



NOTE ON EUROPEAN COMMISSION INFRINGEMENT PROCEEDINGS AGAINST THE UK CONCERNING THE RIGHT-TO-RESIDE TEST

Summary

In *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, the appellant – a Latvian national who was refused State Pension Credit because she did not have a ‘right to reside’ in the UK – argued that applying the right-to-reside test, which British and Irish citizens always pass, but not other EEA nationals, to State Pension Credit was unlawful under EU law. Specifically, she argued that it violated the prohibition on nationality-based discrimination found in Article 3 of EU Regulation 1408/71 (now Article 4 of EU Regulation 883/04). The Supreme Court rejected that argument, in a judgment delivered on 16 March 2011.

The AIRE Centre and ILPA had long been of the view that applying the right-to-reside test to State Pension Credit and certain other benefits violated EU non-discrimination norms, including those found in Regulations 1408/71 and 883/04. Our two organisations complained to the European Commission in July 2009 about this and various other problems with restrictions on access to benefits for EEA nationals.¹ We also met with the Commission about the issue and provided them with detailed information about the relevant UK law. Following these discussions and correspondence, the Commission formally addressed its concerns to the UK authorities about the right-to-reside test.

On 29 September 2011, the European Commission announced² that it had sent a ‘reasoned opinion’ to the United Kingdom, in accordance with Article 258³ of the Treaty on the Functioning of the European Union. The reasoned opinion deals with the UK’s alleged breach of EU law arising out of the application of the right-to-reside test to State Pension Credit and some other benefits. If the Commission is not satisfied by the UK’s response, it may take a case against the United Kingdom in the Court of Justice of the European Union, which might effectively overturn the judgment in *Patmalniece*.

What is the right-to-reside test?

The UK imposes a ‘habitual residence test’ on access to certain welfare benefits. In order to pass this test, an individual must show that she is actually habitually resident in the UK (which is more-or-less what it sounds like) and must show that she has a ‘right to reside’ here. British and Irish citizens always have a right to reside in the UK. In order to show that they have a right to reside, other EEA nationals must generally show that they are working, self-employed, enjoy retained worker or self-employed status, that they have permanent residence in the UK, or that they are the family member of another EEA national in one of those categories. EEA jobseekers, though, can sign on at Jobcentre Plus and access some benefits on the basis that they are exercising a right to reside as jobseekers. Some EEA nationals, by virtue of exercising a right to reside (e.g. workers), are automatically considered to be habitually resident in the UK and do not have to show separately that they are actually habitually resident here.

Many economically inactive EEA nationals are refused benefits, even if they have worked in the UK in the past, because they lack a right to reside. For example, a French worker who has worked but who becomes pregnant and who stops working because, at six months, she is unable to carry out the tasks associated with her job will be refused Income Support,⁴ whereas a British Citizen will get it. Similarly, many EEA nationals have a right to reside but may have difficulty proving it (e.g. because they are estranged from their EEA worker spouses).

¹ The term ‘EEA nationals’ refers to citizens of the 26 Member States of the European Union other than the United Kingdom, as well as Iceland, Lichtenstein, Norway and Switzerland.

² <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1081&furtherNews=yes>

³ *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

⁴ This is what happened in *JS v Secretary of State for Work and Pensions* [2011] EWCA Civ 806.

What benefits are affected?

The Social Security (Persons from Abroad) (Amendment) Regulations 2006 apply the habitual residence test (with the right-to-reside requirement) to Council Tax Benefit, Housing Benefit, income-based Jobseeker's Allowance, and State Pension Credit. Regulation 70 of the Employment and Support Allowance Regulations 2008 applies the test to income-related Employment and Support Allowance. Similar rules apply to allocation of housing and homelessness assistance, Child Benefit, Child Tax Credit, and Working Tax Credit.

However, the European Commission is only looking at benefits that fall within the scope of EU Regulation 883/04, that is, benefits that are considered 'social security' benefits under EU law. The only benefits to which this Commission action applies, therefore, are Child Benefit, Child Tax Credit, income-based Jobseeker's Allowance, income-related Employment and Support Allowance, Income Support and State Pension Credit. The Commission's view is that applying the right-to-reside test to these benefits is unlawful under EU law because it constitutes discrimination based on nationality, which EU law (in particular, Article 4 of Regulation 883/04) prohibits. The Commission believes that this is a form of indirect discrimination (because British and Irish citizens always pass the right-to-reside test, but not other EEA nationals) which cannot be justified.

What will happen next?

The Commission gave the UK two months (until the end of November 2011) to inform them of measures the UK authorities have taken to bring UK law in line with EU law. The message from the UK authorities to the media⁵ so far appears to indicate that they will do nothing to change the law. If the UK does nothing, or its actions do not satisfy the Commission that there is no longer a breach of EU law, the Commission can take a case to the Court of Justice of the European Union and ask that Court to find that there has been a breach of EU law. Any judgment by the Court of Justice would be binding and final. That would take at least another year, probably.

What will be the possible outcome for EEA nationals?

If the UK changes national law to bring it in line with EU law, or if the Court of Justice of the European Union finds that there has been an infringement of EU law, no EEA national should ever again be refused any of the benefits to which this action applies (see above) on the basis that (s)he does not have a 'right to reside' in the UK. In those circumstances, it is likely that the legal regime in place before 2004 would apply: EEA nationals, like British Citizens, would have to show that they are actually 'habitually resident' in the UK, but nothing more (i.e. no need to show a right to reside). The UK authorities might also change the legislative scheme that applies to benefits altogether.

What can we do in the meantime?

While the European Commission's view on this matter is authoritative, it is not binding on the authorities or the courts. Indeed, the Commission's view is not likely to hold much weight with tribunals and courts in the UK at the moment, in the light of the *Patmalniece* judgment. However, the Commission sent its reasoned opinion to the UK after the Supreme Court delivered its judgment; this suggests that the Commission believe the Supreme Court got it wrong. The Supreme Court judgment is binding on all UK courts and tribunals. As a matter of EU law,⁶ other courts and tribunals in the UK are nonetheless free to refer questions on this matter to the Court of Justice of the European Union themselves (under Article 267 of the Treaty on the Functioning of the European Union), which would probably speed up consideration of this matter by the Court of Justice.

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⁵ See, e.g., <http://www.telegraph.co.uk/news/uknews/immigration/8798095/Brussels-threatens-to-sue-Britain-to-let-in-benefit-tourists.html> ('[W]e will fight it').

⁶ Cases C-188&189/10 *Melki and Abdeli*, paragraph 42 ('The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it').