

excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions.

Due

Pescatore

Chloros

Delivered in open court in Luxembourg on 17 December 1981.

A. Van Houtte

O. Due

Registrar

President of the Second Chamber

OPINION OF THE ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 19 NOVEMBER 1981

My Lords,

Mr Robert Stanley is an Irish national resident in the United Kingdom. He was born on 8 May 1908 and from September 1935 to January 1955, he was employed in Ireland and covered by the national insurance scheme for employed persons then in force. He then went to the United Kingdom and worked there for a further period of about seventeen years subject to the relevant national insurance provisions. On 8 May 1973 he reached pensionable age and claimed a retirement pension from the Department of Health and Social Security, the competent institution in the United

Kingdom. The Insurance Officer calculated his entitlement to a pension by applying Article 46 of Regulation No 1408/71 (OJ L 149/2 of 5 July 1971) and awarded the amount due under Article 46 (1) because it was higher than that calculated under Article 46 (2). Mr Stanley was also awarded a graduated retirement benefit under Section 36 of the National Insurance Act 1965 and a pension supplement equal to the difference between the total amount of the pensions to which he was entitled under English and Irish law and the flat-rate pension which would have been paid under the former had all his periods of insurance been completed in the United

Kingdom. This supplement was awarded on what was then thought to be the effect of Article 50 of Regulation No 1408/71 of 14 June 1971.

The Insurance Officer subsequently came to the view that the award of the supplement was based on a mistaken interpretation of Article 50 and, on 27 January 1977, he reduced Mr Stanley's pension by its amount. Mr Stanley appealed unsuccessfully to a local tribunal but his further appeal to the Social Security Commissioner then known as "the National Insurance Commissioner" was allowed. In the Commissioner's view, the expression "minimum benefit" in Article 50 means the smallest amount payable under the legislation of the State of residence for the total period taken into account by the competent institution. The smallest amount, in Mr Stanley's case, was that of the flat-rate pension (disregarding the graduated benefit) payable if all his insurance periods had been spent in the United Kingdom. He seems to have taken the view that there is a minimum benefit where the calculation of the entitlement depends on the completion of insurance periods alone, the contributions being fixed and not earnings-related.

It appears to be accepted by the parties that Mr Stanley's pension rights under English law fall to be determined in accordance with the provisions of the National Insurance Act 1965; and related legislation. Section 30 of this Act provides that a person is entitled to a

retirement pension if (i) he is over pensionable age; (ii) he has retired from regular employment and (iii) he satisfies the contribution conditions. The last condition has two limbs: (a) the claimant must have paid not less than 156 weekly contributions between his "entry into insurance" and the relevant time (here, attaining pensionable age); (b) the yearly average of the contributions paid by or credited to him must be at least 50. The pension is paid weekly at a flat rate specified in Schedule 3 of the Act. The rate may be increased to take account, for example, of the claimant's dependants or reduced, e.g. where the claimant continues to work after reaching pensionable age (see Section 30(7) of the Act). It would seem that the graduated benefit awarded to Mr Stanley takes the form of an increase in the rate of pension.

What is important for the purpose of the argument in this case is that the flat rate of the retirement pension may be reduced if the claimant does not satisfy the second limb of the third condition for entitlement to a retirement pension. The National Insurance (Widow's Benefit and Retirement Pensions) Regulations 1972 provide that, where the yearly average of the contributions paid by or credited to the claimant fall below 50, he may be entitled to a pension at a reduced rate. The amount of the reduction depends on the yearly average of the contributions during the period between entry into insurance and, in the present case, attaining retiring age. If it is below 13 there is no right to a pension at all. Between 13 and 49 the yearly average is divided into a number of bands and the level of the entitlement depends on the band into which the claimant's average contribution falls. The lowest level is that for a yearly average

of 13 to 17 contributions. It appears that the total number of contributions paid by and credited to Mr Stanley under both English and Irish law, when divided by the number of years between his entry into insurance in Ireland in 1935 and the date he reached pensionable age, produces a yearly average of just over 50. On the other hand, when the same calculation is made with regard to the contributions taken into account under the English scheme alone and by reference to the period of insurance under that scheme, the yearly average falls to 38.

The Insurance Officer applied to the Divisional Court of the Queen's Bench Division of the High Court of Justice of England and Wales to have the Commissioner's decision set aside. The Divisional Court on 18 December 1980 referred the following questions by way of a reference for a preliminary ruling:

- "1. Is there a minimum benefit within the meaning of Article 50 ... where the legislation of a Member State makes entitlement to retirement benefit at a flat rate conditional on the yearly average of weekly flat-rate contributions paid or credited to a claimant during the period between his entry into insurance and his obtaining pensionable age being not less than 50 and, if that condition is not satisfied, but the yearly average is not less than 13, provides for a reduced amount of retirement benefit determined solely by reference to the claimant's contribution average for that period?
2. If the answer to Question 1 is in the affirmative, is the 'minimum benefit'
 - (a) the smallest amount of benefit that may be paid to an insured

person under the legislation of that State, i.e. for a contribution average of 13;

- (b) the amount that would be payable to the claimant under the legislation of that State, taking account of all the insurance periods completed under the legislations of all Member States to which he had been subject; or,
- (c) some other (and if so what) amount?"

Article 50 of Regulation No 1408/71, together with its heading, provides as follows:

"Award of a supplement when the total of benefits payable under the legislations of the various Member States does not amount to the minimum laid down by the legislation of the State in whose territory the recipient resides.

A recipient of benefits to whom this Chapter applies may not, in the State in whose territory he resides and under whose legislation a benefit is payable to him, be awarded a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods of insurance taken into account for the payment in accordance with the provisions of the preceding articles. The competent institution of that State shall, if necessary, pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits payable

under this Chapter and the amount of the minimum benefit.”

At the hearing it was submitted on behalf of the Commission that Article 50 cannot be considered in isolation from the declaration which the Member States are required to make under Article 5 of Regulation No 1408/71, specifying what are the minimum benefits referred to in Article 50. If national legislation is ambiguous or unclear concerning the existence of a minimum benefit and the declaration states that none exists, the latter should be given much weight, even if it is not decisive. The first such declaration made by the United Kingdom stated, under the heading “Minimum benefits referred to in Article 50 of the Regulation”, “The rates of flat-rate old-age pension and survivor’s benefits depend upon the yearly average of contributions paid or credited throughout the insurance life and these rates are laid down in Regulations made under” the National Insurance Act 1965 and amending legislation (OJ C 43/1 of 18 June 1973, at p. 7). In 1975, when the National Insurance Act was replaced by the Social Security Act 1975, the declaration was also replaced by one reading “The minimum retirement pension, widow’s allowance, widowed mother’s allowance or widow’s pension provided for by the Social Security Act 1975 . . .” (OJ C 245/2 of 25 October 1975). However, in 1977, the declaration was further amended to read “None” (OJ C 89/2 of 14 April 1977). This is said to be a step taken on reflection and after experience and so should be a strong pointer.

Member State may be estopped by its declaration from denying that a particular benefit is a minimum benefit within the meaning of Article 50, a declaration which is to the effect that a benefit is not a minimum benefit is not decisive that this is so (Case 35/77 *Beerens v Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249 and Case 64/77 *Torri v ONPTS* [1977] ECR 2299). It is for the national court to decide whether, under national law, there is a minimum benefit within the meaning of Article 50, as interpreted by the Court as a matter of Community law.

Counsel for Mr Stanley contends that under the system in force in the United Kingdom at the relevant time, the minimum benefit for all the periods which have to be taken into account by virtue of Article 50 is, and always will be, the same as that which results from the application of Article 46 (2) (a). The fact that the two figures are the same does not matter. Nor does it matter that under the legislation of other Member States a “minimum benefit” may be prescribed in other ways. Once it is possible to calculate a pension without reference to any variable factors other than the completion of periods of insurance and the payment of fixed contributions for such periods, there is a minimum benefit within the meaning of Article 50.

I do not consider that this change of declaration assists very much. Even if a

Counsel for the Insurance Officer stresses that the United Kingdom scheme

has no provision which entitles a person to a pension provided only that he has paid a given number of contributions, or provided that he has been in insurance for any particular length of time. Everything depends on the individual's insurance history and the specific figure produced by dividing the number of contributions by the period of insurance to obtain the relevant average. "Minimum benefit" means a benefit payable provided only that the individual has completed a period of insurance or residence regardless of other qualifications which may have to be satisfied before there is an entitlement.

In Case 64/77 *Torri (supra)*, Mr Torri claimed that under the Belgian system of retirement pensions the minimum benefit for the purposes of Article 50 corresponded to the amount of the theoretical pension calculated in accordance with Article 46 (2) (a) of the Regulation. Although that case was different from the present (in that the calculation of benefits depended upon the amount of wages or salary and on the duration of the insurance periods completed) it seems clear that the Court rejected this general approach. It regarded Article 50 as having a limited object — as covering cases where the periods of employment of the worker under the legislation of the States to which he was subject were "relatively short with the result that the total amount of the benefits payable by those States does not provide a reasonable standard of living". The Court ruled that whether Article 50 applied depended upon whether the legislation of the State in which the individual resided itself provided for a minimum pension.

Mr Stanley's Counsel places much emphasis on the use of the word "determined" ("less than the minimum benefit determined by that legislation"). The text of Regulation No 1408/71 in English, which is contained in the Special Edition of the Official Journal dated December 1972, has "fixed" and not "determined". The documents concerning the accession to the European Communities of, *inter alias*, the United Kingdom has in a replacement version of Article 50 the word "determined". By a corrigendum to Regulation No 1408/71, to be found in OJ L 82/13 of 27 March 1980, "fixed" replaces "determined". Other language versions of Article 50 seem to have words more appropriately translated by "fixed". Despite the interest of his argument I do not think that weight should be attached to the distinctions between the words "fixed" and "determined".

As I see it, the object of Article 46 of the regulation is to ensure that a worker does not suffer, so far as his pension is concerned, because he has been employed in more than one Member State. It provides for the apportionment between Member States of the responsibility for paying the pension calculated. Chapter 3 of the regulation contains detailed provisions to attain this object. It is obviously possible that a particular Member State may provide for an amount to be payable in respect of periods of insurance or residence which is higher than the total of the benefits which result from applying the provisions

of Chapter 3. In dealing with this possibility the purpose of Article 50 is twofold: first, to ensure that all the periods of insurance which are taken into account for the purpose of calculating the payment to be made under Articles 44 to 49 of Chapter 3 can be relied on, in the State where the recipient of benefits resides, to establish a qualification for minimum benefit; and second, to ensure that the individual concerned does not lose the advantage of the minimum benefit merely by the application of those provisions of Chapter 3 which precede Article 50.

The relevant minimum benefit is one "fixed (or determined) by that legislation for a period of insurance". Article 1 (r) of the regulation defines periods of insurance as "periods of contribution or periods of employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance".

The fact that a minimum benefit is one fixed by the national legislation "for a period of insurance or residence" seems clearly to recognize that the minimum may be made dependent on the completion of a qualifying period and that the amount may vary for different qualifying periods. I say "may be made" because I am not satisfied at present, as was argued before the Court, that a minimum benefit cannot fall within Article 50 if it is payable regardless of the completion of a particular qualifying period, as appears to be the case with agricultural workers in Greece.

The word "fixed" or "determined" seems to me to be referring to the quantum of the benefit rather than to qualifying factors. The purpose of the reference period defined in Article 50 is essentially to deal with the situation where, under the legislation of a Member State, the amount of the minimum benefit varies according to the period of insurance or residence completed by the claimant. For example, in Luxembourg it seems that no invalidity or old-age pension can at present be lower than LFR 107 809 per annum for persons who have been insured for at least 10 years, and LFR 216 657 for those who have been insured for at least 35 years (both figures varying in accordance with the cost-of-living index). Where a person has been insured in Luxembourg for 30 years and in another Member State for five years, the effect of Article 50 is that if both periods would be taken into account for the purpose of calculating the payment under the preceding articles of the regulation, the minimum benefit applicable is that for those who have been insured for at least 35 years.

I do not accept that a minimum benefit within the meaning of the article is simply the lowest amount which may result by the operation of the system of insurance established. A narrower meaning must be given to the phrase. If an amount is fixed in respect of a period of insurance without it being necessary to satisfy other conditions than the completion of the period of insurance, then it is a minimum benefit within the meaning of the article. The "limited object" of Article 50 is to enable the person, who cannot satisfy the qualifying

factors to achieve a higher pension under the preceding articles of the regulation, to obtain in the country in which he resides the minimum fixed in respect of all the periods of insurance referred to. The minimum benefit may not necessarily be expressed in the legislation as a specific sum of money. It may be a sum which is capable of calculation by reference to a formula. It must, however, not be conditional other than in the way which I have indicated.

In the first question posed by the Divisional Court of the Queen's Bench Division, the pension is not stated to be conditional simply upon the completion of a period of insurance. Entitlement to benefit at a flat rate is conditional on the

yearly average of weekly flat-rate contributions paid or credited, during the period between entry into insurance and attaining pensionable age, being not less than 50; if that condition is not satisfied then a reduced pension, which varies according to the yearly average, is payable, so long as the yearly average does not fall below 13.

Accordingly, in my opinion, no minimum benefit within the meaning of Article 50 has been fixed by the legislation to which the Court has been referred, because entitlement depends upon, and differs according to, the yearly average of contributions. If the average does not attain at least 13 the person concerned will get nothing at all.

For these reasons, in my opinion the answer to the first question referred by the Divisional Court is "No" and the other questions do not accordingly arise.