SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 16 June 2009

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. Having considered the circumstances of the case and any reasons put forward in the request for a hearing, I am satisfied that the application can properly be determined without a hearing. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

2. The decision of the appeal tribunal dated 16 June 2009 is in error of law. The error of law identified will be explained in more detail below. I would ask the legally qualified panel member (LQPM) of the appeal tribunal to note that there have been considerable advances in the law relating to the issue of a claimant's 'right to reside' in the United Kingdom since the date of the decision of the appeal tribunal, and which have settled certain difficult questions which had arisen in connection with that issue.

3. I am able to exercise the power conferred on me by Article 15(8)(a)(i) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so without making fresh or further findings of fact.

4. My revised decision is as follows. The decision of the Department, dated 2 December 2008, that the appellant did not have an entitlement to jobseekers allowance (JSA) on a claim to that benefit received in the Department on 25 November 2008, was made on the basis that the appellant did not have a 'right to reside' in the United Kingdom. For the reasons which are set out below, I accept that the appellant did have a right to reside in the United Kingdom on 2 December 2008. Accordingly,

the case is remitted back to the Department to determine whether the other conditions of entitlement to JSA are satisfied.

Background

5. On 2 December 2008 a decision-maker of the Department decided that the appellant did not have an entitlement to JSA on a claim to that benefit received in the Department on 25 November 2008. A copy of the relevant decision is attached to the original appeal submission as Tab No 6. The basis of the disallowance was that the appellant did not have a 'right to reside' in the United Kingdom. The decision dated 2 December 2008 was reconsidered on 28 January 2009 but was not changed. A letter of appeal against the decision dated 2 December 2008 had been received in the Department on 16 December 2008.

6. An appeal tribunal hearing took place on 16 June 2009. The appellant was present and was represented by Mrs Carty from the Law Centre (Northern Ireland). The Department was represented by Mr McNamara of the Decision Making Services (DMS) section. The appeal tribunal disallowed the appeal and confirmed the decision dated 2 December 2008. On 11 November 2009 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service. On 13 November 2009 the application for leave to appeal was refused by the LQPM.

Proceedings before the Social Security Commissioner

7. Throughout the proceedings before the Social Security Commissioners the appellant has continued to be represented by Mrs Carty of the Law Centre (Northern Ireland) and the Department by Mr McNamara and Mr Gorman of the DMS section. Gratitude is extended to all representatives for the care and attention which they have given to the preparation of their written submissions and their patience in awaiting this decision.

8. On 10 December 2009 a further application for leave to appeal was received in the Office of the Social Security and Child Support Commissioners. On 17 February 2010 written observations on the application for leave to appeal were sought from DMS. On 4 March 2010 a further submission was received from Mrs Carty. Following the grant of an extension of time, initial written observations on the application for leave to appeal were received on 16 July 2010. Following the grant of an extension of time, written observations in reply were received from Mrs Carty on 18 August 2010 and were shared with Mr McNamara on 20 August 2010. On 4 September 2010 a further submission was received from Mr McNamara which was shared with Mrs Carty on 13 September 2010. In this further submission reference was made to an ongoing appeal in England and Wales in the case of *Galina Patmalniece v Secretary of State for Work and Pensions*. Further submissions were received from both parties to the proceedings in October 2010. Mrs

Carty submitted a further submission on 24 January 2011 and a reply to that submission was received from Mr McNamara on 17 February 2011.

Errors of law

9. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law.

10. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

> "(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
> (iv) giving weight to immaterial matters;
> (v) making a material misdirection of law on any material matter;
> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...
>
> Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Was the decision of the appeal tribunal in the instant case in error of law?

11. It is clear from the record of proceedings for the appeal tribunal hearing that the appeal tribunal went about the forensic evidence-gathering process in a careful and thorough manner. Equally, the appeal tribunal has provided a detailed, analytical statement of reasons for its decision in respect of the issues arising in the appeal. Where then did the appeal tribunal go wrong in law?

12. In her further submission, dated 24 January 2011, Mrs Carty submitted that:

> '... I wish to bring it to the Commissioner's attention that the Department has issued amended guidance in relation to the application of the cases of the Ibrahim and Texeira

cases to A8 nationals. I am enclosing a copy of the amended guidance for the Commissioner's reference.

Para 10 of the guidance states as follows:

10. "Where an A8 or A2 national has been employed in the UK on or after the date of accession, that work may trigger Article 12 rights if it is for an authorised employer, or the migrant worker is otherwise exempt from the requirement to register or seek authorisation. The migrant worker does not have to complete 12 months registered or authorised work before a child can gain Article 12 rights."

It is submitted that this is directly relevant to the adjudication of this appeal. At the time of the decision under appeal (the claimant) was the primary carer of his daughter [S], who had commenced education while he was in registered employment. Article 12 rights were accrued by [S] and accordingly (the claimant) had a right to reside at the relevant time as her primary carer.'

13. In reply to this submission Mr Gorman submitted that:

'The Law Centre has highlighted the decision issued by Judge Jacobs on 21.09.10 (CIS/0647/2009) and has also stated that it is no longer appropriate to await the outcome of *Patmalniece v Secretary of State for Work and Pensions* that is currently before the Supreme Court.

Judge Jacobs considered the application of the Court of Justice of the European Union (CJEU) judgments in *Baumbast, Ibrahim* and *Teixeira* where an A8 national has not completed 12 months registered work under the Worker Registration Scheme (WRS) and stated:

"The line of authority began with cases in which the worker and the primary carer were different. The leading authority is Baumbast and R v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091. It has been confirmed by the recent decision of that Court in London Borough of Harrow v Ibrahim (Case C-310/08). The line has now been extended to cases in which the worker and the primary carer are the same person by the Court's decision in Teixeira v London Borough of Lambeth (Case C-480/08). The combined effect of those decisions is this. They decide that an EU citizen who is the primary carer of a child has a right to reside if the child was in education while she was a worker. She does

not need to be self-sufficient or have comprehensive sickness insurance in the United Kingdom.

The operation of those cases depends on the circumstances at two points in time. At one point, a child is in education when a parent is a worker; I call this the first requirement. It operates to crystallise the child's right to education under Article 12. It confers no right on the person who is the worker. At the other point, the child is being looked after by the primary carer who does not have a right to reside; I call this the second requirement. This right does not depend on the person having been a worker. It is a right that is purely protective of the child's right to education.

The claimant undertook full-time work. She did not register immediately, but she had registered by the time her children were in education in this country. She never acquired the full worker status. She did, though, acquire temporary and conditional worker status under regulation 5(2). And when she had that status for the time being, her children were in education. Focussing on that moment, she satisfied the first Baumbast requirement. Later, she was no longer working but she was the primary carer of her children who were still in education. At this time, she made her claim for income support. Focussing on that moment, she satisfied the second Baumbast requirement. She claimed her right to reside in support of her children's right to education. Her claim at that moment did not depend on having acquired the full advantages of worker status. It was entirely independent and based on her status as primary carer."

(The claimant) had lawfully worked in the United Kingdom (UK) during his period of employment with Steeweld Ltd that was registered under the WRS. At that time his daughter, [S], was in his household and attending school. Judge Jacobs decided that it was not necessary for an A8 national to have completed 12 months registered employment and that the only requirement was that they had achieved *"temporary and conditional worker status"* by being in registered employment at a time when the child was in education. (The claimant) can therefore be considered to have been a worker at a time when his daughter was in education, thereby satisfying the first requirement and giving [S] a right to reside derived from Article 12.

In the circumstances of this case the Department would submit that (the claimant's wife) should be considered to

be the primary carer as she was the parent who was not working and would therefore have spent more time caring for [S]. As (the claimant's wife) was the primary carer and did not have a right to reside the second requirement is satisfied. Following the CJEU judgments in *Ibrahim* and *Teixeira* (the claimant's wife) would also derive a right to reside in order to give effect to [S's] Article 12 right.

The judgments of the CJEU only give a right to reside to the primary carer of the child of a migrant worker who is in education in order to give effect to that child's Article 12 right. The judgments would therefore appear to be of no direct assistance to (the claimant) as they concerned primary carers who were single parents and not members of a couple. Further, the Department submits that it is not possible for a person to derive a right to reside as a family member of a person who themselves have derived a parasitic right to reside.

The Department, however, sees no basis for concluding from the CJEU judgments that it was intended that only single parents can derive a right of residence from their children via Article 12 and that consequently, where a married couple are concerned, that only one member of the couple can have a derived right. The Department finds no direct support for such a proposition in this case and indeed is of the view that both the terms of Article 12 itself, particularly the reference to the State's duty to encourage all efforts to enable children to attend courses under *"the best possible conditions"*, and Article 8 of the European Convention on Human Rights (ECHR) that protects family life, would tend towards the conclusion that the right should not be so narrowly construed. The Department submits that in order to give full effect to Article 12, read in conjunction with Article 8 of the ECHR, (the claimant) must also derive a right to reside.

In conclusion, the Department submits that following on from the CJEU decisions (the claimant) had a right to reside at the date of his claim to Jobseekers Allowance (JSA). The Department also agrees with (the claimant's) representative that it is no longer appropriate to await the Supreme Court decision in *Patmalniece*.'

14. Mr Gorman, in his careful and comprehensive analysis, is correct to state that despite the complexities of the domestic legislation, the European legislation which underpins it, the inevitable interaction which exists between the two, and the consequent plethora of case-law, there is much which is now settled in this area.

15. Upper Tribunal Judge Jacobs provides an accurate and succinct summary of developments to date concerning the right to reside of parents of children, who, in turn, have acquired a right to education, at Section F of his decision in *Secretary of State for Work & Pensions v JS (IS)* ([2010] UKUT 347 (AAC)), which was cited by Mr Gorman in the further submission set out above.

16. Applying those principles to the instant case, Mr Gorman submits that the appellant had lawfully worked in the United Kingdom (UK) during his period of employment and was registered under the Worker Registration Scheme. During the period of his employment, he had a daughter who was a member of his household and who was attending school. In the opinion of Upper Tribunal Judge Jacobs, it was not necessary for an A8 national, such as the appellant, to have completed 12 months registered employment and that the only requirement was that he had achieved what Judge Jacobs described as 'temporary and conditional worker status' by being in registered employment at a time when the child was in education. Accordingly, the appellant could be considered to have been a worker at a time when his daughter was in education. In turn, the first requirement is satisfied, namely that the appellant's child had an Article 12 right to education.

17. That is not the end of the matter, however. The second requirement identified by Judge Jacobs also had to be satisfied, namely that the appellant, in order to obtain a parallel right to reside, would have to be the primary carer of his child with an Article 12 right to education. Mr Gorman concedes that the appellant does acquire a right to reside on the *Ibrahim* and *Teixera* principles. His concession is based on an extension or wider interpretation of those principles. That interpretation is necessary, Mr Gorman submits, because, factually, the primary carer of the child would seem to have been the child's mother rather than the appellant, the child's father.

18. I am of the view that it is arguable that the appeal tribunal found, as a fact, that the appellant was the primary carer of the child. A submission had been made to the appeal tribunal that the appellant had a right to reside as the parent of a child with an Article 12 right to education. The appeal tribunal rejected that submission on the basis of the principles set out by what was then the decision of the Court of Appeal for England and Wales in *Harrow LBC v Ibrahim* ([2008] ECWA Civ 386). The Court of Appeal had expressed scepticism that both a child with an Article 12 right to education and the parent of that child who was a primary carer of that child had a right to reside but had referred questions about the issues arising to the Court of Justice of the European Communities. The appeal tribunal below declined to stay the appeal before it pending the outcome of the referral in *Ibrahim* and felt bound by the sceptical view set out by the Court of Appeal at paragraphs 50 to 55 of its decision. It is arguable, however, that by considering the relevant argument and rejecting it, the appeal tribunal was accepting that the appellant had the status of primary carer.

19. Mr Gorman's real concession is based on an extension or wider interpretation of the principles in *Ibrahim* and *Teixera*. Once again, it is arguable that there is support for the basis of the concession. In *Baumbast and R v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091*, the Court of Justice had stated, at paragraph 50 of its decision that:

> 'In that respect, it must be borne in mind that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host Member State (see Case C-308/89 *Di Leo* [1990] ECR I-4185, paragraph 13).'

20. At paragraph 72, the Court had also stated that:

> 'Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law (see *Commission* v *Germany*, cited above, paragraph 10).'

21. At paragraph 58 of its decision in *London Borough of Harrow v Ibrahim (Case C-310/08)*, the Court had stated:

> 'While that provision is not applicable in the main proceedings, it illustrates the particular importance which Directive 2004/38 attaches to the situation of children who are in education in the host Member State and the parents who care for them.'

22. Accordingly, I accept the concession which has been made by Mr Gorman.

Disposal

23. The decision of the appeal tribunal dated 16 June 2009 is in error of law. I am able to exercise the power conferred on me by Article 15(8)(a)(i) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so without making fresh or further findings of fact.

24. My revised decision is as follows. The decision of the Department, dated 2 December 2008, that the appellant did not have an entitlement to JSA on a claim to that benefit received in the Department on 25 November

2008, was made on the basis that the appellant did not have a 'right to reside' in the United Kingdom. For the reasons which are set out above, I accept that the appellant did have a right to reside in the United Kingdom on 2 December 2008. Accordingly, the case is remitted back to the Department to determine whether the other conditions of entitlement to JSA are satisfied.

(signed): K Mullan

Chief Commissioner

23 August 2011