THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY COMMISSIONERS (PROCEDURE) REGULATIONS 1999

Commissioner's Case No.: CIS/4286/2007

Name:
Tribunal:
Tribunal Date:
Tribunal Register No:

NOTICE OF DETERMINATION OF APPLICATION FOR LEAVE TO APPEAL

1. I refuse leave to appeal.

REASONS

2. I held an oral hearing of this application, without notice to the Secretary of State. The claimant was represented by Mr Dan Manville of Birmingham Tribunal Unit, for whose helpful submissions I am grateful.

3. The claimant is a Dutch national. The date when he first came to the United Kingdom is strangely not recorded in the bundle of documents before me – as it is central to Mr Manville's argument – but it appears to have been in 2001 or 2002 (although the tribunal seems to have thought it was 2003), when he came to join his wife who had been in the United Kingdom since 2000. They have seven children. He left the United Kingdom for three months in 2004, having been in receipt of income support on the ground of incapacity for work before then. The consequence is that he lost the benefit of transitional protection on which his right to income support had depended since entitlement to income support had generally depended on a person having a right of residence in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. When he returned, he claimed income support again but that claim was unsuccessful as he had no relevant right of residence (see CIS/1096/2007). However, he made another claim on the ground of incapacity for work with effect from 16 November 2006. That claim was also disallowed on the ground that the claimant had no right of residence because he was not a qualified person within the terms of regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003). He also sought to argue that he had a right of residence as the family member of his wife who had a right of residence under regulation 15 because she had been resident for five years. That argument was rejected because she had not been a qualified person for five years. The claimant has subsequently argued that he has a right of residence under regulation 15 on the basis of his own five years' residence, since the period

of his absence was for less than six months. The claimant appealed but his appeal was unsuccessful. The tribunal's reasoning is not very clear but that does not matter greatly in the circumstances of this case. The claimant now applies for leave to appeal, having been refused leave by a tribunal chairman.

4. Despite Mr Manville's submissions, I regard the claimant's case to be completely unarguable. The only grounds upon which the claimant could succeed under regulation 15 would be on the basis that he or his wife had resided in the United Kingdom for five years "in accordance with these Regulations" or their predecessors. That plainly means in accordance with rights of residence under those regulations and since neither the claimant nor his wife had been a "qualified person" for five years, that is an end to his case under regulation 15.

5. Mr Manville points out that Article 16 of Council Directive 2004/38/EC, which regulation 15 is designed to implement and which has direct effect insofar as regulation 15 does not fully implement it, uses the phrase "resided legally" and I am prepared to accept for the purposes of this application that that is wider than the scope of "qualified person" in the domestic legislation. However, it plainly does not stretch beyond residence in accordance with rights of residence either guaranteed by Community law or recognised by the Member State. The claimant had not exercised such a right of residence for five years and neither had his wife.

6. Mr Manville submitted that, Article 17 of the EC Treaty having created the concept of citizenship of the European Union, Article 18 conferred a right of residence for all citizens of the Union. However, that is not consistent with the case law or the language of Article 18, which subjects the broad principle to limitations imposed by other "measures", which include Directives. In guaranteeing rights of residence in some circumstances, Council Directive 2004/38/EC implies that rights of residence are not guaranteed in others.

7. He also submitted that it was not possible for a person to have a right to be admitted to the United Kingdom but not to have a right of residence. However, that is precisely the effect of the Directive, combined with domestic law. He also submitted that legislation had the effect that a person does not require leave to remain in the United Kingdom in order to have a right of residence. However, there is no such provision in the Nationality, Immigration and Asylum Act 2002, which he mentioned at the hearing, and neither does section 7 of the Immigration Act 1988 have that effect. It is clear that a national of an EEA State may be lawfully present in the United Kingdom without having a right of residence (see *Ismail v Barnet LBC* [2006] EWCA Civ 383; [2006] 1 W.L.R. 2771).

8. After the hearing, Mr Manville referred me to section 115(9) of the Immigration and Asylum Act 1999. However, that is not a provision conferring right so residence. It merely provides a definition for a section that is concerned with excluding categories of claimant from benefits and it does not follow that those not excluded under that section cannot be excluded under some other provision.

9. Finally, Mr Manville takes issue with my suggestion during the hearing that an EU citizen was generally expected to look to the Member State of which he is a national for social assistance unless he has a right of residence in another Member State. The existence of such a principle was recognised by the Court of Appeal in *Abdirahman v. Secretary of State for Work and Pensions* [2007] EWCA Civ 657; [2008] 1 W.L.R. 254 (also reported as R(IS) 8/07), where Lloyd LJ drew attention to Mr Advocate-General Geelhoed's observation in *Trojani v. Centre public d'aide sociale de Bruxelles* (Case C-456/02) [2004] E.C.R. I-7573) that –

> "The basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State".

10. Nothing in the judgment in *Trojani* contradicts that position, save that it is made clear that an EU citizen who is recognised as having a right of residence by a Member State of which he is not a citizen under its domestic law must be treated by that State in the same way as it treats its own citizens. Nor is the principle contrary to *Grzelczyk v. Centre public d'aide sociale d'Ottignes-Louvain-la-Neuve* (Case C-184/99) [2001] E.C.R. I-6193, which concerned a student who had had a right of residence based on a declaration as to his ability to support himself rather than an actual ability to do so.

11. I have recognised in CIS/408/2006 and CIS/2358/2006 that a person may have a right of residence under Article 18 of the EC Treaty in circumstances not covered by a Directive where there is simply a lacuna in the Community subordinate legislation. However, this is not a case where there is such a lacuna.

12. An appeal by the claimant would have no prospect of success.

(Signed) **MARK ROWLAND**
Commissioner
3 September 2008