

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT
APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

Decision

1. My decision is that the decision of the supplementary benefit appeal tribunal ("SRAT") dated 3 May 1983 is erroneous in point of law. I set it aside and refer the case to a social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing of this appeal. The initial hearing at which neither the claimant nor the Secretary of State was represented (although the claimant was accompanied by Mr. C.P. Carvalho, solicitor, to advise her for Messrs. Sergeant and Collins), was adjourned at an early stage in order to hear argument on the effect of Decision R(SB)24/84, which is that of a Tribunal of Commissioners and was about to be promulgated, and to see whether arrangements could be made for the claimant to be represented. At the resumed hearing, the claimant, who appeared, was represented by Mr. Robin Allen of Counsel, instructed by Messrs. Sergeant and Collins, Solicitors, the adjudication officer was again represented by Mr. C.A.M.E. d'Eca of the Solicitor's Office, Department of Health and Social Security, and the Secretary of State for Social Services was represented by Mr. Andrew Collins of Counsel. Their able and lucid arguments have been of considerable assistance.

Nature of the Appeal

3. This appeal relates to the circumstances in which a person from abroad, without the right of abode in the United Kingdom, and who has overstayed limited leave to enter, can obtain supplementary benefit.

4. The material facts were not found by the SBAT and I have no jurisdiction to find the facts in an appeal from a SBAT. It was accepted for the purpose of the hearing before me that the claimant entered the United Kingdom on 14 November 1982, that she did not have the right of abode in the United Kingdom and obtained limited leave to enter. She went through a ceremony of marriage on 19 November 1982. Her leave expired on 14 February 1983. On 22 February 1983 she applied for fresh leave. On 25 February 1983 she claimed supplementary

benefit; apparently as from 14 February 1983: see paragraph 7 below, first sentence. As from 8 August 1983 she was granted indefinite leave by the Home Office to remain in the United Kingdom and, I was told since that date she has been in receipt of supplementary benefit. The claimant's position between expiry of her limited leave (14 February 1983) and 8 August 1983 is in dispute. It is that period which is in issue in the present case.

5. The relevant statutory provisions in force throughout the period in issue (14 February 1983 to 8 August 1983) are contained in the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No. 1299] as amended by, inter alia, SI 1980 No. 1774. The provisions in point are regulation 10(4A) of and paragraph 9A of Schedule 2 to those regulations. These provisions (since replaced in similar terms by regulation 10(6) of and paragraph 10 of Schedule 3 to the Supplementary Benefit (Requirements) Regulations 1983 as amended by SI 1984 No. 1102) are set out in the Appendix to this decision. Their effect is to treat a claimant with limited leave or without leave, within the meaning of regulation 10(4A) (unless that claimant is one of a married or unmarried couple within sub-paragraph (a) of paragraph 9A of Schedule 2 (which it has not so far been suggested applies in the present case)), as having normal supplementary benefit requirements which are "nil". The result is that such a claimant cannot obtain supplementary benefit. In respect of any period as from 6 August 1984, a claimant who is otherwise in the position of this claimant may be able to obtain benefit under the Supplementary Benefit (Urgent Cases) Regulations 1981 as amended from that date. They cannot assist the present claimant as regards the period in issue.

6. The Immigration Rules in force on 14 November 1982 were HC 394. I was told that the claimant was admitted under paragraph 55 of these Rules, which is set out in the Appendix. These Rules were replaced as from 16 February 1983 by HC 169. Paragraphs 123 and 124 of the latter Rules are in similar terms to paragraph 55 of HC 394.

The Supplementary Benefit Officer's Decision

7. On 17 March 1983, a supplementary benefit officer decided that the claimant was not entitled to supplementary allowance from 14 February 1983. She appealed against this decision to a SBAT.

8. According to form LT 205, the facts before the supplementary benefit officer were the following. The claimant had signed unemployed and completed a claim for supplementary allowance on 25 February 1983. She was interviewed on 3 March 1983 and said she did not receive any maintenance payments from her estranged husband. On the telephone, the claimant's husband stated on 14 March 1983 that he did not propose to maintain the claimant because he considered their marriage of 19 November 1982 to be void and he was seeking an annulment. He confirmed this in writing. It was found, on enquiry, from the Home Office that the claimant's leave to remain in the United Kingdom had expired on 14 February 1983. Because leave to remain had expired, no application for variation or extension could be granted. Such application could only be made during the currency of a period of leave to remain. The claimant held a Pakistani Passport and her husband held a United Kingdom Passport.

9. The supplementary benefit officer stated that the reasons for his decision were that on the known facts of the case the claimant was present in the United Kingdom without permitted leave and therefore under the provisions of the Requirements Regulations had a nil entitlement to a supplementary allowance. Regulation 10(4A) was the relevant legislation.

The Decision of the SBAT

10. The SBAT heard the appeal on 3 May 1983. Their unanimous decision was that -

"The appellant is entitled to supplementary allowance."

Their recorded findings of fact were:

"On 31.5.82 the appellant married Mr [.....] in Pakistan. On 19.11.82 she again married Mr [.....] in London. Both marriage certificates were produced. Halsbury's Laws of England Vol 4 produced by representative (Control of Immigration). This indicated that following marriage on 19.11.82 the appellant's stay in the country was legal."

Their recorded reasons for decision were:

"The tribunal agree that the appellant's status in this country is valid and she does not come within Reg 10(4)(a)(b)[sic] of the Requirements Regulations in that she is a person present in the UK without permitted leave but this fact has been superseded by her subsequent marriage on 19.11.82 which took place within the currency of her permit."

Was the decision of the supplementary benefit appeal tribunal erroneous in law?

11. (1) The decision of the tribunal was clearly erroneous in point of law.

(2) The first question before the SBAT was whether the claimant had overstayed limited leave to enter the United Kingdom and was a person who fell within paragraph (b) of regulation 10(4A) of the 1980 Requirements Regulations as amended. In order to determine this question it was necessary to find the material facts, including the date of claim, the period for which benefit was in issue, the terms on which the claimant was admitted to the United Kingdom, whether those terms amounted to "limited leave" and if so whether there was a time limit attached to the leave which had expired before or during the period in issue. If there was a limited leave which had so expired, it was then necessary to go on and make a further finding as to whether any further leave was in operation during any of the period in issue and, if so, when. Findings as to the nature of any such leave were essential. There are no findings on any of these points. Since the material facts have not been found and recorded there has been a breach of rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 which required the material facts to be found and recorded.

(3) The reasoning of the SBAT contains a false proposition of law ex facie. The SBAT thought that marriage by the claimant in London during the currency of a permit to be in the United Kingdom rendered her stay in this country legal after the expiry of the time for which the stay was permitted. That is simply wrong. A person without the right of abode in the United Kingdom can only be lawfully in the United Kingdom with leave pursuant to the Immigration Act 1971: see paragraphs 19-22 below.

Is it expedient to give the decision that the SBAT should have given?

12. It is neither expedient nor possible to give the decision that the SBAT should have given since the necessary facts have not been found. The case must accordingly be referred to a social security tribunal, which should be entirely differently constituted and should determine the appeal in accordance with my directions.

Decision R(SB)24/84

13. Mr. Allen, on behalf of the claimant, argued before me that the social security appeal tribunal to whom the case is now referred should be directed to consider whether the claimant was a person who was present in this country with permission to remain given by the Home Office, and that the crucial question was - had the Home Secretary given leave under the Immigration Act but outside the Immigration Rules to remain in the country without conditions? While accepting the remarks in Decision CSB 503/84 that mere forbearance to deport does not in itself constitute the granting of a fresh leave, that was not the present case. Here, the claimant's position was being investigated by the Home Office and the claimant had been invited to attend that Office. It was absurd to say that there was no permission to remain. This must have amounted to consent under the Immigration Act. Mr. Allen relied upon the reference in Decision R(SB) 24/84, (which is that of a Tribunal of Commissioners) in paragraph 17, where it was stated that the claimant who had "permission i.e. leave, to remain" was not a person who fell within paragraph (b) of regulation 10(4A) of the 1980 Requirements Regulations.

14. Mr. d'Eca, however, pointed out that in Decision R(SB) 24/84, where he appeared for the supplementary benefit officer, there was a letter before the Tribunal of Commissioners which was from the Home Office and said "permission to stay is extended". In my judgment, the decision in that case was given on the assumed fact that the Home Secretary (acting through the Home Office) in writing this letter was granting leave by notice in writing under section 4(1) of the Immigration Act 1971. No special form of words is necessary for such leave to be granted: see R v Immigration Appeal Tribunal Ex parte Ahluwalia [1979-80] Imm A.R.I. which was cited to the tribunal and is further considered below.

15. Decision R(SB) 24/84 was given in the context of Immigration Act terminology. Persons without the right of abode in the United Kingdom are authorised by section 1(2) of the Immigration Act 1971 to live and work in the United Kingdom "by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act" Generally, such a person requires leave under section 3 of the Act. The power under the Act to give or refuse leave to enter the United Kingdom is exercised by immigration officers, and the power to give leave to remain in the United Kingdom or to vary any leave under section 3(3)(a) is exercised by the Secretary of State, by notice in writing to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument: see section 4(1). Immigration officers, in granting leave to enter the United Kingdom follow the Immigration Rules, which are referred to in sections 1(4) and (5) and 3(2) of the Act. The reference by the Tribunal of Commissioners to leave or permission in the passage quoted in paragraph 13 above, in the context in which it was used, clearly relates to leave (or permission: see section 1(2)) authorised or given under the Act. Leave given outside the Immigration Rules, namely leave given by the Home Secretary, is not "extra statutory" and this expression

was used per incuriam. The ratio of the decision is contained in the first sentence of the quoted passage, namely "It is, in our unanimous judgment, obvious that the intention of paragraph (b) is to treat a person who was not an illegal entrant, because he originally had a limited leave (i.e. one limited as to duration, which is the meaning of "limited leave" in the Immigration Act 1971) falling within regulation 10(4A), so as to deny him supplementary benefit, if that permitted leave has expired and he has obtained no further leave". The decision proceeded on the footing that the claimant in that case had obtained such further leave.

16. As the Commissioner explained in Decision C(SB)503/1984:

"In the above case [R(SB)24/84] the claimant, whose leave to remain in this country had expired, applied for political asylum and received a letter from the Home Office authorising him to remain in this country pending the determination of his application. It was held in that case that the permission in question amounted to leave to remain. There was no condition attached to it that the claimant should not have recourse to public funds so that he did not fall within regulation 10(4A)(a); he was outside regulation 10(4A) altogether. Although in the course of that decision it was stated that the leave granted was "extra statutory", it is quite clear from what was said that the Tribunal of Commissioners merely meant that the leave was not given under the Immigration Rules. (Strictly speaking, even those rules are non-statutory, being made under a code of practice.) The leave was, of course, statutory in the sense that it was a leave falling within section 3 of the Immigration Act 1971. In the context of regulation 10 "leave" does not mean permission or consent simpliciter, but is a term of art. Paragraph (a) of regulation 10(4A) specifically states that "limited leave" shall be "as defined in section 33(1) of the Immigration Act 1971". However, in the case now under appeal, no such leave was given by the Immigration Authorities. Indeed, there was no written communication of any kind between the Home Office and the claimant after the expiration of the leave to remain and between the grant of asylum. In contrast, the letter from the Home Office in the Decision R(SB) 24/84 was construed by the tribunal as being a de novo grant of leave under section 3 of the 1971 Immigration Act (see the principles enunciated by the Divisional Court in R v Secretary of State Ex parte Ahluwalia [1979-80] Imm A.R.) Accordingly, the claimant can derive no assistance from the Decision R(SB) 24/84."

This passage correctly expounds the basis on which Decision R(SB) 24/84 was given. It should, however, be added, that regulation 10(4A)(a) does not refer to a "condition attached to it that the claimant should not have recourse to public funds" but to "limited leave given in accordance with any provision of immigration rules (as defined in section 33(1) of [the Immigration Act 1971]) which refers to there being, or to there needing to be, no recourse to public funds, or to there being no charge on public funds, during that limited leave".

Directions to the social security appeal tribunal

17. The social security appeal tribunal to whom the case is now referred should apply Decision R(SB)24/84 in the light of the explanation of its significance and effect as set out in the above paragraphs. The author of Decision CSB 503/84 has read these paragraphs and authorised me to say that he agrees with them.

(That Commissioner and I are the two Commissioners still serving who participated in the Tribunal of three Commissioners which gave that decision.)

18. As already explained, in considering regulation 10(4A) the tribunal must bear in mind Immigration Act terminology, which that regulation reflects, and leave must be one recognised by the Immigration Act. The following observations, which are based on the submission of Mr. Andrew Collins, appearing for the Secretary of State as a result of a request of mine, should be accepted as correctly representing the relevant law.

19. (1) One must distinguish between the Immigration Act and the Immigration Rules. One needs leave to enter or remain in the United Kingdom (if not patrial) otherwise one cannot be in the United Kingdom lawfully. The Immigration Rules are practice laid down by the Secretary of State through Parliament. Paragraph (a) of regulation 10(4A) relates to limited leave that is to say where there is an express limitation. For example the "visitor" rule comes under (a) and so does the "fiancee" rule [the latter is rule 55, under the Rules in force at the date of entry, and is set out in the Appendix]. Sub-paragraph (b) relates to overstayers, (c) to cases where a deportation order had been made and (d) to a limited form of illegal entrant, namely the type not given leave to enter or remain. All persons falling within (b), (c) and (d) have no leave. As regards (b), a person within that is one whose status at the relevant moment is that of a person who has stayed beyond time and who does not have present leave. It is always necessary to look to see whether the individual in question has leave to be in the United Kingdom at the relevant time, whether or not that person in the past had any form of leave.

(2) One must consider whether on the facts the claimant was granted leave at any time after she had made her application for fresh leave (22 February 1983) and if so at what time. The claimant had obtained leave from 8 August 1983. If the position is that the claimant has been awarded supplementary benefit on review as from 8 August 1983 the relevant period before the fresh tribunal would be 14 February 1983 (the date referred to in the supplementary benefit officer's decision) to 8 August 1983. If leave (not falling within paragraph (a) of Regulation 10(4A)) was granted before 8 August 1983 supplementary benefit may be payable from the date when it was granted.

20. It is the Secretary of State (always in practice the Home Secretary) who is charged with the giving or refusing of leave to remain. Leave can be granted outside the Immigration Rules but it is not extra statutory. Only the Secretary of State and immigration officers can grant leave. If leave is not so granted to a non-patrial he cannot be here lawfully.

21. Persons without the right of abode in the United Kingdom (i.e. those not within section 2(1) and 2(2)) can live and work here "by permission": section 1(2). Except where otherwise provided by or under the Act, leave to enter or remain to a person without the right of abode here, is given as provided in section 3(1). The Secretary of State is empowered to make rules in this connection (these are the Immigration Rules): see section 3(2). Section 3(3)(a) refers to the variation of limited leave. "Limited leave" is defined in section 33(1). A person without the right of abode who remains beyond the time limited for leave is liable to deportation: section 3(5). He is not lawfully here. As mentioned in paragraph 15 above, the power to grant leave to enter is to be exercised by immigration officers and to give leave to remain or to vary leave is to be exercised by the Secretary of State and unless otherwise allowed by the Act it is to be exercised by notice in writing given to the person affected except that the powers under section 3(3)(a) may be exercised generally by statutory instrument: see section 4(1).

22. Assuming that it is found as a fact that the claimant's limited leave to enter the United Kingdom expired, as I was told it did, on 14 February 1983, and application for fresh leave was made after that date, the claimant will not be assisted by The Immigration (Variation of Leave) Order 1976, which was made under section 4(1), because that only applies where the application for fresh leave is made before the existing leave has expired. The effect of the Order is considered, in a supplementary benefit connection, in Decision CU/309/1983 (to be reported as R(U) 1/85).

23. The real question for decision by the tribunal to whom the case is now being remitted is whether the Secretary of State (the Home Secretary through the Home Office) had at any time granted leave which had been notified in writing as required under section 4(1) of the Immigration Act 1971. No documentation should be treated as such leave unless it is clear that that was what the Home Office intended. It is not necessary to use the word leave, since in the case of Ahluwalia [1979-80] Imm A.R.I. it had been held that the expression "authority for holder to remain" was leave. But it is apparent from that decision that a person who was liable to deportation but had not been deported was not lawfully there.

24. Any such leave must relate to the period in issue and must not, as already explained, fall within paragraph (a) of regulation 10(4A) if the claimant is to obtain benefit in respect of that period.

25. A simple request by the Home Office to a claimant to attend for interview does not amount to leave given by the Home Secretary by notice in writing under section 4(1). The fact that a claimant, as in the case of the present claimant, has applied for leave within the meaning of section 33 of the Immigration Act 1971 to remain in the United Kingdom and is awaiting the determination on that application may enable a claimant to supplementary benefit for a period on or after 6 August 1984 to obtain benefit under the 1981 Urgent Cases Regulations, in a case where he is caught by regulation 10(6) of the 1983 Requirements Regulations (replacing regulation 10(4A) of the 1980 Requirements Regulations). But it cannot assist the present claimant since paragraph 21(1)(d) of the Urgent Cases Regulations did not come into force until after the end of the period in issue.

26. The tribunal to whom the case is now referred should find the facts relating to the following points:

- (1) The date of claim.
- (2) The period for which benefit is in issue.
- (3) The terms on which the claimant was admitted to the United Kingdom.
- (4) Whether these terms amounted to "limited leave".
- (5) If there was a time limit, the date when the leave expired.
- (6) When indefinite leave to remain was granted and as from what date.
- (7) When supplementary benefit was granted and from what date and whether it was granted by way of review or in some other and what way.
- (8) Whether, in respect of any of the period in issue, the claimant had leave, under the Immigration Act 1971, which did not repeat not fall within paragraph (a) of regulation 10(4A).

(9) If the tribunal find that the claimant did have a subsisting leave of that character in respect of the period in issue, or any part of that period, they should state how that leave was given and identify the notice in writing referred to in section 4(1) of the Immigration Act 1971.

(10) If the tribunal find that in respect of the period in issue, or any part of that period, the claimant did not have such leave then, unless the claimant's representative accepts that she was not one of such a couple, they should determine whether or not the claimant was, during any of the period, one of a married or unmarried couple falling within sub-paragraph (a) of paragraph 9A of Schedule 2 to the 1980 Requirements Regulations: see the Appendix to this decision for the relevant provision. If such a concession is made, it should be recorded. If not, careful findings of the tribunal's conclusion on this point, with their reasons and the material facts on which their conclusion is founded, must be made.

27. In the light of the findings on the above points, the tribunal should determine whether or not the claimant is entitled to supplementary benefit during any part, and if so what part, of the period in issue and at what rate.

28. The tribunal's findings of fact and reasons should cover the points discussed in this decision and all other relevant points raised by or on behalf of the claimant or the adjudication officer. The record of their decision should comply with regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984, as amended.

(Signed)

V.G.H. Hallett
Commissioner

Date:

15 March 1985