CIS/1934/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. On file CIS/1934/2006, the Secretary of State's appeal is unsuccessful. I set aside the decision of the Fox Court appeal tribunal dated 25 November 2005 (ref: U/42/242/2005/10951) but I substitute a decision to the same effect. The claimant had a right of residence in the United Kingdom and was habitually resident in the United Kingdom from 23 June 2005.

2. On file CIS/2095/2006, I allow the Secretary of State's appeal. I set aside the decision of the Fox Court appeal tribunal dated 25 November 2005 (ref: U/42/242/2005/09448) and I substitute a decision that the claimant is not entitled to income support from 25 April 2005 until 22 June 2005 because she was not habitually resident in the United Kingdom.

REASONS

The facts and procedural history

3. The history asserted by the claimant was not in dispute before the tribunal, the Secretary of State not even being represented at the hearing. The claimant is an Italian national of Ethiopian origin. She first came to the United Kingdom from Ethiopia in January 2000. She obtained work quickly but in 2001 she became pregnant and in January 2002 she went to Italy for the birth of her twins. She had been abandoned by her boyfriend and was invited to stay in Italy by a friend. After the birth, she went with the children to Ethiopia where her father still lived. She remained there for three months and returned to the United Kingdom by herself in September 2002, leaving the children in the care of her father. She resumed work with one of her former employers but returned to Ethiopia in March 2003 because her father was seriously ill and was having difficulty looking after the children. On 19 April 2005, which the tribunal found was as soon as she was able, she returned to the United Kingdom with her children and started looking for work again. She claimed income support on 25 April 2005. On 1 June 2005, the Secretary of State disallowed the claim on the ground that the claimant did not have a right of residence in the United Kingdom and therefore she could not be treated as habitually resident in the United Kingdom and so was a "person from abroad" with an applicable amount of nil (see regulation 21 of the Income Support (General) Regulations 1987 (S.I. 1987/1967) as then in force). The claimant appealed. On 23 June 2005, she made a second claim, which was disallowed on 17 August 2005 on the same ground. The claimant also appealed against that decision.

4. Both appeals came before the Fox Court appeal tribunal on 25 November 2005. The tribunal allowed them on the ground that the claimant had been a worker in the United Kingdom – "a status which she must retain, i.e., once a worker always a worker" – and that, as she was looking for work, she was a qualified person within the Immigration (European Economic Area) Regulations 2000 by virtue of being a "worker" within the scope of regulation 5(1)(a) and so had a right of residence under regulation 14 of those Regulations.

5. The Secretary of State now appeals with the leave of a tribunal chairman. One of the appeals is technically late but I admit is as it was obviously always the intention of the Secretary of State to appeal against both decisions and the claimant cannot have thought otherwise. I held an oral hearing, at which the Secretary of State was represented by Mr

Daniel Kolinsky of counsel, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions, and the claimant was represented by Ms Jordana Adams of Fulham Legal Advice Centre.

The legislation.

6. Before 30 April 2006, regulation 21(1) of, and Schedule 7 to, the Income Support (General) Regulations 1987 (S.I. 1987/1967, as amended) provided that a "person from abroad" had an applicable amount of "nil", with the consequence that he or she was not entitled to payments of income support under section 124 of the Social Security Contributions and Benefits Act 1992. So far as is material, regulation 21(3) and (3G) provided –

> "(3) Subject to paragraphs (3F) and (3G), in Schedule 7 –
> …
> 'person from abroad' means a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is –
>
> (a) a worker for the purposes of Council Regulation (EEC) No. 1612/68 or (EEC) No. 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC or No. 73/148/EEC; …
>
> …
>
> (3G) In paragraph (3), for the purposes of the definition of a person from abroad 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."

7. A number of Directives of the Council of the European Economic Community (in particular, Council Directive 68/360/EEC) required Member States to enact legislation conferring the rights of residence necessary to give full effect to the freedom of movement of workers guaranteed by what is now Article 39 of the EC Treaty. Before 30 April 2006, regulation 14(1) of the Immigration (European Economic Area) Regulations 2000 (S.I. 2000/2326) provided that a "qualified person" was entitled to reside in the United Kingdom for as long as he remained a "qualified person". So far as is material, regulation 5 provided –

> "(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as –
>
> (a) a worker;
>
> …
>
> (2) A worker does not cease to be a qualified person solely because –
>
> (a) he is temporarily incapable of work as a result of illness or accident; or
>
> (b) he is involuntarily unemployed, if that fact is duly recorded by the relevant employment office.
>
> …"

By regulation 3(1), the term "worker" in the 2000 Regulations was defined as "a worker within the meaning of Article 39 of the EC Treaty".

The arguments

8. It has not been in issue in these appeals that the effect of regulation 21(3G) of the 1987 Regulations was that a person could not be treated as habitually resident in the United Kingdom, and therefore potentially entitled to income support, if he or she did not have a right to reside in the United Kingdom. The claimant has always argued that she had a right to reside in the United Kingdom by virtue of regulation 5(2) of the 2000 Regulations and, in his written submissions, the Secretary of State concentrated on that provision.

9. He first argued that the tribunal erred in regarding the claimant's former status as a "worker" to have been retained on the basis that "once a worker always a worker", referring to *Leclere v Caisse nationale des prestations familiales* (Case C-43/99) [2001] E.C.R. I-4265. He then submitted that regulation 5(2)(a) could not apply because the claimant was not incapable of work by reason of her own incapacity, and he cited my decision in CIS/3182/2005. As regards regulation 5(2)(b), he originally submitted that the claimant could not be a workseeker because she was claiming income support rather than jobseeker's allowance. In the light of CH/3314/2005, he abandoned that argument but submitted that regulation 5(2)(b), being derived from Article 7(1) of Council Directive 68/360/EEC, applied only to those who ceased working due to involuntary unemployment which was not so in this case, even if the claimant was involuntarily unemployed by the date of her claim, which he in turn disputed on the ground that she would be unlikely to become self-sufficient.

10. At the hearing before me, Mr Kolinsky submitted that, even if incapacity or involuntary unemployment did not have to be the cause of the person ceasing to be employed, both the language of the regulation and the language used by me in paragraph 11 of CH/3314/2005 and by Mr Commissioner Mesher in the passage from R(IS) 12/98 quoted by me in paragraph 10 of CH/3314/2005 suggested that there nonetheless had to be some continuity. He also referred me to *Regina v. Immigration Appeal Tribunal, ex parte Antonissen* (Case C-292/89) [1991] E.C.R. I-745, where the European Court of Justice held that the freedom of movement for workers guaranteed by Article 48 (now Article 39) of the Treaty entailed the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purpose of seeking employment. The Secretary of State concedes that such workseekers have a right of residence – it is unnecessary to decide whether such people have rights of residence by virtue of regulation 5(1)(a) of the 2000 Regulations or whether the rights they have arise outside the Regulations – and Mr Kolinsky conceded that the claimant in the present case might have such a right of residence but that she would nonetheless be entitled to income support only after she had become habitually resident in the United Kingdom.

11. It was accepted on behalf of the claimant that a person who had been a worker did not automatically retain that status for ever but it was emphasised that the context in which the tribunal decided the case was that the claimant had only ceased to be in the labour market in the United Kingdom for reasons beyond her control. It was accepted that, apart from *Antonissen*, it was necessary for the claimant to rely in regulation 5(2) but it was not accepted that, for the purposes of that regulation, incapacity or involuntary unemployment necessarily had to be the reason for ceasing to be employed. However, it was also argued that I should not follow CIS/3182/2005 and that it was sufficient for the purposes of regulation 5(2)(a) that

the claimant had ceased work due to the illness of her father. Before me, it was further argued by Ms Adams that the claimant's absence from work was involuntary and that it would be discriminatory not to treat those caring for the sick in the same way as those who were sick themselves because far more women than men are carers. Alternative, she submitted that a third category, consisting of those involuntary unemployed for reasons beyond their control, had to be implied into the legislation.

12. Mr Kolinsky replied by submitting that no proper case of discrimination had been formulated and that there was no legal basis for implying a third category of people who remained workers into regulation 5(2).

Discussion

13. I broadly accept Mr Kolinsky's submissions in relation to regulation 5(2) and I am satisfied that the claimant cannot rely upon that provision. In relation to regulation 5(2)(a), I see no reason to resile from CIS/3182/2005. I do not consider the construction I put on regulation 5(2)(a) to give rise to unlawful discrimination and I see no ground for implying into the legislation a term that, had it been intended, would have been included on the face of both the regulation and Article 7(1) of the Directive to which the regulation gave effect. In relation to regulation 5(2)(b), I am not persuaded that involuntary unemployment must be a cause of a person giving up employment and it may well be that some gap between employment and a person starting to seek work again will not be fatal to reliance on regulation 5(2)(b). It may, for instance, be arguable that regulation 5(2)(b) could be relied upon after a person had taken time away from the labour market for a short holiday or while giving birth. However, the language of the legislation – in particular, the word "cease" – undoubtedly implies some continuity and, if such a gap is permissible in some cases, the gap in the present case was too long. It was just over two years and it seems to me to be significant that such a period abroad would now be sufficient to cause a person to lose even a right of permanent residence acquired through a residence for five years as a worker (see Article 16(4) Council Directive 38/2004/EC, which had been adopted, although it had not come into force, at the time material to these appeals).

14. On the other hand, I accept Mr Kolinsky's concession that the claimant may have had a right of residence as a workseeker. I asked him why I should not simply accept that she was a workseeker on the basis of the tribunal's finding that she "is now looking for work" and "has every intention to find [sic] work again". He submitted that more detailed findings could be made and that the tribunal's findings had been made in the context of an erroneous legal analysis and that it would be necessary for her to show that she had a genuine chance of being engaged in employment. However, I am not persuaded that it is necessary for this case to be referred to another tribunal. Retrospective adjudication about workseeking is seldom very satisfactory and the difficulty in this case was caused by the Secretary of State's failure to ask the right questions when the claimant made her claim or his failure to be represented at the hearing before the tribunal to challenge the claimant's evidence. The claimant had shown a willingness and ability to work in the past and having three-year-old twins does not prevent a person from working. The tribunal was obviously satisfied that she was genuine in her claim to be looking for work and there is no reason to suppose that, at least within a short period of returning to the United Kingdom, she could not have arranged child care so that she had a genuine chance of being employed again for more than 16 hours a week, which in my view would be sufficient to be "genuine and effective". It is to be noted that she had experience in the travel industry and had already sent a cv to an employment agency and a travel agency by

29 April 2005. It is true that the tribunal's findings were expressed in the present tense and did not deal with the position at the date of claim and also that the claimant's grounds of appeal to the tribunal mentioned that the children were due to start nursery school in September 2005 and that the claimant hoped to return to work then. However, it seems clear that she had started looking for work earlier and it seems unlikely that she had not persisted in that when refused income support. She appears to have had a number of friends following her earlier periods of residence in the United Kingdom and I accept that she could have arranged child care and started work before September had she been offered a job.

15. However, I also accept Mr Kolinsky's submission that a person who was a workseeker but could not rely on regulation 5(2)(b) must actually have been habitually resident in the United Kingdom if he or she was to be entitled to income support. It is apparent from *Collins v. Secretary of State for Work and Pensions* (C-138/02) [2004] E.C.R. I-2703 (also reported as R(JSA) 3/06), that a person in the claimant's position did not fall within head (a) of the proviso to the definition of "person from abroad" in regulation 21(3) of the 1987 Regulations in force at the material time`. The claimant had clearly ceased to be habitually resident in the United Kingdom between March 2003 and April 2005 and I accept Mr Kolinsky's submission that the claimant had to have been resident in the United Kingdom for an appreciable period after her return before she could again be said to be habitually resident here. The Secretary of State appears to accept that, conventionally, such an appreciable period is between one month and three months (see R(IS) 7/06) and I take the view, having regard to the fact that the claimant was returning to a country of which she was not a citizen but which she plainly intended to make her home in circumstances where her absence had always been intended to be temporary, that a period in the middle of those extremes would be sufficient. I find that she became habitually resident from 23 June 2005.

16. The consequence is that the claimant's first claim fails but her second claim will succeed if the Secretary of State accepts that the other conditions of entitlement are met. I therefore give the decisions set out in paragraph 1 above, effectively allowing the Secretary of State's appeal in respect of the earlier period but dismissing it in respect of the later period.

(signed on the original) **MARK ROWLAND**
Commissioner
29 April 2008