A claimant can be ordinarily resident in two countries at once? 7

**SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**

**Commissioner's File NoS.: CP/3035/1999 & CP/3717/1999**

# Starred Decision No: 67/00

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*5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

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67/00

CP 3035 1999 ; CP 3717 1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the claimants' appeals.

2 This decision is about two separate appeals made by the claimants (who are husband and wife and to whom I refer as Mr and Mrs C) against two separate decisions of the Plymouth appeal tribunal on 8 September 1998. The cases concern the separate retirement pension entitlements of Mr and Mrs C but are based on broadly the same facts. They were heard at the same time by the tribunal. It is therefore expedient that I deal with them together. The first appeal (CP 3035 1999) is Mrs C's appeal, and the second (CP 3717 1999) is Mr C's appeal.

3 For the reasons below, both decisions of the tribunal are set aside, and I substitute my own decision for those decisions. My formal decisions are:

CP 3035 1999:
**The claimant was and remained ordinarily resident in Great Britain at all times relevant for the purposes of this appeal. The review decision of the adjudication officer dated 9 April 1998 is therefore set aside.**

CP 3717 1999:
**The claimant was and remained ordinarily resident in Great Britain at all times relevant for the purposes of this appeal. The review decision of the adjudication officer dated 9 April 1998 is therefore set aside.**

As a result of these decisions there is no valid review of the entitlement to either Mr or Mrs C to the original retirement pension awarded by the adjudication officer, and those full entitlements should therefore be paid unless and until revised or superseded. It also follows that no question of any overpayment arises, and there can be no question of recovery of any benefit. As these are decisions on the facts, either party to either appeal is at liberty to refer any point of uncertainty or dispute arising in respect of the implementation of this decision back to me (or to another Commissioner if I am not available).

*Background to this appeal*

4 The appeals concern the continuing entitlement of both Mr and Mrs C to full British retirement pension during a period when they spent time in both Britain and New Zealand. The chronology relevant to the appeals is:

| | |
|---|---|
| 10. 10. 1992 | Arrived in New Zealand |
| 04. 04. 1993 | Arrived in Britain |
| 17. 10. 1993 | Arrived in New Zealand |
| 15. 04. 1994 | Arrived in Britain |
| 18. 09. 1994 | Arrived in New Zealand |

| | |
|---|---|
| 12. 05. 1995 | Arrived in Britain |
| 28. 09. 1995 | Arrived in New Zealand |
| 28. 05. 1996 | Arrived in Britain |
| 29. 09. 1996 | Arrived in New Zealand |
| 09. 06. 1997 | Arrived in Britain |
| 10. 08. 1997 | Arrived in New Zealand |
| 12. 05. 1998 | Arrived in Britain |

The tribunal heard the case on 8 September 1998. It was told that Mr and Mrs C would again shortly be going to New Zealand. It was also told that they would in future, so long as they could travel, spend 8 months in New Zealand and four months in Britain. The evidence was that Mr and Mrs C stayed in each of the countries from arrival to departure on each occasion. Visits were organised well in advance in both directions. Mr C stated that they never left Britain without buying return tickets.

5 The tribunal also heard why the claimants made their visits to New Zealand and Britain in the way they did. There were domestic problems in the family and Mrs C was looking after young grandchildren for part of the time. Mrs C had applied for, and in March 1995 was granted, residency rights in New Zealand to prevent her being an overstayer under New Zealand immigration law. Although Mr C usually travelled with and stayed with Mrs C, he did not claim residency rights in New Zealand. Mr and Mrs C made the point in their appeal that they were both British nationals who had had their home in Britain for 43 years together before the present dispute started. Mrs C retained the home in Britain throughout the period (although she was trying to sell it during the later part of the period) which was available for them both to live in at any time. They had family - and family commitments - in New Zealand, and set up home there during the period. The British pension was a main source of income, and they received no New Zealand pension. Income tax was paid in Britain during at least part of the period.

6 Statements made by Mr and Mrs C about their longer term intentions and where they lived and where they intended to live vary both from time to time and, indeed, to some extent between them. For example, Mrs C filled in a form CF 899B in September 1997 to the effect that she was leaving Britain permanently as from March 1995. But when this was queried by the Department of Social Security, she wrote in October 1997 to point out that she had been back to Britain for extended periods three times since then. She also stated in another, undated, letter in 1997 that she was a permanent resident in New Zealand. But that letter suggests that her husband was retaining British links, and he never made any categorical statement in the same terms as Mrs C. On the contrary, all the statements to which he put his name were to the effect that he remained ordinarily resident in Britain.

7 The decisions under appeal are the decisions of the adjudication officer on 9 April 1998. The decisions disqualified both Mr and Mrs C separately from receiving any additional retirement pension for stated periods from and including 10 April 1995 because they were not ordinarily resident in Britain immediately before that

date, and had not been in Britain since 10 August 1997. The joint ground of appeal against these decisions was, in essence, that neither of them had ceased to be ordinarily resident in Britain on that or any other date. The core decision of the tribunal was that the couple were ordinarily resident in New Zealand, although the tribunal did not decide from when. It confirmed that there had been an overpayment, and that the overpayment to each claimant was recoverable. It is also clear that at some date the pensions were stopped, although it is not entirely clear why (for example, to recover the overpayment).

*The law*

8 Pension entitlement of British pensioners absent from Britain and outside the European Common Travel Area is governed by regulations 4 and 5 of the Social Security Benefit (Persons Abroad) Regulations 1975 ("the Regulations"), subject to any modifications under individual bilateral agreements between the United Kingdom and other states. Regulation 4(1) of the Regulations provides:

> [Subject to specific exceptions] a person shall not be disqualified for receiving ... a retirement pension of any category or graduated retirement pension by reason of being absent from Great Britain.

Exceptions are set out in regulation 5(1) -(3). These are in the appeal papers and I need not repeat them here in full. The terms of the provisions are not in dispute, nor their interpretation. Their effect is to stop a pensioner who is outside Britain receiving the annually awarded upratings of pension if he or she is not "ordinarily resident in Great Britain immediately before" the date on which an annual uprating order comes into effect until he or she again becomes ordinarily resident in Great Britain.

*"Ordinarily resident"*

9 In the submission to the tribunal, the adjudication officer drew attention to the guidance of the Tribunal of Commissioners on the meaning of "ordinarily resident" in R(F) 1/62. This concerned a case where a Canadian family came to Britain for a period of up to three years and claimed a family allowance on arrival. The tribunal held that the parents became ordinarily resident in Britain on the day they arrived, and the Tribunal of Commissioners upheld that decision. The Tribunal of Commissioners referred to the opinion of Lord Warrington of Clyffe in the leading case of *Levene v Commissioners of Inland Revenue* [1928] AC 217 (at 232):

> "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is ordered.

The Department of Social Security appears to have had that view in mind when it formulated its own definition of "ordinarily resident" (see document 10):

> "Ordinarily resident" means a person must be normally resident apart from temporary or occasional absences of long or short duration. "Ordinary residence" means residence in a place with some degree of continuity and apart from accidental or temporary residence. Alternatively it might be described as residence according to the way in which a person's life is usually ordered. There is no fixed time limit attached to the term ordinary residence.

10 R(F) 1/62 offers further guidance about how to determine whether a claimant is ordinarily resident, including where a person is staying at the time and where the claimant makes his home, and whether he retains a home in one place while resident in another. No further reference was made by either party to decisions of Commissioners except for my own decision in CP 4679 1997 which dealt specifically with issues arising under the United Kingdom - New Zealand social security convention. There has however been further case law directly relevant to the meaning of "ordinarily resident". In particular, in R(M) 1/85 the Commissioner noted and adopted the decision of the House of Lords in *R v Barnet LBC ex parte Shah* [1983] 2 WLR 679 that the words "ordinarily resident" should be given their natural and ordinary meaning. In R(M) 1/85 the claimant and her family left Britain, disposing of their home here and putting their possessions in store, because her mother was ill. They had no intention of returning to Britain until they were in a fit state to travel. In the event, they returned to Britain a little under two years after they left. The Commissioner confirmed the decision of the tribunal that the claimant was not entitled to mobility allowance from the day after she left Britain because she was no longer ordinarily resident here on that date.

11 The main ground of appeal of the claimants, emphasised in their final observations in May 2000, are that they were ordinarily resident in the United Kingdom for all relevant years. The claimants submitted in support of that contention the Revenue guidance in booklet IR20 (*Resident and non-residents : Liability to tax in the United Kingdom).* It is not clear to me that the Revenue have had occasion to confirm the claimants' view (beyond the statement that Mrs C remained liable to British income tax), but I do not think anything turns on that point.

12 The issue of ordinary residence, and the significance of the views taken by the Inland Revenue, were also considered in another reported decision, R(P) 1/78. That case concerned a woman who remarried in 1971 (aged 71) and moved in 1973 from Britain to live in her husband's home in Rhodesia. But she intended to return regularly to Britain, and did so for an extended period each year. In Britain she stayed with her brother or other friends and family. She claimed additional upratings of her retirement pension but these were not paid to her from 1973. The Commissioner concluded that the claimant was not ordinarily resident in Britain at any of the relevant times. The core of his decision is paragraph 7, where he said:

> I also appreciate that as Scarman J (as he then was) said in *Sinclair v Sinclair* [ [1968] P 207, 232] "there is nothing exclusive about residence. A man may reside in several places at one and the same time." But in the context of the regulations I am considering it seems to me that a person who has a matrimonial home in one country is not normally to be treated as resident in another country at a time while he is residing at the matrimonial home. And that is particularly true if he has not a settled home in the other country.

In my view, that decision can be distinguished readily from the cases I am considering on the ground that in these cases there was a home in Britain at all relevant times and because the "matrimonial home" in the sense used by the Commissioner (which is, I think, the centre of the couple's activities as a couple) appears to have moved with the couple between Britain and New Zealand. I therefore find that the reasons given by the Commissioner for not considering the claimant in that case resident in Britain on the relevant dates do not apply to these cases.

13 In reaching his decision in R(P) 1/78, the Commissioner dealt with the views of the Inland Revenue as follows:

> The claimant points out that for income tax purposes the Inland Revenue authorities have treated her as continuously resident and ordinarily resident here since September 1973. That is not conclusive of the questions I have to decide. In the first place, the claimant's treatment for tax purposes merely reflects the opinion of an inspector of Taxes, and that opinion is not binding on me. In the second place, the Inland Revenue treatment is based on the provisions of the Income Tax Acts, and I am concerned with different statutory provisions. Having said that, however, I should also say that the income tax cases do give assistance on the factors to be taken into consideration in determining whether a person is resident or ordinarily resident in a particular country...

The Commissioner then cited tax cases, including *Levene* noted above, and also other cases dealing with matrimonial jurisdiction, including *Sinclair* noted above. I agree with the Commissioner in R(P) 1/78 that the decision of the Inland Revenue does not bind a Commissioner, or the appeal tribunal. As no specific decision of the Inland Revenue has been produced in this case, I need take the matter no further save to note that the published Revenue view is that taxpayers can have ordinary residence in more than one state.

14 In R(P) 1/78 it was decided that the claimant could not be resident, and therefore ordinarily resident, in two places at once for the reasons noted above. Those reasons do not apply here. Instead, this is a case where, in my view, full weight should be given to the views of Scarman J cited in that decision that there is nothing exclusive about residence, and the views of Lord Warrington of Clyffe, cited above, that a man may be ordinarily resident in two places at the same time if that is the way his life is ordered. The Department of Social Security definition quoted above adopts part of that phraseology and is not inconsistent with it. It was the way that the definition was put to the claimants that suggested that they could

only have one ordinary residence (and, implicitly, that they had the same single ordinary residence).

15 The meaning of "ordinarily resident" has also been debated in the judicial consideration of the meaning of "habitual residence". In the leading case of *Nessa v Chief Adjudication Officer*, House of Lords, 21 October 1999, Lord Slynn said:

> There is an overlap between the meaning of "ordinary" and "habitual" residence and one is sometimes defined in terms of the other .... I am not satisfied, but it is unnecessary to decide, that they are always synonymous. Each may take a shade of meaning from the context and the object and purpose of the legislation. But there is a common core of meaning which makes it relevant to consider what has been said in cases dealing with both ordinary and habitual residence."

His Lordship then surveyed the case law, concluding that "it is not necessary for the working of this particular legislation that the ordinary meanings of the word should be set aside in order that there is no gap between habitual residence in one state and habitual residence in another state". The key issue in *Nessa* was whether the claimant could become habitually resident in Britain on first arrival here without a period of residence. The House decided that this was a question of fact in the circumstances of each case. No further opinion was expressed on the meaning of "ordinary residence".

16 His Lordship also cited cases making the point that the loss of resident status was not the same thing as gaining it, in particular the views of Lord Brandon in *In re J* [1990] 2 AC 562. Lord Brandon's emphasis was on the person who lost the status of habitual residence in state A in a day, but took some time in acquiring it in state B. This led to the concern reflected by Lord Slynn about gaps occurring. Their Lordships did not focus on the issue of overlap, but it seems to me that the argument can apply the other way round. In other words, if the facts and intentions establish it, then it may be, as Lord Warrington of Clyffe clearly assumes, that an individual can gain a new ordinary residence without losing the old one at the same time, or, indeed, can have two ordinary residences at the same time.

*Where were Mr and Mrs C ordinarily resident?*

17 The question in these cases was whether, immediately before 10 April 1995, or on any other relevant subsequent date, Mr and Mrs C had ceased to be ordinarily resident in Great Britain. Following the guidance set out above, it is clear that this is a question of fact in all the circumstances. The decision of the Tribunal of Commissioners and of other Commissioners give no indication that there is any special meaning attached to "ordinarily resident" in this context and it is the ordinary meaning of the words that applies. With respect to Lord Slynn, I do not think it is the same thing as asking whether they ceased to be habitually resident in Great Britain on that or any other date. With regard to the decision of the tribunal, in my view this is not a question of whether the claimant were resident or ordinarily resident in New Zealand. The logic of the tribunal decision was that because it

found the claimants were ordinarily resident in New Zealand, they must have ceased to be ordinarily resident in Britain. That is wrong. It is not an either/or question. They could be ordinarily resident in both. The fact that the claimants, or either of them, may have become resident or ordinarily resident in New Zealand is one part of the factual picture to be taken into account in assessing if either or both had given up their ordinary residence in Britain.

18 I find that the tribunal erred in law in this case because it regarded the matter as an either/or question, and it gave no thought to the possibility that Mr and Mrs C were ordinarily resident in Britain even if also ordinarily resident in New Zealand at the relevant times. In fairness to the tribunal, that possibility was not considered by either party at any stage, and it will be a somewhat unusual occurrence for an individual to be ordinarily resident in two places at once. But there is the highest authority for the proposition that it may occur, and in my view this is the sort of case where consideration should have been given by the tribunal to dual ordinary residence. It was not, and I find that the tribunal erred in law for that reason. I must therefore set aside the tribunal decision. But I consider it expedient to reach my own decision as the facts of the case are clearly established.

*My decision*

19 Mr and Mrs C argued that they were ordinarily resident at all relevant dates in Britain. The adjudication officer decided that they were not ordinarily resident here on the relevant dates because of the residence in New Zealand. The tribunal decided that they were ordinarily resident in New Zealand. Who is right? The starting point is that Mr and Mrs C were long term ordinary residents of Britain for many years before the visits to New Zealand started. For that reason, and as these are review decisions, the onus is on the Secretary of State to show that the circumstance of ordinary residence in Britain had changed in each case, and when it had changed.

20 I set out the facts above about the visits between Britain and New Zealand. There is a clear pattern over several years (at least seven) of extended periods spent in both Britain and New Zealand. But at no time did a full year go by without an extended visit back to Britain. Mr and Mrs C had in 1998 (when the adjudication officer took the key decisions) established a clear pattern of extended residence in both Britain and New Zealand. Further, they retained their home in Britain (even if at one time they tried to sell it) and, by reason of their pensions, their strongest economic ties were with Britain. Their intentions appear to have been inconsistent both in temporal terms and as between the two of them. The inconsistency can be explained in part because they were reacting to family circumstances beyond their control and which argued for their presence in New Zealand for at least one extended period. Taking an overall view of their statements, I do not see any unambiguous statement by them that they were indefinitely leaving Britain. Nor am I persuaded that at any time they did leave Britain without any definite intention to return. I say "they" deliberately because of the different approaches Mr and Mrs C took in the various statements made. However, there is no evidence at any stage

to suggest that both Mr and Mrs C acted otherwise than together throughout, whatever separately they might have said about future intentions.

21 My conclusion is that at the time the adjudication officer took the review decisions under appeal, the balance of probabilities was that both Mr and Mrs C had been and remained ordinarily resident in Britain. And I see no reason why that had changed by the time of the tribunal hearing. By that time, they may also have been, as the tribunal found, ordinarily resident in New Zealand, but that did not preclude them retaining their British ordinary residence. Britain had been, until the events now in issue, their long term home, and they still had a home there at all relevant times. Nor was it occupied by anyone else. Further, Britain was and remained the source of their main income, and was a country where one at least was paying tax. It is particularly important that over several years the claimants had a settled pattern of living of the kind within the views of Lord Warrington of Clyffe cited above (although given the ease of modern transport and communications as compared with those in the 1920s, not one his Lordship was likely to have had in mind then).

22 As I am taking my own decision, and as the decision of the adjudication officer predated the Social Security Act 1998, I must consider the position down to the date of my decision. I note that Mr and Mrs C still have the same British address as they have used throughout the appeal, and that some at least of the correspondence comes from that address in the last year, including a letter jointly signed by them in May 2000. But they were in New Zealand at the end of last year. This suggests that the pattern continues as before. I therefore find that Mr and Mrs C continue to be ordinarily resident in Great Britain to the date of this decision. If there has been some other superseding decision, or if I am mistaken and there is evidence of a change of circumstances that is not before me, then the Secretary of State may if necessary exercise the right to revise or supersede this decision on the basis of ignorance of material facts, and the claimants will have fresh rights of appeal from any such decision.

23 In reaching this view, I expressly reject one submission of the Secretary of State's representative (in paragraph 5):

> ... that although the UK Inland Revenue can consider the question of residency (sic) over a period of a number of years, when applying the test for social security purposes, it would not be appropriate to consider a period longer than that in question in the relevant decision.

I disagree. The Secretary of State and tribunal should consider all the facts available at the time of their respective decisions to see what pattern of life a claimant has, whether those facts occur before, during, or after the period of benefit under consideration. The definition of the Department of Social Security, quoted above, was right in saying "there is no fixed time limit attached to ordinary residence." Likewise, there is no fixed time attached to the period that can be reviewed in identifying it. Nor do the temporal limits in the Social Security Act 1998

affect this, because the "circumstance" is whether the claimant is or is not ordinarily resident. In the case of a tribunal, it is only if the evidence shows a change of circumstances occurring after the decision of the Secretary of State that the tribunal should now stop looking. In particular, I reject as artificial and unfounded the way that the adjudication officer put "the facts" to the tribunal in this case by plucking a period of 44 months out of the middle of the relevant period and considering only that. The evidence in this case shows a clear pattern and, as with any pattern, it is wrong to try and derive the whole pattern from looking only at a part of it when the other parts can also be examined readily.

24 My formal decision that Mr and Mrs C did not cease to be ordinarily resident in Britain at any time relevant (regardless of whether they did or did not become ordinarily resident in New Zealand) is at the start of this decision. It follows that there has been no overpayment of benefit and no question of recovery of an overpayment can therefore arise.

25 I add finally that no point arising from the United Kingdom - New Zealand convention of direct relevance to this case was drawn to my attention, and I noted none myself.

David Williams
Commissioner

12 September 2000

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