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ATH/CW/LB/3

Commissioner's File: CIS/13498/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

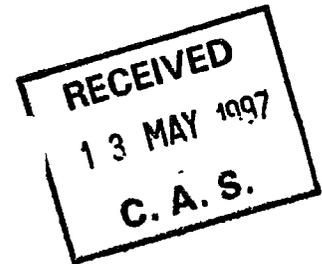
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:



[ORAL HEARING]

1. I disallow this appeal by the claimant. The decision of the social security appeal tribunal dated 7 September 1995 was not erroneous in law.

2. On 6 April 1995 the claimant entered the United Kingdom and on 10 April 1995 she claimed income support. On 27 April 1995 the adjudication officer decided that the claimant was not habitually resident in the United Kingdom. The claimant appealed and on 7 September 1995 the social security appeal tribunal decided that the claimant "was not and is not habitually resident in the United Kingdom". The claimant appeals to the Commissioner with my leave.

3. On 27 February 1997 I held an oral hearing. The claimant was not present but was represented by Mr Desmond Rutledge of the Free Representation Unit. Mr Scoon of the Solicitor's Office, Department of Social Security, represented the adjudication officer. I am grateful to them for their submissions.

4. Since 1 August 1994 a claimant who is claiming income support must show that he or she is a habitual resident in the United Kingdom: Regulation 21 and Schedule 7, Income Support (General) Regulations 1987, as amended. The words "habitual resident" are ordinary English words but their meaning has given rise to a number of Commissioner's decisions since they were introduced in 1994.

5. The claimant was born in 1934 in Bangladesh. In 1962 her husband also, so far as I am aware, born in Bangladesh, was a British Citizen and held a British Passport and he came to the UK. In 1973 the claimant came to the UK to join him bringing with her two of their sons, and leaving the youngest son and two daughters with her mother in Bangladesh. Between 1973 and 1978 the claimant went to and from Bangladesh, spending, as she put it, half her time in the UK and half her time in Bangladesh. In 1985 their youngest son obtained entry clearance to the UK. In the same year the claimant's husband returned to Bangladesh and died there in 1987. The claimant returned to the UK a few months later but in November 1990 she returned to Bangladesh and remained there for the next five years.

6. Some time in 1993 or 1994 the claimant's mother died in Bangladesh. On 6 April 1995 the claimant returned to the UK and appears to have stayed in the U.K. in the home of one of her sons and his wife and their children. On 10 April 1995 the claimant made a claim for income support. She had a right of abode. She was, therefore, a "person from abroad": see regulation 21(3) of the Income Support (General) Regulations which means, as amended from 1 August 1994, (as I have said) -

"a claimant who is not habitually resident in the United Kingdom..."

In other words, as Mr Commissioner Howell put it in paragraph 15 of his decision in CIS/1067/1995 (starred as 82/95), there is, by virtue of section 124 of the Contributions & Benefits Act 1992 a general entitlement to income support "by reference to physical presence in Great Britain regardless of a person's origin" but such a person will be excluded from benefit if he or she is not habitually resident here.

7. The words "habitual residence" are not defined in the regulation and must be given their natural and ordinary meaning. Mr Commissioner Howell in CIS/1067/1995 (see above), and Mr Commissioner Mesher in CIS/2326/95 (starred as 38/96) have indicated some guidelines. Thus in CIS/1067/1995, the Commissioner stated in paragraph 24:

"24...In all cases, an appreciable period of time of actual settled residence has to be demonstrated as well as a settled intention, before residence can be rightly said to have become habitual."

See also Lord Brandon in Re. J [1990] 2 A.C. 562 at 578-9. And in CIS/2326/1995 Mr Commissioner Mesher stated in paragraph 21:

"Some time must elapse before residence becomes habitual. A habit takes time to become established."

Mr Commissioner Howell also made clear in CIS/11481/95 (starred as 31/96) that the question must be considered not only at the date of claim but also at the date of the decision. Although there are a number of other citations which could be referred to, they can all, in my judgment, be summarised in the words of Mr Commissioner Howell that I have already referred to, namely "an appreciable period of time of actual settled residence as well as a settled intention".

8. In other words, the adjudicating authority must consider (i) the period of time of the residence (ii) whether there is a settled intention to reside here for an appreciable period which may be for a limited period "provided that it has a sufficient degree of continuity to be properly described as settled": paragraph 28 of CIS/2326/1995; and (iii) the question must be considered at all times between the date of claim and the date of the decision. I must emphasise, however, that whether or not a claimant is habitually resident here is a question of fact to be decided in all the circumstances of the case.

9. In paragraph 28 of CIS/1067/1995 Mr Commissioner Howell stated that what counted as an "appreciable time" must depend on the facts of each individual case and continued:

"I would say it must be the kind of period which demonstrates according to the good sense and judgment of the tribunal a settled and viable pattern of living here as a resident, of the kind which would lead in normal parlance to a person being described as an habitual resident of this country."

The Commissioner then proceeded to give some illustrations of the period that might suffice, but one thing is clear, there can be no defined period of settled residence for the purpose of determining whether a person has acquired "habitual residence"; it all depends upon the facts.

10. Before the appeal tribunal, the claimant in the present case, speaking through an interpreter, stated, as recorded in the chairman's note of evidence, that she went to stay with her son in the United Kingdom because there was not enough room in Bangladesh and that she had nowhere else to go; that she would like to stay here but also to visit her family in Bangladesh; that she was in Bangladesh when her husband came there and was there for about two years before he died and she continued:

"I came back when I did. I spent the time deciding what to do. I remember filling in the questionnaire. I see the answers. I do not think this represents any difference to the way I have lived over the last twenty years."

The questionnaire to which the claimant referred is at page 27-28 of the case papers. In answer to question 14 "how long do you intend to remain in the United Kingdom?", she replied "as long as I wish possibly 3 - 5 years not sure". She stated that she had come from abroad to the UK because she had children and grandchildren living in the UK.

11. As a Commissioner, I can only interfere with the decision of the appeal tribunal if I am satisfied that it was erroneous in law.

12. In their reasons for their decision in form AT3 box 4 the appeal tribunal stated:

"The tribunal noted the formal legal submission on behalf of the claimant and accept that it is for the tribunal to decide as a matter of the interpretation of ordinary English words whether or not the claimant, in the light of all the circumstances, is 'habitually resident' at the date of claim or at any other date subsequent to that and prior to the date of the hearing."

That was perfectly correct law. They then stated:

"Her family loyalties clearly lay in both countries and she had clearly experienced the dilemma of someone with a divided family with her husband being in one country and then in the other, with her mother being in Bangladesh and her children and grandchildren being both in the United Kingdom and in Bangladesh and with herself having no individual property ties or economic interests that mandated her staying either in Bangladesh or in the United Kingdom ... In all these circumstances, the tribunal applied its mind to whether this pattern of circumstances represented a settled position. They did not regard it as necessary to reaching their decision that the claimant should have decided permanently to reside in any one country but that there should be a long term view. In the light of the claimant's personal history from 1973 to the date of the hearing, the tribunal were not satisfied that the claimant had established any permanent pattern and therefore did not appear to have habitual residence either in Bangladesh or in the United Kingdom."

Although, in my judgment, it was not necessary for the claimant to establish "any permanent pattern", nevertheless the appeal tribunal made it clear that the claimant was not required to have decided "permanently to reside in any one country".

13. The claimant was absent from the UK for five years, between 1990 and 1995, and nothing that occurred prior to 1990 would, in my judgment, assist her in claiming to have

"habitual residence" here in 1995. In my judgment, her entry into the UK in April 1995 was the beginning of a new period of residence and the sole question is whether or not the claimant had in the five months between April 1995 and September 1995 acquired a habitual residence in the UK. That was a question of fact for the appeal tribunal to decide. I can find no error of law in the appeal tribunal's decision and, accordingly, I must disallow the appeal.

14. I was informed at the oral hearing that the claimant had after the decision of the appeal tribunal made a new claim at the end of November 1995 for income support which was disallowed but that another appeal tribunal heard her appeal relating to that claim on 14 May 1996 and decided that the claimant was habitually resident from 14 May 1996. That decision, although on a new claim, was given some 13 months after the claimant's return to the UK in April 1995. By that date, of course, the claimant had been resident in the UK for an appreciable period of time.

15. Putting the matter briefly and untrammelled by any legal decision, I am bound to say that, as a matter of common sense, I am of the opinion that a Bangladeshi who re-enters the UK after five years absence and has remained in the UK for only five months living with her married son will not have become a habitual resident here.

16. I disallow this appeal.

(Signed) A T Hoolahan
Commissioner

(Date)

15 APR 1997