MH/MD/1

Commissioner's File: CSB/1218/1988

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: [redacted]

Case No: [redacted]

[ORAL HEARING]

1. For the reasons appearing below, the decision of the social security appeal tribunal given on 22 March 1988 is not erroneous in point of law, and accordingly this appeal must be dismissed. The claimant was not entitled to supplementary benefit for the period on and after 11 September 1986.

2. This is an appeal by the claimant, brought by leave of the chairman of the appeal tribunal. The claimant was granted an oral hearing, at which he appeared, represented by Mr. Martin Rodger of the Free Representation Unit; the adjudication officer appeared by Miss K. Lee of the Solicitor's Office, Departments of Health and of Social Security.

3. Between 1983 and August 1986 the claimant had been receiving supplementary benefit while living in Kent. As from 11 September 1986 he was refused benefit. The original reason given in writing by the DHSS on 3 November 1986 was "claimant has failed to provide evidence of current leave to remain in U.K." This was amplified in the adjudication officer's submission to the appeal tribunal to the effect that in August 1986 a routine review had disclosed that the claimant was a French national and could not produce any passport or other document to support his claim that he had leave to remain in the U.K. It was submitted that the claimant came within the provisions of Regulation 10(6)(b) of the Supplementary Benefit (Requirements) Regulations 1983, and so was not entitled to benefit.

4. The claimant's appeal was heard by the Dover Social Security

Appeal Tribunal on three occasions, the last of which was on 22 March 1988. On each occasion the tribunal was differently constituted; no point in relation to this was taken before me, and, having considered the record, it is clear that there has been no procedural irregularity. The purpose of the adjournments was to allow the parties to research the relevant European Community (EC hereinafter) Law.

5. The tribunal heard evidence, including that of the claimant. The findings of the Tribunal on questions of fact material to their decision were:-

> "We found that [the claimant] was a French national; that he became unemployed in France, following a period of employment which lasted 6 years, in 1979; that, following that in France, he completed a State Training Scheme; that he made enquiries in the U.K. by letter and otherwise as to the possibility of obtaining employment here; that he was not promised any offer of a job in the U.K.; that notwithstanding that situation, he entered the U.K. in 1981, with the intention of seeking employment; that, at that time, his knowledge of English was limited; that he did have sufficient funds of his own to enable him to subsist for 12 months; that in spite of a considerable degree of effort on his part, he only succeeded in obtaining a total of 4 months' employment from 1981 to date, namely as a Father Christmas in a department store for one month in 1981, and from 8.1.85. to 26.3.85., as an Artists' model; that he had no wish to be "a burden on the State"; that he had never been granted a Residents Permit".

6. The unanimous decision of the Tribunal was:-

> "That the Appeal be disallowed, in that [the claimant] is not entitled to Supplementary Benefit from 11.9.86"

7. The Reasons for decision were:-

> "The Tribunal considered Regulation 10(6) of the Supplementary Benefit (Requirements) Regulations 1983. The Tribunal, having found that [the claimant] had no leave from the immigration authorities to be in the United Kingdom, had to consider whether he was nevertheless entitled to remain here as a national of a Member State of the E.E.C., in which case he would be excluded from Paragraph 6 of Regulation 10 of the Requirements Regulations. However, in order to be excluded from that Paragraph by virtue of being a national of a Member State, he had to fall within the category of "worker". Had [the claimant] come within the category of "worker", then he may have had "statutory" leave to be in the United Kingdom, which would have overridden the provisions of Paragraph 6 of Regulation 10 of the Requirements Regulations. The case decided in the Court of Justice of the European Communities on the 18th June, 1987, of Public Social Welfare Centre, Courcelles and Marie-Christine Lebon specifically addressed itself to the

question as to whether, in order that a national of a Member state may rely on his status as a "worker" in order to enter and establish himself within the territory of another Member State, it was sufficient for him to claim that he wished or intended to work. The question specifically asked was whether there had to be actual evidence of that wish in the form of serious and genuine efforts to gain work, or must he hold an offer of employment?

The Court determined that the answer to that question that the quality of treatment as regards social and tax advantages laid down in Article 7 (2) of Regulation No.1612/68, was enjoyed only by workers, and not by nationals of the Member States who moved in order to seek employment. (Tribunal's underlining)

In view of the decision in Lebon, the Tribunal concluded that [the claimant] was not a "worker", and as such, having had no leave from the immigration authorities to remain in the United Kingdom, did not have "statutory" leave Excluding him from the provision of Paragraph 6 of Regulation 10 of the Requirements Regulations."

8. The relevant passages in the Supplementary Benefit (Requirements) Regulations 1983 are:-

" 10. (1) In the case of a person to whom any paragraph in column (1) of Schedule 3 applies, the provision, which in the corresponding paragraph in column (2) of that Schedule relates to him, or ....., shall have effect with respect to the weekly amounts for normal requirements specified in those provisions further modified as shown in the corresponding paragraph in column 3 of that Schedule.
....

(6) For the purposes of paragraph (10) of Schedule 3, a person shall be treated as present with limited leave, or without leave, to enter or remain in the United Kingdom if
.....

(b) having a limited leave to enter or remain in the United Kingdom he has remained beyond the time limited by the leave;

Schedule 3:

Paragraph 10.	Modified amount (3)
Person defined in Regulations 10(6) who is present with limited leave, or without leave, to enter or remain in the United Kingdom -	
(a)	

(b) in any other case; (b) nil

9. The appeal tribunal, in their reasons for decision, had found that the claimant had no leave from the immigration authorities to be in the United Kingdom on 11 September 1986, the relevant date for the claim. No challenge to this finding, which was entirely consistent with the evidence, was made before me.

It follows from this conclusion that, so far as United Kingdom law was concerned, on 11 September the entitlement of the claimant, as a single person, to normal requirements for the purpose of supplementary benefit was "nil", in accordance with paragraph 10(b) of Schedule 3 above.

10. However, it was argued before the appeal tribunal, and before me, on behalf of the claimant, that he was entitled to rely on the relevant provisions of E.C. law which overrode the effect of Regulation 10(6)(b) of the Requirements Regulations and paragraph 10(b) of Schedule 3 to those Regulations.

11. The relevant EC provisions are:-

TREATY OF ROME

TITLE III. FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL
CHAPTER I. WORKERS

Article 48.

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment

in the public service.

COUNCIL DIRECTIVE 68/360/EEC

Article 1.

Member States shall, acting as provided in this Directive, abolish instructions on the movement and residence of nationals of the said States and of member of their families to whom Regulation (EEC) No.1612/68 applies.

....

Article 4.

1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled 'Residence Permit for a National of a Member State of the EEC' shall be issued .....

3. For the issue of a Residence Permit for a National of a Member State of the EEC Member State may require only the production of the following documents; - by the worker:

   (a) the document with which he entered their territory;

   (b) a confirmation of engagement from the employer, or a certificate of employment

   .....

REGULATION (EEC) No.1612/68 OF THE COUNCIL
on freedom of movement for workers within the Community.

TITLE II
Employment and equality of treatment
Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, re-instatement of re-employment:

2. He shall enjoy the same social and tax advantages as national workers.

.....

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. Such worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist; he shall enjoy the resultant benefits and priorities.

12. It was common ground between the parties to this appeal that Regulation 1612/68 related to "workers" and their families by reason of the wording of the title and of the contents. It follows that Directive 68/360, by reason of Article 1 relates to the same description of persons.

Article 7(2) of Regulation 1612/68 in its reference to "the same social ... advantages" was wide enough to, and did, include entitlement to supplementary benefit, it was accepted on behalf of both parties to the appeal.

13. Before the appeal tribunal, Mr. Thompson, solicitor, then appearing for the claimant submitted that the benefit of Article 7(2) of Regulation 1612/68 was available to any national of an EEC member state in any other member country who was a worker or who was seeking work there. The appeal tribunal held on the authority of the LeBon case, (1987) E.C.R. 2832, that only workers were entitled to the benefit of Regulation 1612/68, but not persons who were seeking work, who were not within the expression "workers". This argument was not pursued before me and Mr Rodger expressly accepted that LeBon had been correctly decided.

14. Mr Rodger put forward three separate matters, each of which he submitted constituted an error of law.

The first ground was that the appeal tribunal had not adequately stated their reasons for their decision and so were in breach of Regulation 25(2)(b) of the Adjudication Regulations S.I.1986 No.2218. Miss Lee submitted that the reasons stated by the appeal tribunal were entirely adequate and that there had been no breach of Regulation 25(2)(b). In each case where such an issue is raised, the separate facts of the case must be looked at. The broad test to be applied is whether the claimant, on reading the reasons for decision, is able to understand why the tribunal came to the decision which it did. In my view, in the present case the reasons stated by the tribunal fully explain why they came to their decision, and this ground of appeal must fail. Whether the decision was correctly arrived at as a matter of law is quite a different question and is further considered below.

15. The second and third issues of law were in effect argued together by Mr Rodger and were that the appeal tribunal had asked itself the wrong question and had not correctly considered whether the claimant was a worker. Turning to the material facts, he submitted that these separate periods should have been considered -

1) From 1981 when he entered the U.K. to 7.1.85 when he started work.

2) From 8.1.85 to 26.3.85 when he was a worker.

3) From 27.3.85 to 11.9.86 when he was no longer in employment.

Mr Rodger conceded that the evidently transient employment as a Father Christmas in 1981 for one month should be disregarded for the purposes of this case. He further agreed that for period 1 above the claimant had only the status of one looking for work, but not that of a worker. However for period 2) above he evidently was a worker. As to the period 3), that appeal tribunal ought to have considered whether he had lost his status as a worker. Mr Rodger submitted that in relation to period 2) it would be wrong to use hindsight by taking into account the shortness of the period; the claimant's status should be looked at as from the beginning of the employment. On that basis, the appeal tribunal should have concluded that the claimant remained a worker throughout period 3.

16. Miss Lee agreed that the claim depended on whether the claimant had been a worker at the material time. If he had been, he would have been entitled to benefit, on the ground that Article 7(2) of Regulation EEC No.1612/68 displaced the national Regulation 10(6)(b) of the Supplementary Benefit (Requirements) Regulations 1983. If he was not a worker when he claimed benefit, then only the national Regulation would apply and he would not be entitled to benefit.

She submitted that the appeal tribunal was entitled to look at the total period since the claimant had arrived in the U.K. as one single period. It was further relevant to take into account the actual length or lengths of any period of work. In the present case, only two months work in over 5 years was not sufficient of itself to give the claimant the status of worker. Although the European Court had held that "worker" should be given a liberal interpretation, it should be appreciated that once an EC national acquired the status of worker, a considerable collection of rights accrued not only to him but also to his family as appeared from the various provisions of EEC Regulation 1612/68. The appeal tribunal, she submitted, was entitled to wait for a reasonable period before deciding whether on a particular date a person was a worker, and in the present case was correct in doing so, particularly since the work was part time (as admitted in a written submission to the original tribunal) and only lasted two months.

17. In my judgment, the argument over period or periods of time submitted by Miss Lee is preferable. The argument advanced by Mr. Rodger could lead to artificial results; it is not supported by any authority; and it does not seem to me to afford any advantages to the task of the adjudicating authorities. Accordingly the appeal tribunal was correct in considering the whole period from 1981 onwards as one.

18. There is no definition of "worker" in either the EC legislation or the authorities. The relevant cases are discussed in paragraphs 9-13 of Commissioner's decision R(SB)2/85, which I adopt with respect. In particular I agree that the special definition of "worker" in EEC Regulation No 1408/71 (dealing with a different subject-matter) does not assist in the present context. The various cases decide that "worker" should have a uniform meaning in the EC, although its applicability should be decided by the national courts. In the Levine case, (Case 53/81), it was held that work could qualify, even if it was only part-time, provided that the rules relating to workers covered "only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary". Although no authority was cited to me, I cannot see why such exclusion should not apply to a situation where the total period of employment (albeit only one period) bears a sufficiently small relationship to the total period under consideration. Compare R.v.Seechi (1975) 1 CMLR 383, where the magistrate stated a similar proposition.

19. In my view, the appeal tribunal was stating, in its reasons for decision, its conclusion that the claimant had never been a "worker" since 1981 (the correct starting date as accepted by both parties before me) and so was not entitled to the benefit claimed. My judgment is that they were entitled so to find on the material before them, and have made no error in law in arriving at their conclusion. The consequence is that no successful ground of appeal has been put forward, and that this appeal must be dismissed.

20. A considerable amount of submissions were made to by both advocates (as well as a further written submission presented by Mr. Rodger) on an issue which no longer calls for final decision in view of my conclusion stated in the previous paragraph that the claimant was correctly held never to have been a "worker". However it seems desirable to make some reference to it and the various aspects which were discussed.

The European Court of Justice has held in several cases that the rights of an EC worker to reside and receive equality of treatment with U.K. workers arises by reason of Article 48 of the E.C. Treaty, and not from the possession of a residence permit granted under Article 4(2) of Council Directive 68/360 EEC. Such a permit is only evidence of such rights and is only declaratory of them (Rodgers case, (1976) E.C.R. 497 Sagulo's case, case 8/77). Those two decisions further hold that community law does not present a member state from providing appropriate sanctions in order to ensure the efficacy of provisions concerning the control of aliens. Such sanctions must be appropriate and reasonable. Such a sanction must "by no means be so severe as to cause an obstacle to the freedom of entry and residence provided by the Treaty" (Sagulo's case and see R.v.Pieck (1981) 3 A.E.R. 46). Some EC countries (but not, as I understand, the U.K.) impose a legal obligation on migrant

workers to obtain a permit under Article 4(2) above, with a penal sanction for failure to do so. The cases before the European Court have been concerned with the appropriateness of such penalties; for example it has been said that deportation or imprisonment would be unreasonable since they interfered with the freedom of movement conferred by the Treaty. The Court has said that in each case it is for the national court to use its discretion to impose a punishment appropriate to the character and objective of the provision of Community law, the observance of which the penalty is intended to safeguard (Sagulo's case). The conclusion to be reached is that a moderate fine for failure to obtain the necessary permit would not be held to be contrary to Community law.

21. This reasoning has been extended in two Commissioners' decisions, R(SB)10/84, and R(SB) 2/85. These cases were decided in relation to what was, at the time, the equivalent Regulation as Regulation 10(6)(b) of the Requirements Regulations. It was accepted that the claimants were migrant workers, but in each case they had no residence permit. It was held that the withholding of supplementary benefit was a penalty for not having a permit, and it was a reasonable one, purporting to apply the Rover and Sagulo cases.

22. I emphasise that these conclusions are extensions of the European Court decisions, since nothing in those cases refer to the withholding of benefits as a penalty. I would go further and suggest that there is a reasonable possibility that the European Court might well refuse to endorse the correctness of these decisions. What gives claimants the right to claim equality of social advantages with U.K. workers (and so the right to supplementary benefit as was accepted before me) is their status as "workers" not whether they possess residence permits.

23. Mr. Rodger added further grounds of argument why these cases should not be followed; he submitted that loss of benefit was not anyhow a penalty in the sense used in the EC cases; if it was, it was of a blanket and arbitrary form of the nature disapproved in the EC cases; it had the result of depriving the claimant in effect of his freedom of movement and residence; finally it took no account of the individual's financial situation. Miss Lee submitted that Regulation 10(6)(b) imposed no penalty; it was no more than one limit of the definition of those entitled to benefit; if it was a penalty it was not disproportionate.

24. In view of my decision in paragraph 19 above, I do not express any conclusion upon the correctness of the two Commissioners decisions referred to, or whether they would be applicable if the facts of the present case had been somewhat different. I do no more than suggest that if the question should arise for decision in the future, the two cases, and in particular paragraph 34 of R(SB) 10/84, should be examined in the light of the full reasoning expressed in the European Court cases referred to above.

25. My decision is as set out in paragraph 1 above.

(Signed) M. Heald
Commissioner

(Date) 16 January 1990