Neutral Citation Number: [2013] IEHC 192

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1161 J.R.]

BETWEEN

PETER FLOOD

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 19th March, 2013

1. The complexities of EU social security regulations presented in this application for judicial review must not be allowed to obscure the very human tragedy which is at the core of the current proceedings. Before narrating these tragic and compelling facts, it may be said at the outset that the fundamental question which I am called upon to determine is whether the applicant is resident in Ireland or in Germany for the purposes of EC Regulation No. 883/2004 ("the 2004 Regulation") as supplemented by the implementing Regulation No. 987/2009 ("the 2009 Regulation"). The resolution of this question has a central relevance to the question of which Member State bears responsibility for the medical costs associated with Mr. Flood's medical condition.

2. I will return shortly to examine these issues, but it is first necessary to set out the background facts.

The background to the present application

3. In the summer of 2002 the applicant travelled to Germany for the purposes of holidaying with his girlfriend, Ms. Ioana Bachmayer, a Romanian national whom he had met in the previous November at a conference in Dublin. While on holiday the applicant was admitted as an emergency patient to Universität Klinikum Düsseldorf ("Uni Klinik"). Mr. Flood was originally diagnosed as suffering from tetanus, but it later transpired that he suffered from a rare, bilateral infarct to his brain stem. It appears the difficulty in diagnosis coupled with the impact of the infarct has led to him suffering severe quadriplegia and loss of motor function. There is no doubt, therefore, but that the applicant has been severely ill for well over ten years. During that period Mr. Flood has unfortunately remained gravely ill and necessitated constant care and attention from the consultants attached to the Uni Klinik. The net question, as we shall see, which is presented by this judicial review application, is whether the applicant should be taken to be resident in Ireland or, alternatively, in Germany, for the purposes of EU social security legislation.

4. By way of background it should be first explained that Mr. Flood is an Irish national who is now aged 56. He is a graduate from the law school of UCD and was later employed in a Dublin accountancy firm. Between 1983 and 1988 Mr. Flood lived in the United Kingdom where he was employed by Channel 4 Television Corporation. After May, 1998 the applicant continued to be based in London where he was a freelance consultant and film executive producer. In 1990, Mr. Flood was employed as a general manager in an independent television production company based in Belfast. From July 1994 until 1997, Mr. Flood reverted to freelance media consultancy having a base in the United Kingdom. He returned to Ireland in the summer of 1997 and was the operations manager of a start up company which, unfortunately, collapsed in mid-1998.

5. At the time of the collapse Mr. Flood was convalescing from a heart attack which he had suffered in March 1998. He was unemployed for a period claiming unemployment benefit from March, 1999 until December, 1999. He thereafter was engaged in doctoral studies at Dublin City University and undertook a number of freelance consultancy projects for broadcasters in Ireland and UK. He transferred his studies to the Dublin Institute of Technology in September, 2001 and at the time of the medical emergency in August 2002 he had been employed as a temporary lecturer at the Dublin Institute of Technology.

6. The circumstances in which the applicant came to require urgent emergency treatment in August, 2002 have already been briefly described. Having been treated in the Uni Klinik, Mr. Flood was thereafter transferred to St. Mauritius Therapie Klinik in Meerbusch near Düsseldorf. He was discharged from this clinic in May, 2003 and he has been receiving ongoing care treatment on an outpatient basis since that time. Another unfortunate complication was that shortly after this the applicant was found to have a genetic mutation which adversely affects the composition of his blood and this is a further factor which requires constant monitoring and treatment. Since the commencement of these proceedings Mr. Flood has also been diagnosed with cancer and is currently receiving treatment for this condition.

7. Sadly, however, the applicant is currently completely wheelchair bound and has only very limited use of his arms and hands. He has lived since his discharge from the St. Mauritius Klinik with his partner, Ms. Bachmayer, and she has looked after and cared for him. They reside in an apartment in Düsseldorf which they now rent and which is suitable to facilitate wheelchair use.

8. At the heart of the applicant's case is the contention that he is an Irish citizen who has been sent abroad to receive treatment not available in Ireland. It is important to acknowledge that Mr. Flood is not entitled to receipt of any allowance or benefit from the German State, but he is in receipt of a disability allowance from Ireland. He also receives a small occupational pension from the UK by reason of his work there with Channel 4 in the 1980s. Mr. Flood is anxious to stress his limited connections with Germany other than the fact that by reason of his medical condition and the necessity for on-going treatment he is effectively obliged to live there. It is thus emphasised, for example, that he has no German bank account nor does he own any property in Germany. His bank account is with an Irish bank and he remains in regular contact with his two children in Ireland (who were born in 1991 and 1994 respectively). The applicant does not speak German and has made no effort to integrate with German society.

9. It is clear that while the applicant remains deeply grateful to the German health care system for the quality of care which he has received, his earnest desire is to return to Ireland were all other things equal. This, however, is contingent on a number of matters,

such as his fitness to travel, the availability of an equivalent treatment regime and, not least, the availability of suitable wheelchair adapted accommodation. Were this possible, then Ms. Bachmayer would travel with him to Ireland.

10. After his illness the applicant endeavoured to correspond with the Dublin Institute of Technology concerning his academic work until 2008, at which time he was, because of his medical condition, unable thereafter to continue. At various points between 2004 and 2007 Mr. Flood engaged in some sporadic academic work by delivering occasional lectures at the University of Dusseldorf for which he was separately remunerated, although he was never employed by the University. Mr. Flood needed Ms. Bachmayer's active assistance to deliver these occasional lectures (such as, for example, holding a microphone and by operating a PowerPoint presentation) and even the delivery of these occasional lectures was considered to be medically exhausting for him and these lectures were discontinued after 2009. Such limited remuneration as Mr. Flood as earned for these lectures was returned as income earned by him by Ms. Bachmayer for the purposes of German social security legislation, as she is the person registered within the German system.

11. It is true that on a few occasions after his illness Mr. Flood found himself able to travel abroad, albeit for a short period and under medical supervision. He thus travelled to Lisbon to give a lecture in October, 2004 and he also travelled to Ireland on a few occasions, most recently in 2009. Even then this was achieved with considerable difficulty, given the difficulties associated with negotiating access through airports for such a severely disabled traveller. It is accepted that at present it would be all but impossible for Mr. Flood to travel to Ireland, at least if he were confined to travelling by scheduled airlines.

12. As far as Ms. Bachmayer is concerned, she had worked in Germany but she accepted redundancy in 2004 in order to become the applicant's full time carer. She is in receipt of unemployment benefit from the German State. So far as the applicant's disability allowance is concerned, it should be recorded this was originally disallowed by the (Irish) Minister for Social Protection on the basis that the Minister did not accept at the time that the applicant was habitually resident in Ireland. Separate judicial review proceedings were commenced by Mr. Flood in 2008 and these were compromised. As a result the Minister reviewed her decision and decided to allow the applicant's application for disability allowance. The applicant has been in receipt of since that date. A further consideration here is that disability allowance is regarded as a cash benefit which, under the applicable EU social security regulations, Ireland is entitled legitimately to confine to those who are resident here.

13. Ms. Bachmayer did apply for the German equivalent of a carer's allowance. It appears that (contrary to the position in Ireland) under the German system such an allowance is a charge on the health insurance costs of the person thus cared for. While Mr. Flood and Ms. Bachmayer did apply for this allowance, but this was refused on the basis that Mr. Flood was an Irish resident and the Irish insurance did not provide for it.

14. Fundamental to the present proceedings, therefore, is the question as to whether or not the respondent should be responsible for Mr. Flood's healthcare costs on the basis that he is actually resident in Ireland. The applicant originally received treatment pursuant to form E111 (which form is now know as EIHC) which, by common consent, is the form that is applicable and appropriate for emergency treatment which citizens of other EU member states require when visiting another member state. In March, 2003 the applicant's status was altered and from that point he has received his treatment pursuant to Form E112 (now known as Form S1), which form has been renewed on approximately twenty or more occasions since that date.

15. The present dispute derives from a decision of the respondent on 25th November, 2011, which refused to grant Mr. Flood a renewal of the E112 form. The question essentially which I am now required to consider is whether the applicant is entitled to an order of mandamus from this Court compelling the HSE to continue to supply the applicant with what is known as a Form E112.

16. Lest, however, it be thought that the respondent is taking a legalistic or cost saving approach towards an Irish citizen with real medical problems, it should fairly be acknowledged that the HSE has stated that it will continue to cover the applicant's healthcare costs on an *ex gratia* basis pursuant to a form known as an E106 form.

Regulation No. 1408/71 and Regulation No. 883/04

17. It may be convenient at this point to set out the relevant EU Regulations. The Regulations themselves may be thought to give effect to fundamental principles associated with the single market itself, specifically the right to travel in order to take up employment and to enjoy the right of access to the health services available in other Member States on the same terms and conditions as citizens of the host Member State in question.

18. It is clear from the recitals to Council Regulation No. 883/04 ("the 2004 Regulation") that its object is to coordinate national social security systems, while guaranteeing "within the Community equality of treatment under the different national legislation for the persons concerned" (5th Recital). It is also clear from the 4th Recital to the 2004 Regulation that it was necessary to introduce a consolidated version of Regulation No. 1408/71, while at the same time modernising and simplifying these rules.

19. Under the scheme established by Article 22 of the earlier 1971 Regulation and Article 20 of the 2004 Regulation, the responsibility for the reimbursement of the costs of hospital treatment incurred while abroad lies with the competent institution of the Member State whose resident has travelled abroad for this purpose under the conditions specified in the legislation of the host Member State in question. Article 20(1) and Article 20(2) thus provide:-

> "(1) Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent authorisation.
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> (2) An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his/her condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness."

20. It may be noted that "stay" is defined by Article 1(j) as "temporary residence" and "residence" is defined as the place "where a person habitually resides." I shall return presently to this topic.

21. The present case is undoubtedly an unusual one which does not easily assimilate itself to the standard types of cases for which the 2004 Regulation caters. In effect, Mr. Flood's case is that he happened to be on holiday in Germany when he fell gravely ill and

that – save for limited periods not directly to the present case – he has been coerced through medical circumstances to remain unwillingly in Germany by reason of both his medical condition and the excellence of the treatment which is available to him there.

22. This situation is somewhat different from that contemplated by Article 19 (which deals with Form E 111) and Article 20 (which deals with Form E 112) respectively. Article 19 deals with the standard situation where the traveller happens to fall ill when abroad and Article 20 addresses itself to the position of the EU national who travels abroad for scheduled treatment which is not reasonably available in his or her country of origin. The present case rather falls between the interstices of the two legislative provisions in that Mr. Flood's case cannot be equated with that of the not uncommon case of the traveller who needs short-term hospital care by reason, for example, of a minor accident occurring while abroad in another Member State. But nor does it easily fit into the case posited by Article 20, namely, that of the patient who elects to seek treatment abroad by reason of the absence of suitable healthcare in his country of origin.

23. Perhaps the authority which is closest to the present one on its facts is Case C-145/03 *Heirs of Annette Keller* [2005] ECR I-2548. Here, the applicant, a Spanish resident, travelled to Germany for family reasons. She had applied for and obtained an E111 form prior to her departure from the Spanish general security system to which she was affiliated. During the course of her stay in Germany Ms. Keller was diagnosed with a malignant tumour at the base of her skull which was sufficiently serious to be liable to cause her death at any time and she was admitted to a University hospital in Koln.

24. At that point Ms. Keller requested the Spanish authorities to issue her with a Form 112. As the Court of Justice was later to point out (at para. 15 of the judgment) "that form was issued to her on the ground that in view of the serious nature of her state of health a transfer to Spain was not advisable." The German treating doctors concluded that given the seriousness of this rare condition it was necessary to transfer her for treatment to the University Clinic in Zürich as the only institution with the appropriate expertise.

25. The Zürich hospital treatment cost some CHF87,030 which Ms. Keller personally paid. The Spanish authorities refused to reimburse her, arguing that it was not bound for this purpose by the diagnosis of the doctors in the host state (Germany) to transfer her to the Swiss clinic. While that was the critical issue in that case, the Court of Justice also noted that:-

> "….it is of no importance for determining whether the competent institution is bound by such findings and decisions that the State to which those doctors have decided to transfer the patient is not a member of the European Union, since the choice of treatment thus made is, having regard to the considerations in points 47 to 52 above, within the competence of the doctors authorised by the institution of the Member State of stay and of that institution.
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> 56. In those circumstances, and as the defendants in the main proceedings themselves conceded in their written observations, the person concerned, covered by a Form E 111 or E 112, cannot be required to return to the competent Member State to undergo a medical examination there, when doctors authorised by the institution of the Member State of stay consider that his state of health requires urgent vitally necessary treatment (see, to that effect, *Rindone*, paragraph 21).
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> 57. Moreover, it cannot be argued, as the defendants in the main proceedings do, that the findings made and decisions on treatment taken by doctors authorised by the institution of the Member State of stay must be subject to the approval of the competent institution. Such an argument would amount to disregarding the rule of shared responsibilities which underlies Article 22(1)(a)(i) and (c)(i) of Regulation No 1408/71 and the principle of mutual recognition of doctors' professional skills, and would be contrary to the interests of patients who need urgent vitally necessary treatment."

26. The parallels with the present case are in some respects striking, save that Ms. Keller had in fact obtained a Form E 111 prior departing from Spain to Germany. This very point was discussed in passing by Advocate General Geelhoed in *Keller* when he raised the question of why the applicant would need to have a Form E 112 at all given that she was already in Germany when the diagnosis was made and she was in possession of an E-111 which "provided a suitable basis for her treatment in that Member State." Advocate General Geelhoed concluded ultimately ([2005] ECR I 2534, 2548) that this difference was:-

> "irrelevant to the answer to this question given the fact that both forms serve a similar function in different situations and that they establish entitlement to exactly the same benefits in kind."

27. While the Court of Justice did not directly address the point in its judgment, its seems implicit in its that it regarded the objectives of Forms E 111 and E 112 as being essentially interchangeable. While it is true that Article 20(2) of the 2004 (or its earlier Article 22(1)(c) equivalent) envisages that a Form E 112 is contingent on the existence of a prior authorisation in the home Member State, it is clear from Keller that this requirement must be dispensed with when this would be inconsistent with patient health and safety.

28. Accordingly, whatever may possibly have been the situation at various points over the last eleven years, no one suggests that Mr. Flood could (or should) now return to Ireland for the purposes of a medical examination here as a precursor to the grant of such an authorisation.

29. This brings us directly to the critical question of whether Mr. Flood can be said to be "staying" in Germany for the purposes of both Article 20(1) and Article 20(2). This was not a feature of *Keller*, because the treatment and hospital stays (whether in Germany or in Switzerland) at issue there were of much shorter duration, lasting in that case from mid-October 2004 to late February 2005. Before examining this question further, it is, however, necessary to consider the import of Regulation No. 987/2009 ("the 2009 Regulation") which lays down the procedure for implementing the 2004 Regulation.

Regulation No. 987/2009

30. Article 26 envisages that in the case of scheduled treatment (*i.e.*, Form E 112) should the insured person:-

> "not reside in the competent Member State, he shall request authorisation from the institution of the place of residence, which shall forward it to the competent institution without delay. In that event, the institution of the place of residence shall certify in a statement whether the condition set out in the second sentence of Article 20(2) of the basic Regulation are met in the Member State of residence."

31. This raises squarely the issue of whether Mr. Flood can be said to be resident in Germany for this purpose. Article 11 provides:-

> "1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to

relevant facts, which may include, as appropriate:-

(a) the duration and continuity of presence on the territory of the Member States concerned;

(b) the person's situation, including:

(i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;

(ii) his family status and family ties

(iii) the exercise of any non-remunerated activity;

(iv) in the case of students, the source of their income;

(v) his housing situation, in particular how permanent it is;

(vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence."

32. While Article 11 is designed to give guidance to health administrators in resolving the place of residence in difficult cases, it would seem appropriate that these principles might be applied by analogy to a case of the present kind. Many of these factors would, if applied, tend to suggest that Mr. Flood is resident in Germany. Thus he has been physically present in Germany for some eleven years (Article 11(1)(a)) and his immediate family ties are with his partner who resides there (Article 11(1)(b)(ii)) and the fact that he has been a long-time tenant further suggests a degree of permanency (Article 11(1)(b)(v)).

33. Yet I cannot help thinking – as I have more or less already hinted – that the present case does not fit comfortably within any of the categories specified in either the 2004 Regulation or, for that matter, the 2009 Regulation. Nor has the situation presented by Mr. Flood's tragic circumstances been presented in any of the present case-law of the Court of Justice. It is true that, as we have already acknowledged, *Keller* has in certain respects clear affinities with the present case, but it does not have the critical feature of the present one, namely, that the patient has been required to remain immediately close to the place of treatment over a very long period of time.

34. Of course, I am fully conscious of the fact that the concept of residence is one which must bear an autonomous European meaning. Likewise, it may well be that Mr. Flood would be regarded as "domiciled" in Germany for some purposes, such as, for example, the application of the conflict of law rules in the Brussels Regulation 1215/2012. But in the context of a social security regulation dealing with health treatment abroad, it may well be that a person who is – in one sense – effectively detained in that country by reason of an exceptionally serious medical condition is nonetheless "staying" there simply for the purposes of medical treatment within the meaning of Article 20(1) and Article 20(2) of the 2004 Regulation (or, for that matter, the companion provision, Article 19).

Conclusions

35. Given the very unusual facts of this case and in light of the fact that it presents a category of case not previously the subject of consideration by the Court of Justice, it seems to me appropriate that I should accordingly stay the present proceedings pending the outcome of the reference of the following question to that Court pursuant to Article 267 TFEU, namely,

"Is an insured citizen of a Member State ("the First Member State") who has been gravely ill for eleven years as a result of a serious medical condition which first manifested itself when that person was resident in the First Member State but was on holiday in another Member State ("the Second Member State") to be regarded as "staying" in that Member State for that period for the purposes of either Article 19(1) (Form E11, now EIHC) or, alternatively, Article 20(1) and Article 20(2) of Regulation No. 883/2004 (Form E112, now S1) where the person in question has been effectively compelled by reason of his acute medical illness and the convenient proximity of specialist medical care physically to remain in the Second Member State for that period?"

36. I propose to discuss with counsel the precise form of the order for reference, any consequential matters and the issue (should it prove necessary) of any interlocutory relief pending the outcome of the order for reference.