# THE RIGHT TO RESIDE TEST AND THE RECENT TRIBUNAL OF COMMISSIONERS' DECISIONS

**Presentation by Keith Venables:**
**Welfare Rights Caseworker at Leicester Law Centre**
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## The Right to Reside Test

*"no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland"*

Reg 21(3G) of IS (General) Regs 1987
HB/CTB/JSA/PC Regs virtually identical.

CTC/CHB Regs provide that "a person shall be treated as not being in" the UK(CTC)/GB(CHB) "if he does not have a right to reside in" the UK/GB.

In practice affects EU nationals. British citizens have a clear right to reside. Non-EU nationals will usually either have an immigration status which confers a clear right to reside (e.g. ILR), or will be PSICs and have no claim to benefit anyway.

Largest group of clients in Leicester are Somalis who came to EU as refugees, and now have EU citizenship. Mainly lone parents, but some incap and PC claimants.

## The Tribunal of Commissioners

5 Cases – first 3 refused on facts of case

**CIS/2680/2005** – Polish national – came to UK April 2000 – claimed asylum (no decision) – worked intermittently with periods of incapacity on mental health grounds – claimed IS July 2004 – decision "IS not payable until status determined" – appealed to tribunal awarded IS on basis worker and A8 rules did not apply – relied on Article 2,3,4 of 1408/71 and Article 7 of 1612/68 – SofS appealed
**Comms decision** – No appealable decision in first place – remitted to SofS for decision.

**CIS/2559/2005** – Dutch national of Somali origin – lone parent, 3 kids and pregnant - to UK August 2004 to be near relatives – no work – claimed IS October 2004 – refused, no R2R – tribunal confirmed no R2R and decided not hab res in any case
**Comms decision** – not hab res on settled intention therefore R2R irrelevant – *Bhakta* cannot assist since R2R would then arise – CIS/4474/2003 disagreed with on appreciable period – cannot be reduced to a tariff

**CPC/2920/2005** – Norwegian of Somali origin – to UK April 2004 – PC claim June 2004 – refused on R2R – confirmed by tribunal
**Comms decision** – EEA Agreement does not allow Norwegians to rely on Directive 90/364 in general – despite DWP conceding that it does and every Govt in EU agreeing

In all 3 cases said would have refused anyway following CIS/3573/2005.
**CIS/3573/2005** – lead case (**CH/2484/2005** follows it) – Dutch national of Somali origin – lone parent, 3 kids – to UK March 2004 – IS claim May 2004 – refused, no R2R – tribunal allowed on all arguments – SofS appealed.

**The arguments and the Commissioner's response**

1. **A domestic law right to reside? -** the benefit regulations do not define "right to reside". The DWP interprets it by reference to the Immigration (EEA) Regs 2000, which set out that certain people were "entitled to reside". Our argument is that, since there is no definition in the benefit regulations, the phrase "right to reside" must be given its ordinary, everyday meaning. Under the EEA Regs, EEA nationals cannot be refused entry to the UK. They can be required to leave in limited circumstances, but it is clear that they can stay here until the Home Office makes a decision to remove them. It is Home Office policy not to remove EEA nationals even if they are not "qualified persons". It is arguable that if a person is allowed to stay indefinitely in the UK then, on the ordinary meaning of the words, they do have a right to reside here.

   Relevant Cases:
   *CAO v Wolke [1997] HL*
   *R v Westminster City Council ex parte Castelli [1996] CA*
   *Szoma v Secretary of State for Department for Work and Pensions [2005] HL*
   MH (Slovakia) [2004] IAT

   Commissioners' response – (paras 34-37) – appear to accept that EEA nationals cannot be refused entry and "very difficult, if not well nigh impossible" to remove. Appear to accept claimant was "lawfully present". But "cannot accept that *de facto* presence is the same as a right to residence" and "fact that a person is at liberty to stay in the UK does not...confer a right". No ambiguity and perfectly understandable that the statutory scheme permits people to be lawfully in UK without a right to reside". Rejected argument (paras29-30) that provisions are ambiguous and therefore ECSMA can be used to interpret. ECSMA provides that "lawfully present" nationals of ECSMA countries "shall be entitled equally....and on the same conditions to social...assistance".

2. **An EU law right to reside? –** Article 18 of the EU Treaty provides that citizens of the Union have a right to reside anywhere in the EU.

There are several EU Directives that appear to place limitations and conditions on this right (90/364 for economically inactive people), but their exact relationship to Article 18 is not completely clear. It is arguable that the Directives simply authorise Member States to *terminate, or restrict the exercise of* an EU citizens right to reside provided that it is proportionate to do so, and the right of residence continues until steps are taken to remove or object to their presence. It is clearly for the immigration authorities, not the DWP, to take such steps. The question in each case will be whether it is proportionate to take such steps.
Also arguable that if 90/364 places conditions on Art18 right, a "conditional right" is still "a right" albeit easily terminated/limited (argued in CIS/2559/2005 but not dealt with in decision).

Relevant Cases:
*Baumbast v SSHD [2002] ECJ*
*Grzelczyk v CPAS d'Ottignies-Louvain-la-Neuve [2001] ECJ*
*D'Hoop v ON d'Emploi [2002] ECJ*
*Trojani v CPAS de Bruxelles [2004] ECJ*
*Bidar v Ealing LBC and another [2005] ECJ*

Commissioner's response (paras 19-23 and 31-32)– right of residence under Article 18 is subject to Directive 90/364, EEA Regs 2000 implement that Directive in UK. Not self-sufficient or economically active therefore no R2R.

3. **Article 12 of the EC Treaty –** Article 12 prohibits discrimination on the grounds of nationality. British and Irish citizens always have the right to reside. Therefore, refusing benefit to other EU nationals under the R2R test is indirect discrimination on the grounds of nationality. An EU citizen can rely on Article 12 provided they are lawfully resident in a Member State, and it is clear from the cases such as *Wolke* that all EU citizens who have not been asked to leave will be lawfully present. The *Grezylcyk* and *Trojani* cases, which concerned entitlement to the Belgian minimex (equivalent to IS) are relevant here, as is *Martinez Sala v Freistat Bayern [1998] ECJ.* Since there would appear to be clear discrimination, the question is whether the Government can justify the discrimination. There were attempts to overturn the old habitual residence test under Article 12 (e.g. *Collins*) but these ultimately failed because the test was held to be justified as a way of showing a degree of integration and a connection to the UK labour market. The R2R test will never be satisfied by an economically inactive claimant, and following the principles of *Bidar* the test is unlikely to be proportionate, and is therefore unjustified.

Commissioners' response (paras24-28) – Accept indirectly discriminatory, but consider to be justified as "an obvious legitimate response to a manifest problem" the problem being (in Govt's

words) "protecting the UK tax-payer from a potentially limitless financial burden" due to "exploitation by people with no right to reside here". The Govt however conceded "uncertainty about the exact size of the effect" and a "lack of firm figures". Failed to deal in any detail with cases such as *Martinez Sala, Trojani, Grzelcyck* and *Bidar.*

4. **The "treated as" or "construction" argument** – This relies on the exact wording of the Regs. The Regs actually say that no person can be *treated as* habitually resident unless they have a right to reside. In the benefits legislation the words "treated as" usually mean that someone who is not in a particular situation should have their benefit entitlement determined as if they were in that situation. The argument is that claimants do not need to be *treated as habitually resident*, if they *are actually habitually resident in fact.* Accordingly it is arguable that the R2R test does not apply to people who are actually habitually resident, but only to those who *are being treated as* habitually resident.

   Commissioner's response (paras 14-17) – such a construction would render the R2R test otiose, since all those *treated as* hab res would have R2R in any event. Probably right on this point.

Leave to appeal was sought from the Commissioners in CIS/3573/2005, CH/2484/2005 and CPC/2920/2005. Leave refused, but will be renewed to CofA once Legal Aid granted.

**Other arguments**
May be discrimination arguments under 1408/71 for those who have worked in other EU states (necessary to bring claimant within personal scope (Art2)) but difficult to bring IS within material scope (Art4). Not clear adds much to Art 12 discrim argument.
May be discrimination arguments under Art 14 and Art 1FP of ECHR (relying on *Stec*) – discrim on nationality or lone parents v others or carers v non-carers or women v men (as more likely to have kids/caring resp.) ECHR argued in CIS/2559/2005 but not dealt with in decision.

**Other caselaw**

**CIS/3890/2005** – deals with "temporary incapacity" and retention of worker status. Was incapable of work October 2004 to June 2005, but continued to have health problems after return to work. Tribunal held that continuing health problems meant incapacity was not "temporary". Commissioner held return to work showed incapacity was temporary.

**CH/3314/2005, CIS/3315/2005 and CIS/3182/2005** – to be heard 19/7/06. Commissioner Rowland will be looking at two issues – a) nature of

"involuntary unemployment" – claimant was worker, but stopped when childcare arrangements broke down (pregnancy/caring responsibilities(?) in CIS/3182/2005) and b) whether IS claimant can be jobseeker – requirement for "involuntary unemployment" to be "registered at the relevant employment office" – how do WFIs fit with this? – do "employment offices" exist separate from DWP/Jobcentre Plus offices? – how does IS claimant evidence workseeking activities? . SofS appears to accept that formal claim for JSA not necessary, but indicates in submissions that claimant must still satisfy workseeking requirements of JSA, i.e. weekly documenting of workseeking activities. Difficulty in this case may be providing evidence that she was looking for work, period in question is October 2004 onwards and client no longer has any records.

**Practical Steps**

Many appeals were stayed pending the Tribunal of Comms. Tribunals are now deciding cases and dismissing following CIS/3573/2005. Until leave is granted difficult to argue cases should not be heard. Our approach – apply for leave on basis CIS/3573/2005 wrongly decided.

Claim CTC/CHB – should be refused but in practice awarded (NINo issue?) - is it right to advise this? – are we encouraging claimants to claim benefits we know they are not entitled to?

Try to identify R2R as worker (invol unemployed/temp incap) or workseeker (best at present to claim JSA) or dependent of worker (seen several people who have been able to argue dependent of working parent/child).

Best advice – GET A JOB

**Further Reading**

Most of the cases mentioned are available on www.bailii.org. The only exception is *Castelli*, which can be found in the 1996 Housing Law Reports 28 HLR 616.

The Welfare Rights Bulletin has had several articles over the last couple of years in issues 180, 183, 186 and 190.

Deputy Commissioner White's article *Residence, Benefit Entitlement and Community Law* (Journal of Social Security Law, January 2005) gives a detailed analysis of the ECJ caselaw, and see also the notes to his talk to the January 2006 SSLPA meeting (on Rightsnet).

Keith Venables
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