

JJS/4/LS

Commissioner's File: CP/17/1987

C A O File: AO 1003/P/87

Region: London North

**SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR RETIREMENT PENSION
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Mohamed Mohamud Mahamoud

Appeal Tribunal: West Ham Central

Case No: 36/01

[ORAL HEARING]

1. My decision is that from and including 1 January 1985 an increase of retirement pension is payable to the claimant.

2. I held an oral hearing of this appeal. The claimant was represented by Ms Helen Stoller of the Welfare Rights Support Team and the adjudication officer was represented by Mr K. Turner of the Chief Adjudication Officer's Office. The appeal was by way of rehearing. Ms Stoller produced an amount of documentary evidence which was not before the tribunal and offered the claimant for cross-examination and he was examined by Mr Turner.

3. This is a claimant's appeal against the unanimous decision of the Stepney social security appeal tribunal, given on 4 November 1986, confirming the adjudication officer's decision that increase of retirement pension was not payable to the claimant for his wife from and including 1 January 1985 because she was absent from Great Britain and not residing with him.

4. Section 45 of the Social Security Act 1975 provides *inter alia* for a pension increase in respect of a pensioner's wife for any period during which the petitioner is residing with his wife. Section 82(5) of the Act, in so far as it is material to the instant case, is as follows:

"Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit and an increase of benefit shall not be payable in respect of any person as the beneficiary's wife or husband, for any period during which that person:

(a) is absent from Great Britain; or

....."

The regulation which provides for a modification of the Act in relation to a husband or wife is regulation 13 of the Social Security Benefit (Persons Abroad) Regulations 1975 and reads as follows:

"13. A husband or wife shall not be disqualified for receiving any increase (where payable) of benefit in respect of his or her spouse by reason of the spouse being absent from Great Britain, provided that the spouse is resident with the husband or wife, as the case may be."

5. The claimant came to Great Britain from Somalia in 1960 to take up employment as a mariner. His wife, Halimo Mohamud Adan, remained in Somalia and she has never resided in Great Britain. The Social Security Benefit (Persons Residing Together) Regulations 1977 are also material; regulation 2 thereof deals with the circumstances in which a person is to be treated as residing or not residing with another person or in which persons are to be treated as residing or not residing together and it is regulation 2(4) which bears on the present case, it is as follows:

"Subject to the foregoing provisions of this regulation, two persons shall not be treated as having ceased to reside together by reason of any temporary absence the one from the other."

The circumstances in the instant case are such that regulation 2(4) is not subject to derogation by any of the foregoing provisions in such regulation.

It is common case that the claimant came to Great Britain from Somalia in August 1960. He is a mariner and he came here to take up employment as such. The claimant completed claim form BF225, dated 19 December 1984 in which he claimed an increase of benefit for his spouse and for their seven children. He had earlier completed form BR1. The adjudication officer accepted the date of marriage as 31 December 1954, but decided that an increase of retirement pension was not payable for the claimant's wife because she was absent from Great Britain and not residing with him.

6. The claimant appealed to the tribunal. He attended the hearing before the tribunal. It is recorded in the chairman's note of evidence that the claimant had lived in England for a number of years and was a retired seaman. His wife had never lived in England, but he had visited his wife from time to time in her country of residence. He had not seen his wife for over 10 months. He did not intend to return to "Swiziland" (sic). He was receiving unemployment benefit but did not receive increased benefit for his wife. When he obtained the increase in pension for his wife, it was his intention to return to Swaziland. The only reason he did not return was the fact that he had not received such increase. The members of the tribunal found as facts that the claimant was not residing with his wife in Britain and he had never set up a home with his wife here. The wife permanently lived in Swaziland. There was a doubt as to whether the marriage was monogamous. His appeal was dismissed and in their reasons for so doing the members of the tribunal stated that the claimant's wife was absent from Great Britain and could not on the facts be treated as residing with the claimant. There was no positive evidence that they would be residing together in the near future.

7. The claimant's representative challenges the findings of fact made by the tribunal and states that an aeroplane ticket for a one way journey to Mogadishu was handed to the tribunal and that the claimant gave evidence that he was preparing to leave Great Britain and return permanently to his wife. She further complains that no mention is made in the record of evidence that the appellant returned to his wife in Somalia on a regular basis. The hearing before me is a complete rehearing and I shall decide the case on the evidence before me, it is unnecessary to spend time dealing with the conduct of the proceedings before the tribunal. However I think it right to say that I fail to understand the references to Swaziland. The members of the tribunal refer to Swaziland four times in the course of their decision, when in fact the country in question was Somalia. This should have been clear to the members from a reading of the documents and in particular the AT2. There may be some explanation for this error but I cannot see what it was. I have checked the original AT3 signed by the chairman.

8. The case for the claimant is that his absence from his wife was a temporary absence only. He has produced a bulk of documentary evidence before me which supports his case. He left Somalia in 1960, leaving his wife behind. He came to Great Britain in order to work as a seaman. The adjudication officer originally concerned was of opinion that the absence

could not be said to be temporary because the claimant had not lived permanently with his wife for 26 years. But it is not the duration of the absence which is the test. It is the type of absence. What was described by the Commissioner in a decision on Commissioner's file CSF/1/1979 as the character of the absence, he said:

"I use the words 'character' because in my judgment the question whether that absence is likely to be permanent is not simply a matter of its probable duration; but rather of the prospect of its coming to an end."

The Commissioner in that case was considering a question to be decided by virtue of regulation 11(1) of the Child Benefit (General) Regulations 1976, which provided that where a person is married, he and his spouse shall not be treated as having ceased to reside together by reason of any absence the one from the other which is not likely to be permanent. I have to consider the circumstances in this case in the light of regulation 2(4) of the Social Security Benefit (Persons Residing Together) Regulations 1977 where the test is "by reason of any temporary absence the one from the other". But it seems to me that the commonsense test adopted by the Commissioner in the case to which I have referred is one which I should adopt. The question of whether the absence is temporary is not to be decided on its length, but rather on the character of the absence. I have to look at all the circumstances of the case, including the length of time the husband and wife have been away from one another, and then decide whether the absence is temporary. I must look to the likelihood of the absence ending. In the instant case there is no question of a judicial separation or of the husband and wife not coming together because of differences between them. I have evidence, in the form of sheets from the claimant's Seaman's Discharge Book covering the period 1973 to 1985, which shows that out of 12½ years, approximately 10 years and 6 months were spent at sea and 2 were spent on shore. The claimant's case is that he spent his periods of long leave in Somalia with his wife and family and this is corroborated by the record in his Seaman's Discharge Book and those in his passport. Corroborated to the extent that he did have long leave during the periods in question and that he was in Somalia during such periods. His evidence is that he went to Somalia on occasions between 1960 and 1973 also, but his recollection of dates suffered because visits had taken place a considerable time ago and he was unable to refresh his memory by reference to a Seaman's Discharge Book, because the book covering that period was lost. Neither of the two passports which he produced covers the period prior to 1973. But he did remember that he went to Somalia in approximately 1964 and was there for about 6 or 7 months. I find as a fact that the claimant visited Somalia and his wife from time to time during the years 1964 onward. They had 6 children during the period 1972 to 1980. The claimant has land in Somalia upon which he built a house and where his family resides. When in Great Britain he lives at a seaman's hostel and corroboration of this is provided by a letter from the chaplain. The claimant's evidence is that he supported his wife and family during his absence. The money was not sent on a weekly or monthly basis but lump sums were sent from time to time there is some corroboration of this in the letter to his bank, at C50 of the case papers. He explained that he transmitted the money through Somali Merchants trading in London because of exchange control provisions in Somalia and for safety. I find that he supported his wife and family during his absence. The claimant's evidence is that he intended to return to his family on retirement and that he has been anxious to do so since he made his claim, but has waited in Great Britain in order to make his case before the statutory authorities. In corroboration of this he has produced a airticket for a single journey to Mogadishu. I find that he intends to return to Somalia and to end his days with his wife. I have to consider on the whole of the evidence whether the claimant's absence from his wife is an absence which is merely temporary or one which is not merely temporary. I am satisfied on the balance of probabilities, indeed I am sure, that the absence of the claimant from his wife was a temporary absence and consequently they are to be treated as residing together.

9. There is a further point. The marriage between the claimant and the wife was a polygamous marriage. The claimant had in fact a second wife. The evidence shows that he divorced this lady on 5 January 1984. I have evidence of this divorce. There is a certificate

from a court in the Somali Republic, a translation thereof and a certificate from the Embassy of the Somali Democratic Republic in London. Section 2 of the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 deals with the consequences of a polygamous marriage for the purposes of the Social Security Act and the Family Allowance Act. Regulation 2(1) provides that a polygamous marriage shall be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage was in fact monogamous. I am satisfied that on 1 January 1985 the claimant had no spouse other than Halimo Mohamud Adan and that the polygamous marriage was in fact monogamous at that date and has continued so.

(Signed) J J Skinner
Commissioner

Date: 20 July 1987