

Challenging discrimination on the grounds of nationality under EC Law

Secretary of State for Work and Pensions v Bobezes [2005] EWCA Civ 111

Facts: Mr Bobezes, a Portuguese national, came to the UK as a 'worker' pursuant to what is now Article 39 of the E.C. Treaty. Whilst here he became permanently incapable of work but by virtue of Article 2(b) and Article 7 of Commission Regulation EEC1251/70 he retained his rights as a 'worker'.

He was denied income support dependent child allowance (and recovery of sums 'overpaid' was sought) because although he remained responsible for his stepdaughter and she was part of his household (for the purposes of reg. 16(1) of the Income Support (General) regulations 1987 ('the 1987 Regs')), she was absent from the UK for periods in excess of 4 weeks (contrary to reg. 16(5) of the 1987 Regs) because of stays with her grandmother in Portugal and then her attendance on a course of study in Portugal, returning to her home in England on a number of occasions.

Mr Bobezes argued that this was discrimination on the grounds of nationality contrary to EC law.

Mr Bobezes' cross-appeal to the Court of Appeal challenged the finding of Commissioner Williams (see CIS/825/2001) that 'discrimination is not obviously there, but that is not to say that the claimant, given the chance cannot establish it'. That, according to the Secretary of State, meant that Mr Bobezes had to produce statistical evidence to prove that there was in fact discrimination against him as a migrant worker. Mr Bobezes contended that this was an impossible task and in any event is one which he was not required by EC law to undertake.

Decision: The Court of Appeal unanimously upheld Mr Bobezes case and allowed his cross-appeal.

The Court considered the ECJ's decisions in a number of cases including O'Flynn, Biehl, Collins and Pinna. Lord Slynn held at para. 24 that:

'[i]n these cases neither the Advocate General nor the Court has insisted on statistical evidence. It was enough in cases of discrimination based on nationality that the effect of the provision is 'essentially,' 'intrinsically,' 'susceptible by its very nature,' 'by its own nature' liable to be discriminatory ... It seems to me that the Commissioners and the court are entitled to take a broad approach and to find that indirect discrimination is liable to affect a significant number of migrant workers on the grounds of nationality without statistical proof being available. This is of course quite different from the position where discrimination on the ground of sex is alleged and where the discrimination in many cases will not be obvious and so that it is necessary to establish that more women than men are liable to be affected'.

His Lordship then went on to find (in para. 26) that reg. 16(5) of the 1987 Regs was intrinsically liable to discriminate against migrant workers. Pill LJ agreed with the judgment of Lord Slynn. Buxton LJ gave a concurring judgment.

The case is notable in two other respects, albeit that these matters were not determined by the Court:

1. On the appeal the Secretary of State took a narrow view as to the scope of application of the Court of Appeal's decision in *Perry v Chief Adjudication Officer* [1999] 2CML 439 as a way of defeating claims under Regulation 1408/71. Perry has in the past been employed extensively by

the Secretary of State to defeat claims under Regulation 1408/71. Bobezes may herald a change of approach; and

2. The Court of Appeal refused to entertain the Secretary of State's appeal based upon whether Mr Bobezes could at the same time rely upon Regulation 1408/71 and Regulation 1612/68 (see Article 42(2) of Regulation 1612/68 and the relevant ECJ caselaw which is summarised in the A-G's opinion in Case C-160/96 Molenaar [1998] ECR I-843 at para. 96ff) as it was academic.