

IMMIGRATION AND SOCIAL SECURITY LAW

A. INTRODUCTION.

1.1 The inter-relationship between Immigration Law and Social Security Law is complex.

1.2 Practitioners need to have a full and detailed understanding of the facts of their case and the relevant statutory provisions. A common error in cases is that all parties (the Claimant, the DWP and the court) have been arguing a case on inadequate or erroneous information.

1.3 The purpose of this talk is to provide a practical guide to this area and to discuss key issues.

1.4 The talk will be divided into

- i. Introduction to the relevant immigration and social security law.
- ii. The key legislative provisions and their effects.
- iii. Key cases and current issues.

B. KEY LEGISLATION

Immigration Law

2.1 The key sources of Immigration Law are

a. Primary legislation

- The Immigration Act (1971) (continuously amended).
- The Immigration and Asylum Act (1999) (as amended).
- The Nationality Immigration and Asylum Act 2002
(Royal Assent Nov 2002 different parts in force at different times -

check Commencement Orders).

- b. The Immigration Rules HC395 (as amended).
- c. Extra statutory policies and guidance contained in Asylum Policy Instructions (API's) and Immigration Directorate Instructions (IDI's) (both available on Home Office website).

Social Security Legislation

2.2 Apart from the obvious general social security primary and secondary legislation the key provisions that need to be looked at are

- Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000
(esp Regs 2,12 and the Schedules)
- Social Security (Incapacity Benefit) Regulations 1994
(as amended) (reg 16).
- Family Credit (General) Regulations 1987
(Regs 3(1)(e)(f)(1A).
- Disability Working Allowance (General) Regulations 1991
(Regs 5(1)(e)(f)(IA).
- S42 Tax Credits Act 2002.

C. THE KEY LEGISLATIVE PROVISIONS AND THEIR EFFECTS.

3.1 A key aim of the Immigration and Asylum Act 1999 was to reduce the number of immigrants who could claim welfare benefits.

3.2 This was essentially achieved by creating a new definition of

persons subject to immigration control and prima facie excluding them from a range of welfare benefits. S115 of the 1999 Act achieves this aim.

Insofar as is relevant S115 provides

115 (1) No person is entitled to income -based jobseeker's allowance under the Jobseekers Act 1995 or to -

- (a) attendance allowance,*
- (b) severe disablement allowance,*
- (c) invalid care allowance,*
- (d) disability living allowance,*
- (e) income support,*
- (f) working families tax credit,*
- (g) disabled person's tax credit,*
- (h) a social fund payment,*
- (i) child benefit,*
- (j) housing benefit, or*
- (k) council tax benefit,*

under the Social Security Contributions Act 1992 while he is a person to whom this section applies.

.....

(3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions as may be prescribed.

(4) Regulations under subsection(3) may provide for a person to be treated for prescribed purposes only as not being a person to whom this section applies.

(5) In relation to the benefits mentioned in subsection (1)(f) or (g) 'prescribed' means prescribed by regulations made by the Department.

.....

(9) 'A person subject to immigration control' means a person who is not a national of an EEA State and who -

(a) requires leave to enter or remain in the UK but does not have it;

(b) has leave to enter or remain in the UK which is subject to a condition that he does not have recourse to public funds;

(c) has leave to enter or remain in the UK given as a result of a maintenance undertaking; or

(d) has leave to enter or remain in the UK only as a result of paragraph 17 of Schedule 4.

(10) 'Maintenance Undertaking' in relation to any person, means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person's maintenance and accommodation.

The General Rule

3.2 As a result of the above the general rule is that a psic is not entitled to the following

Non- contributory social security benefits:

- *Income based Job Seekers Allowance (JSA)*
- *attendance allowance (AA)*
- *severe disablement allowance (SDA)*
- *invalid care allowance (ICA)*
- *disability care allowance (DCA)*
- *income support (IS)*
- *working families tax credit (WFTC)*
- *disabled person's tax credit (DPTC)*
- *social fund payments (SF)*
- *child benefit (CB)*
- *housing benefit (HB)*
- *council tax benefit (CTB)*.

The Exceptions

3.3 Although psic are generally excluded because of this section the Social Security Consequential Amendment Regulations make certain persons who are psic eligible to receive certain benefits as exceptions.

3.4 In relation to the following benefits

- *Income based JSA*
- *income support*
- *social fund payments*
- *housing benefits*
- *council tax benefit*

the following psic can still obtain these benefits

i. Temporary disruption of funds.

People who had to show the immigration authorities that they could maintain and accommodate themselves without recourse to public funds and who are temporarily without funds because there has been a disruption in funds received from abroad.

* there must be a reasonable expectation that the supply of funds will begin again.

ii. Sponsored person in UK for more than 5 years / or sponsor has died.

Persons granted leave as a result of a maintenance undertaking where the sponsor who gave the undertaking has died or where the claimant has been living in the UK for 5 years.

* the 5 year period begins from the date of the person's entry to the UK or the date on which the maintenance undertaking was made, whichever is the later.

iii. ECSMA /CESC Nationals who are lawfully present.

Persons who are nationals of states which have ratified either the European Convention on Social Medical Assistance (ECSMA) or the Council of Europe Social Charter (CESC) and who are lawfully present in the UK (eg *Kaya decision CA* and recent *Commissioner's decision CIS/2091/2001*)

iv. Certain Asylum Seekers.

There are 3 classes of asylum seekers relevant here

a. Asylum seekers who claimed asylum on or before 2 April 2000 ' on arrival ' in the UK (* Various Comm decisions and forthcoming C/A case on this point).

b. Asylum seekers who claim within 3 months of either of the 'declarations of upheaval ' made in relation to Zaire (DRC) on 16 May 1997 or Sierra Leone on 1 July 1997.

NB* in both the above cases entitlement ends as soon as the Home Office record the claim to asylum as having been determined (eg when the HO determine the claim) or the person abandons the claim to asylum. If the asylum decision is negative and the applicant appeals then they are eligible for asylum support.

Transitional Protection

c. Asylum seekers who claimed asylum (on arrival or otherwise) before 5th Feb 1996 whose claims have not been finally decided by that date and who were entitled to these benefits before 5th Feb 1996.

NB.

a break in the claim to benefit does not bring transitional protection to an end eg Yildiz CA.

3.5 In relation to the following non means tested and other benefits

- *attendance allowance*
- *severe disablement allowance*
- *invalid care allowance*
- *disability care allowance*
- *disability living allowance*
- *social fund payments*
- *child benefit*
- *non-contributory incapacity benefit*
- *working families tax credit*
- *disabled person's tax credit*

the following psic are exceptions who can claim these benefits.

- i. sponsored person (re WFTC/ DPTC) in UK for more than 5 years / sponsor has died.***

This exemption applies in relation to WFTC and DPTC if the sponsor who

gave the maintenance undertaking has died or if the claimant has been living in the UK for 5 years or more.

* the 5 year period begins on the date of entry to the UK or the date when the undertaking was given whichever is the later.

ii. Family Members of EEA Nationals.

Non-EEA national family members of EEA Nationals. ' Family members is not defined.

* Non-EEA National family members who are benefitting from EU rights of free movement should not be ' subject to control ' as they do not require leave.

iii. Workers from Certain Countries.

Nationals of Algeria, Morocco, Slovenia, Tunisia Turkey (countries which have made an agreement with the EU which provides for the ' equal treatment of workers in the area of social security) who are lawfully working in Great Britain and their family members who are living with them. Both are exempted from the subject to control test for these benefits.

iv. 1996 Transitional Protection cases.

People who were entitled to these benefits before 5th Feb 1996 (7 Oct 1997 for CB).

* Entitlement carries on until the person's claim to asylum (if they have made one) is recorded as determined by the Home Office, or until the social security authorities revise the award of benefit, for example, because there is a relevant change of circumstances. A break in the claim to benefit brings this transitional protection to an end.

* NB receipt of contributory benefits (national insurance contributions required) does not depend on immigration status. However a persons immigration status may well mean that they cannot obtain these benefits because they have not been in the UK long enough to make sufficient contributions. The following benefits are relevant here

- *contribution based JSA*
- *contribution based incapacity benefit*
- *maternity allowance*
- *bereavement benefits.*

D. SPECIFIC ISSUES AND CASES.

Refugees and Backdated Claims.

4.1 Asylum Claim made on or before 2 April 2000 - Refugees are entitled to backdated benefit paid at the urgent cases rate (90%) from the date of the claim to asylum was originally refused if the claim was made on arrival.

4.2 If the claim was made in-country benefit is paid from the date of the claim, or from 5th Feb 1996 if that is later.

* Refugee must claim income support and backdating within 28 days of being notified that the Home Office has recognised them as a Refugee.

4.3 Asylum Claim made on or after 3 April 2000 - Refugees must also claim income support and back-dating within 28 days of being notified that the Home Office has recognised them but they are entitled to backdated benefit at the full rate from the date of their claim for asylum.

NB the award of benefit is deducted by the value of any asylum support received during the period of back-dating .

Refugees On Arrival

4.4 Although very few cases now 2 recent decisions of interest - CIS/43/2000 - Comm Angus applied the port perimeter test as opposed to the immigration control test.

CIS/ 2702/2000 -heard at the same time dismissed - permission to appeal to the Court of Appeal granted - issues raised - duress/ ECHR breaches.

Sponsorship Undertakings.

4.5 CIS 47/02 - UK sponsor signed a statutory declaration that he was able and willing to maintain and accommodate his parents-in-law. Held - this met requirements of a written undertaking to secure entry clearance therefore no entitlement to IS. Only a written undertaking in a particular form argument rejected.

CIS 3508/2001 - Held sufficient that a maintenance undertaking was a relevant factor in the decision it did not need to be only or even major factor.

* also Shah v SSSS [2002] EWCA Civ 285 - person from abroad undertaking whether undertaking limited to one particular grant of leave to enter - re returning residents / ultra vires.

Lawfully Present Argument Re Turkish Nationals

4.6 CIS/2091/01 - Claimant trying to overturn Kaya. Comm Angus dismissed appeal. C applying for permission to appeal to CA.

Issue Estoppel

4.7 Whether decision by Immigration Adjudicator binds Social Security Appeal - In R Nahar v SSC [2001] EWHC Admin 1049 and CA [2002] EWCA Civ 859 held it did not but academic situation in this case.

When Asylum Claim Recorded as Determined.

4.8 Anufrijeva v SSHD and SSWP HL - on when a claim is recorded as determined to stop entitlement for benefits hearing due in HL.

Habitual Residence Test

4.9 Re *Gingi v SSWP* [2001] EWCA Civ 1685 - argument on precedence of ECJ law (*Swaddling*) to domestic law - CA held that *Nessa* domestic test binding.

EEA Law/Nationals

4.10 Bona fide dependants of EEA Nationals can obtain mainstream benefits and are not subject to immigration control but need to satisfy HRT.

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