) A person falls within this subsection if:

(a) he is both blind and deaf; and

(b) he satisfies such other conditions as may be prescribed.

(3) A person falls within this subsection if:

(a) he is severely mentally impaired;

(b) he displays severe behavioural problems; and

(c) he satisfies both the conditions in section 72(1)(b) and (c) above.

…

(8) A person shall not be entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion.

(9) A person shall not be entitled to the mobility component of [DLA] unless:

(a) throughout:

(i) the period of three months immediately preceding the date on which the award of that component would begin; or

(ii) such other period of three months as may be prescribed, he has satisfied or is likely to satisfy one or other of the conditions mentioned in subsection (1)(a) to (d) above; and

(b) he is likely to continue to satisfy one or other of those conditions throughout:

(i) the period of six months beginning with that date; or

(ii) (if his death is expected within the period of six months beginning with that date) the period so beginning and ending with his death.

…

(10) Two weekly rates of the mobility component shall be prescribed.

…'

13 The Social Security (Disability Living Allowance) Regulations 1991 ('the 1991 Regulations') set out, in particular in regulation 2(1)(a) thereof, the conditions as to residence and presence in Great Britain laid down in section 71(6) of the 1992 Act.

The actions in the main proceedings and the questions referred for a preliminary ruling

14 The disputes in the main proceedings concern actions for annulment brought by Mr Bartlett, Mr Gonzalez Ramos and Mr Taylor against decisions of the Secretary of State for Work and Pensions by which the latter withdrew their entitlement to DLA on the ground that they no longer satisfy the prescribed conditions as to residence and presence in Great Britain. Those decisions were adopted on 13 May 2005, 28 February 2002 and 8 September 2005 respectively.

15 At first instance, the competent tribunals dismissed the actions brought by the applicants. The Upper Tribunal, before which the three cases have been brought, takes the view that, in accordance with the judgment in Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, the care component of DLA must be regarded as a sickness benefit within the meaning of Regulation No 1408/71, as amended, with the result that the grant thereof cannot be made subject to such conditions.

16 As regards the mobility component of DLA, the Upper Tribunal takes the view that, since there is no means test for that component, and as it does not guarantee a minimum subsistence income, it has more in common with a social security benefit than with a special non-contributory benefit.

17 The Upper Tribunal points out that, in any event, the Court ruled, in the judgment in Case C-299/05 *Commission* v *Parliament and Council*, only in respect of Regulation No 1408/71, as amended, which applies with effect from 5 May 2005, with the result that that judgment cannot therefore affect the interpretation of Regulation No 1408/71.

18 The Upper Tribunal accordingly decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) In relation to periods to which [Regulation No 1408/71] applies, is the mobility component of [DLA] under sections 71 to 76 of the [1992 Act] capable of being categorised separately from [DLA] as a whole as either a social security benefit within Article 4(1) of the Regulation or a special non-contributory benefit within Article 4(2a) or otherwise?

(b) If the answer to (a) is yes, what is the proper category?

(c) If the answer to (a) is no, what is the proper category for [DLA]?

(d) If the answer to (b) or (c) is categorisation as a social security benefit, is the benefit in question a sickness benefit within Article 4(l)(a) or an invalidity benefit within Article 4(l)(b)?

(e) Are the answers to any of the above questions affected by the temporal limitation in point 2 of the [operative part of the] Court's ruling in [Case C-299/05 *Commission* v *Parliament and Council*]?

2. (a) In relation to periods to which [Regulation No 1408/71, as amended] applies, is the mobility component of [DLA] under sections 71 to 76 of the [1992 Act] capable of being categorised separately from [DLA] as a whole as either a social security benefit within Article 4(1) of the Regulation or a special non-contributory benefit within Article 4(2a) or otherwise?

(b) If the answer to (a) is yes, what is the proper category?

(c) If the answer to (a) is no, what is the proper category for [DLA]?

(d) If the answer to (b) or (c) is categorisation as a social security benefit, is the benefit in question a sickness benefit within Article 4(l)(a) or an invalidity benefit within Article 4(l)(b)?

3. If the answers to the previous questions produce the outcome that mobility component is properly to be categorised as a special non-contributory benefit, is any other rule or principle of EC law relevant to the question of whether the United Kingdom is entitled to rely on any of the residence and presence conditions in regulation 2(l)(a) of [the 1991 Regulations] in circumstances like those of the present cases?'

Consideration of the questions referred

The first two questions

19 By its first two questions, which it is appropriate to examine together, the national tribunal asks, in essence, whether Article 4(2a) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, must be interpreted as meaning that the mobility component of DLA constitutes a special non-contributory cash benefit within the meaning of that provision.

20 In order to answer those questions, it is first of all necessary to determine whether the mobility component of DLA can be regarded as a 'benefit' on its own account within the meaning of Article 1(t) of Regulation No 1408/71 and of Regulation No 1408/71, as amended.

21 In that regard, it must be borne in mind that the Court held, in paragraph 69 of the judgment in Case C-299/05 *Commission* v *Parliament and Council*, that the mobility component of DLA is severable, with the result that that component alone could be included on the list in Annex IIa to Regulation No 1408/71, as amended, if the United

Kingdom decided to create an allowance which concerned that component alone. It follows that the mobility component of DLA, by itself, constitutes a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71, as amended.

22 Such a finding must also be made, and for the same reasons, with regard to Regulation No 1408/71.

23 Accordingly, it must be held that the mobility component of DLA can also constitute a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71.

24 Next, as the Court has stated, it is not in dispute that the mobility component of DLA is in the nature of a non-contributory benefit (see, to that effect, Case C-299/05 *Commission* v *Parliament and Council*, paragraph 74) or that it is a cash benefit.

25 With regard to the question whether the mobility component of DLA is a special benefit, the Court has stated that DLA can be considered to include a 'social assistance' component and that the mobility component of DLA is in the nature of a special non-contributory benefit and 'could' lawfully be included in the list in Annex IIa to Regulation No 1408/71, as amended, as a non-exportable benefit (see Case C-299/05 *Commission* v *Parliament and Council*, paragraphs 67 and 74). It is in this context that the Court, which annulled the reference to DLA in the list in that annex, decided provisionally to maintain the effects of inclusion of DLA in that list as regards solely the mobility part thereof so that, within a reasonable period, appropriate measures could be taken to include it in that annex (see, to that effect, Case C-299/05 *Commission* v *Parliament and Council*, paragraph 75). It follows, in the view of the Court, that the mobility component of DLA may be a special benefit within the meaning of Article 4(2a) of Regulation No 1408/71, as amended.

26 It should also be noted that it follows from the Court's case-law that a special benefit is defined by its purpose (see, inter alia, Case C-154/05 *Kersbergen-Lap and Dams-Shipper* [2006] ECR I-6249, paragraph 30 and the case-law cited).

27 In that regard, it may be observed that, as both the United Kingdom Government and the European Commission submit, the mobility component of DLA seeks to provide specific protection for disabled persons within the meaning of Article 4(2a)(b) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, since it pursues solely the objective of promoting the independence and social integration of disabled persons and also, as far as possible, of helping them to lead a life similar to that of non-disabled persons. Thus, it is the disability itself which gives rise to entitlement to that benefit and which, depending on the level of the mobility problems suffered by the person concerned, allows the amount of the benefit awarded to be determined.

28 It also follows from the observations made at the hearing that the amount of the mobility component of DLA, which is determined by the costs connected with the mobility problems suffered by the beneficiary in the Member State concerned, is closely linked to the social environment of that person in that State.

29 Furthermore, and for the sake of completeness, it is clear from the case-file and from the observations submitted at the hearing that, in practice, the mobility component of DLA most frequently benefits persons suffering from a disability which seriously affects their mobility and, of necessity, it follows that, although the national legislation does not lay down any criteria as to means, that benefit is awarded in the overwhelming majority of cases to persons who cannot work because of their disability.

30 In the light of the foregoing, it must accordingly be held that the mobility component of DLA must be regarded as a special benefit within the meaning of both Article 4(2a) of Regulation No 1408/71, as amended, and of Article 4(2a) of Regulation No 1408/71.

31 As to whether, as Mr Gonzalez Ramos argues, such a benefit can no longer be regarded as being listed in Annex IIa to Regulation No 1408/71, as amended, inasmuch as the United Kingdom failed to adopt the measures necessary for that purpose within the reasonable period set for it by the Court in the judgment in Case C-299/05 *Commission* v *Parliament and Council*, suffice it to note that that Member State has, in any event, adopted the measures in question. The mobility component of DLA is included among the benefits listed in Annex X to Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43).

32 Finally, it cannot validly be claimed that the mobility component of DLA cannot be regarded as listed in Annex IIa to Regulation No 1408/71 on the ground that it does not appear separately there but through the reference to DLA, of which it forms a part, since DLA has always had two components clearly identified in the national legislation at issue in the main proceedings.

33 Consequently, the answer to the first two questions is that Article 4(2a) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, must be interpreted as meaning that the mobility component of DLA constitutes a special non-contributory cash benefit within the meaning of that provision, referred to in Annex IIa to those regulations.

The third question

34 By its third question, the national tribunal is, in essence, questioning the Court as to the validity, in the light of 'any other rule or principle of EC law', of Article 10a of Regulation No 1408/71 and of Regulation No 1408/71, as amended, inasmuch as it allows the award of the mobility component of DLA, should that constitute a special non-contributory cash benefit within the meaning of Article 4(2a) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, to be made subject to conditions as to residence and presence in Great Britain.

35 The national tribunal thus gives no indication as to the provision or provisions of European Union law in the light of which that assessment is to be made.

36 The Court has, in similar circumstances, held that it must extract from all the factors provided by the national court or tribunal, and in particular from the statement of grounds contained in the reference, the elements of European Union law requiring an interpretation, having regard to the subject-matter of the dispute in the main proceedings (see, to that effect, Case 204/87 *Bekaert* [1988] ECR 2029, paragraph 7 and the case-law cited).

37 In that regard, it is necessary to take into consideration the rules on the free movement of workers and those concerning European Union citizenship.

38 With regard to the first aspect, the Court has already held that the provisions of Regulation No 1408/71 on the waiver of residence clauses constitute measures to give effect to Article 48 TFEU taken in order to establish, in the field of social security, the free movement of workers guaranteed by Article 45 TFEU and that, as regards the special non-contributory benefits mentioned in Annex IIa to Regulation No 1408/71, it is permissible for the European Union legislature to adopt, in the course of implementation of Article 48 TFEU, provisions derogating from the principle of the exportability

of social security benefits. In particular, the grant of benefits closely linked with the social environment may legitimately be made subject to a condition of residence in the State of the competent institution (see, to that effect, Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraphs 78 and 81 and the case-law cited).

39 As stated in the context of the answer to the first two questions, that is indeed the case with regard to the mobility component of DLA.

40 Consequently, the view must be taken that, inasmuch as it allows the award of the mobility component of DLA to be made subject to conditions as to residence and presence in Great Britain, Article 10a of Regulation No 1408/71 and of Regulation No 1408/71, as amended, is not incompatible with the free movement of persons and with Article 48 TFEU in particular.

41 As regards the rules on European Union citizenship, it must be borne in mind that, in accordance with settled case-law, Article 21 TFEU, which sets out the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU (see, inter alia, Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 61) and that accordingly there is no need to adjudicate thereon for the purpose of the main proceedings.

42 It follows from all of the foregoing that consideration of the third question has disclosed nothing capable of affecting the validity of Article 10a of Regulation No 1408/71 in either of the versions applicable in the main proceedings, inasmuch as that article

allows the award of the mobility component of Disability Living Allowance to be made subject to conditions as to residence and presence in Great Britain.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national tribunal, the decisions on costs are a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Article 4(2a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004, and of Regulation No 1408/71, in the latter version, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that the mobility component of Disability Living Allowance constitutes a special non-contributory cash benefit within the meaning of that provision, referred to in Annex IIa to those regulations.

2. Consideration of the third question has disclosed nothing capable of affecting the validity of Article 10a of Regulation No 1408/71 in either of the versions applicable in the main proceedings, inasmuch as that article allows the award of the mobility component of Disability Living Allowance to be made subject to conditions as to residence and presence in Great Britain.

[Signatures]