Ruth Cohen & Beth Lakhani

CSB 159/83 attached for your information

note • capital abroad treated as resource page 9 line 5ff

• business assets disregard not to apply to letting of property page 9 line 45 → page 10.

We have a current commissioners appeal on both issues & will keep you informed.

With Compliments
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CSB159/83 Property Abroad

JBM/BJE

SUPPLEMENTARY BENEFITS ACT 1976

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Supplementary Benefit Appeal Tribunal:

Case No: 09/385

[ORAL HEARING]

1. I grant the claimant leave to appeal on a point of law against the decision of the Finchley Supplementary Benefit Appeal Tribunal dated 16 September 1982 and the claimant and the benefit officer having consented to my treating the application as the appeal itself, I go on to allow the appeal on the grounds that the decision is erroneous in point of law. I set the decision aside and the matter must be referred back to a fresh appeal tribunal.

2. This is an appeal by the claimant to the Commissioner with the leave of the Commissioner against the unanimous decision of the appeal tribunal confirming the benefit officer's decision issued on 16 June 1982 'Refusal to award supplementary allowance from 16 6 82'.

3. The facts as found by the tribunal on the face of the record are as follows:-

> "The appellant is living as husband and wife with Miss T ... . The latter is the owner of a cottage in her native Finland which has been valued at £4,940, and was given to her by her father in October 1980. There is no mortgage outstanding on the property. When the property was transferred, there was a legal agreement to the effect that Mr T should have first option to buy it if it was offered for sale. To date, Miss T has not attempted to sell the cottage, as she is returning to Finland on 21 9 82 and intends to live in the cottage all year round. She is required to leave Britain as her visa has expired and permission to remain has been refused."

4. The chairman's note of evidence on the face of the record states as follows:-

> "Two letters were produced in evidence. One was from a solicitor appointed by Miss T's father, which stated that Miss T could not sell the cottage .. The second letter was from Mr T himself, and stated that his daughter could not sell the cottage, and furthermore that she would derive a permanent income from it".

5. On 8 February 1983 I made the following direction:-

> "I direct that copies of all documents before the appeal tribunal be included in the case papers. I direct a submission as to what was the evidence or valuation of the cottage before the appeal tribunal.
>
> I direct a submission as to what is the effect (if any) of 'the 1959 Social Security Treaty' referred to in the Claimant's appeal to me and what it is."

I would pause to observe that it is essential that all documents (or copies thereof) before the appeal tribunal are expressly referred to in the record of the tribunal and that copies of such documents are contained in the case papers. In the absence of such copies it is impossible for the Commissioner to give proper consideration to the case.

6. The claimant requested an oral hearing. Accordingly on 6 March 1984 I held an oral hearing. The claimant was represented by Miss H Beecroft of the Camden Law Centre. Mr C d'Eca of the Solicitor's Office, Department of Health and Social Security represented the benefit officer. I am indebted to both of them. The claimant was present and supplemented Miss Beecroft's address to me.

7. The relevant statutory provisions are as follows:-

> Section 1(2) and paragraphs 3(1)(a) and (2) of Schedule 1 to the Supplementary Benefits Act 1976 as amended by the Social Security Act 1980.
>
> Regulation 10 of, and paragraph 9A of Schedule 2 to the Supplementary Benefit (Requirements) Regulations 1980 as amended by the Supplementary Benefit (Requirements and Resources) Amendment Regulations 1981.
>
> Regulations 2(1), 5, 6 and 7 of the Supplementary Benefit (Resources) Regulations 1981.
>
> The Family Allowances, National Insurance and Industrial Injuries (Finland) Order 1960.

Regulations 3, 18 and 24 of the Supplementary Benefit (Urgent Cases) Regulations 1981 [S.I. 1981 No. 1529].

I also refer in the body of my decision to further relevant statutory and case law provisions where applicable.

8. I deal in this paragraph with the legal issues involved under the headings set out in this paragraph.

(a) The Status of the Convention

"The 1959 Social Security Treaty" referred to in my direction set out above is the Family Allowances, National Insurance and Industrial Injuries (Finland) Order 1960 which was created following a Convention held in Finland in 1959 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Finland on social security. This Convention of itself is not binding on the adjudicating authorities (that is the benefit officer, the appeal tribunal and the Commissioner). Treaties have no effect on the national law of Great Britain unless enacted by statute, see Salomon v Commissioners of Customs and Excise [1966] 3 ALL E.R. 871 per Lord Denning M.R. at page 874F, per Diplock L.J. (as he then was)at page 876F and per Russell L.J. (as he then was) at page 881C, or by delegated legislation made under powers contained in a statute. A Convention merely creates international obligations between the Governments being parties to the Convention and a claimant's remedy against Her Majesty's Government is in the International Court at the Hague. Should the claimant there succeed it would be solely a matter for Her Majesty's Government whether they made an extra-statutory payment to him or not. This is not a situation similar to that ofa ruling by the European Court of Justice as Finland is not a member of the European Economic Community. The preamble to the 1960 Order and Article 2 of the Order contains references to sections of the National Insurance Act 1946 and the National Insurance (Industrial Injuries) Act 1946 providing for the making of reciprocal arrangements. There is no reference in those parts of the Order to the National Assistance Act 1948. Although there is a reference to that Act in Article 2 of the Convention as set out in the Schedule to the Order this cannot cure the defect of Article 2 of the Order. More fundamentally until 1976 there was no provision in the primary legislation governing supplementary benefit for the making of reciprocal arrangements. Accordingly there was nothing to give effect to any delegated legislation relating to such arrangements. So far as concerns supplementary benefit the Convention is not brought into English law and the 1960 Order is ultra vires in so far as it purports to deal with supplementary

benefit. For the sake of completness I would add that the Social Security (Finland) Order 1984 is not relevant.

In not referring to the 1960 Order the appeal tribunal did not err in law as on the view I have taken immediately above this Order is not relevant for present purposes.

(b) The Immigration Position

It is not disputed that the claimant and Miss T were at the material time living together as husband and wife. Paragraph 3(1) of Schedule 1 to the Supplementary Benefits Act 1976 as amended by the Social Security Act 1980 provides that:-

> "(1) Where two persons are a married or unmarried couple, their requirements and resources shall be aggregated and treated -
>
> (a) until the prescribed date as those of the man; .."

[no date had been prescribed at the date of the claimant's claim].

Paragraph 3(2) provides that the requirements and resources of Miss T's child, V. are also aggregated. Regulation 10(4A) of the Supplementary Benefit (Requirements) Regulations 1980 (as amended) provides as follows:-

> "(4A) For the purposes of paragraph 9A of Schedule 2 a person shall be treated as present with limited leave, or without leave, to enter or remain in the United Kingdom if -
>
> (a) he is a person, other than a national of a member State or a person to whom the European Convention of Social and Medical Assistance applies, who has limited leave ... to enter or remain in the United Kingdom which was given in accordance with any provision of immigration rules ... which refers to there being, or there needing to be, no recourse to public funds, or to there being no charge on public funds, during that limited leave; or
>
> (b) having only a limited leave to enter or remain in the United Kingdom he has remained beyond the time limited by the leave; or"

Regulation 10(1) of those regulations provides that the requirements of persons to whom cases in column 1 of Schedule 2 apply are modified from the amount in column 2 to that in column 3. Paragraph 9A of Schedule 2 applies to persons from abroad as follows:-

"9A. Person (further defined in regulation 10(4A)) who is present with limited leave, or without leave, to enter or remain in the United Kingdom -	9A(a) Paragraphs 1 and 2 of the table;	9A(a) The ordinary rate for householders if the member of the couple mentioned in sub-paragraph (a) in column (1) as not also so present satisfies the conditions of sub-paragraphs (a) to (c) of regulation 5(6) (meaning of householder) and otherwise the ordinary rate for non-householders;
(a) if one of a married or unmarried couple the other of whom is not also so present (with limited leave or without leave);		(b) nil"
(b) in any other case.	(b) paragraphs 1 to 4 of the table and 1 to 3 of Schedule 1.	

Miss Beecroft on this aspect of the case submitted that the tribunal had not considered section 14(1) of the Immigration Act 1971 or the Immigration (Variation of Leave) Order 1976 and the tribunal had in that erred in law.

Mr d'Eca submitted that regulation 10(4A) set out immediately above should apply. It appears that Miss T entered Great Britain on 23 October 1980 and Mr d'Eca informed me she had 4 months' leave which expired on 23 February 1981. Miss T's application for variation of leave was made on 13 April 1981. Section 14 of the Immigration Act 1971 sets out a right of appeal for those who have been refused. In Suthendran v Immigration Appeal Tribunal [1976] 3 ALL E.R. 611 the House of Lords held that there is no right of appeal under section 14 if the application for variation of leave is made after the expiry of leave. That so submitted Mr d'Eca does not prevent a person applying for permission to be given leave, However there is no right of appeal against the determination of that application. The Variation of Leave Order applies where there has been application for extension within the period of leave - the leave continues until the Home Secretary has made his determination on the application for leave. On this aspect, continuing his submission, Mr d'Eca submitted that it is not the duty of the adjudicating authorities to decide the immigration status of a member of the assessment unit, their duty is to make enquiries of the competent authorities and rely upon that evidence. It is not for the benefit officer to review the immigration law. Mr d'Eca informed me that the benefit officer had been advised by the Home Office that Miss T's leave had expired. He accepted that

there was an application out of time and that the appeal procedure was going on. However regulation 10(4A) of the Requirements Regulations applied. The issue before the tribunal was had there been a limited leave - the answer was 'yes', had that limited leave expired - the answer was 'it had' and was the person remaining in the United Kingdom beyond the time limited by that leave. The tribunal found that Miss T was within regulation 10(4A)(b) and that brought in paragraph 9A of Schedule 2. The tribunal were correct in applying regulation 10(4A) to Miss T.

In my judgment on this aspect the tribunal erred in law in that they apparently had before them no evidence as to the immigration status of Miss T and in consequence they made no findings of fact in regard thereto. The appeal tribunal should have had before it full information from the Home Secretary as to the immigration status of Miss T and full details of the course of her appeal. While I accept Mr d'Eca's submissions the appeal tribunal must have before it the relevant evidence on which to make findings of fact. I would add that Miss Beecroft informed me that Miss T was adamant that her leave on entering the United Kingdom was for 6 months but that her passport was now in Finland. It is for the appeal tribunal on the evidence before it to make their findings of fact bearing in mind that it is not the duty of an appeal tribunal to decide the immigration status of Miss T.

(c) Capital Resources - the Land in Finland

Whether or not the claimant's requirements are modified to exclude the requirements of Miss T and her son, regulations 2(1), 5(a) and 6(1)(a)(i), (ii), (v) and (vi) of the Supplementary Benefit (Resources) Regulations 1981 require consideration.

Regulation 2(1) provides as far as relevant

> "In these regulations, unless the context otherwise requires - "claimant" means a claimant for supplementary benefit and references to a claimant's resources include, where under the provisions of the Act the requirements and resources of any person fall to be aggregated with and treated as those of the claimant, the resources of that person;
>
> "home" means the accommodation, with any garage, garden and out-buildings, normally occupied by the assessment unit and any other members of the same household as their home and it includes also any premises not so occupied which it would be impracticable or unreasonable to expect to be sold separately, in particular the croft land where, in Scotland, the home is a croft;"

Regulation 5 provides:-

> "Except in so far as regulation 6 provides that certain resources shall be disregarded, the amount of a claimant's capital resources to be taken into account shall be the whole of his capital resources assessed where applicable
>
> (a) at their current market or surrender value less
>
> (i) in the case of land, 10 per cent, and in any other case, any sum which would be attributable to expenses of sale; and
>
> (ii) any outstanding debt or mortgage secured on them;"

Regulation 6(1)(a) so far as relevant provides as follows:-

> "6(1) In calculating a claimant's capital resources the following shall be disregarded:-
>
> (a) the value of -
>
> (i) the home,
>
> (ii) any premises which have been acquired and not yet occupied by the assessment unit but which it is intended will be the home within 6 months of the date of acquisition or such longer period as is reasonable in the circumstances .....
>
> (v) the assets of any business which is owned, in whole or in part, by a member of the assessment unit, for such period as in the opinion of the benefit officer it would be reasonable to disregard them;
>
> (vi) any reversionary interest."

I should also refer to regulation 7 of the Resources Regulations which provides that where a capital resource exceeds £2,000 [the figure at the date of claim] the claimant shall not be entitled to a supplementary allowance.

It is not in dispute that the claimant and Miss T are treated as an unmarried couple.

Regulation 5 of the Resources Regulations deals with the value of capital resources. It does not imply they must be sold or realised. It attributes a value.

I now turn to the question of ownership of the Finnish cottage and the question of Finnish law. The tribunal had concluded that Miss T was the owner. It is clear there has been a transfer of the property to her. On the evidence of the letter of Miss T's father which was before the tribunal the reason for the gift was to reduce his liability to tax. Although not before the tribunal the deed of gift now available at C61 of the casepapers shows that both the legal and beneficial title were transferred and that the gift was free of all incumberances - there is no condition of repurchase stated on the face of the document. As a question of law for the tribunal to whom I remit this case the deed of gift now in the casepapers shows that Miss T is the absolute owner of the property in question. Even if she were not she has a beneficial interest and it is a capital resource and one that can be valued. Difficulties in regard to a sale are relevant only in so far as they affect the market value of the property. Nothing in the Resources Regulations require the asset to be converted into money. If there was a first option that does not prevent a sale of the property, it merely requires Miss T's father to be given first option. On the assumption that the option was binding that does not prevent a sale taking place. The translation of the letter from the Finnish lawyer which was before the appeal tribunal states 'The Donation has been made on the specific condition that the recipient shall not give the real estate to a third person and otherwise has been agreed that the donors have the first-hand right to buy'. No figure is there set out as the price of repurchase nor is there set out a mode of ascertaining the figure (for example at a valuation to be made by a particular named land agent). Applying English law I find that the option as referred to in the Finnish lawyer's letter is void for uncertainty. In the Finnish lawyer's letter as translated there is reference to 'the Land Register'. Again on the evidence it is uncertain whether Miss T merely has to apply to the Land Register to obtain registration. Were the Land Registry procedure applicable to land in England and Wales, to apply registration would be merely a matter of form involving only a short measure of delay in securing actual registration. As to the Finnish Exchange Control Regulations Mr d'Eca informed me that from the benefit officer's investigations the Finnish law applicable was that where a Finnish national resided abroad in the previous fiscal year or continues outside Finland he was permitted to transfer his assets abroad without bar. There was no evidence as to this before the appeal tribunal. As to the valuation of the cottage in Finland before the appeal tribunal this was that of the Finnish tax authorities supplied to the benefit officer by Miss T. The claimant did not challenge that valuation. The tribunal found there was no mortgage and were therefore in a position to ascribe a value to that resource. Deducting

from that the 10 per cent referred to in regulation 5(a)(i) there is still an excess over £2,000. If as a question of fact resources were over the capital limit at the date of claim of £2,000 then, subject to regulation 6, no supplementary allowance is payable to the assessment unit. The fact that the cottage is outside the United Kingdom does not prevent it being a resource. In R(SB) 33/83 (see in particular paragraph 17 of the Commissioner's decision) the Commissioner decided that foreign earnings fall within the purview of the Resources Regulations. By analogy capital resources in Great Britain or abroad are equally resources of a claimant. There is no geographical restriction as to resources in the Supplementary Benefits Act 1976 as amended. There is nothing in regulation 3 of the Resources Regulations to restrict resources to those present in the United Kingdom. Further, regulation 5 of the Resources Regulations makes no reference to the source of the resources. The resources represented by the cottage in Finland were taken into account by the tribunal. Regulation 6 sets out capital resources which are to be disregarded. It is of course a question of fact as to whether the cottage in Finland is the 'home' for the purposes of regulation 2(1) of the Resources Regulations. As to the first limb of the definition of 'home' the cottage in Finland was never occupied by the claimant. A plurality of units of accommodation cannot be considered a single home. I agree with and follow the decision of the Commissioner R(SB) 30/83 in particular at paragraphs 18(3) and 19(1) of his decision. The second limb of the definition of 'home' involves in my view outbuildings at the same location as the dwelling which it would be impracticable to expect to be sold separately. The second limb of the definition does not extend to a separate dwelling unit especially one never occupied by the assessment unit as a whole.

The tribunal to whom I remit this case will also have to consider regulation 6(1)(a)(ii) and make all relevant findings of fact in respect thereof.

I turn now to regulation 6(1)(a)(v) of the Resources Regulations set out above. Where capital resources fall within that provision they may be disregarded as in that provision set out. The only evidence before the tribunal of the carrying on of a business was that the cottage had been let and that income had been received. Miss Beecroft informed me that the cottage is in the hands of a travel agency. That information was not before the tribunal but even if it had been it would make no difference in my view as a question of law. As a question of law a casual letting of a property for a few weeks in any year cannot be said to constitute a business. I am fortified by the position arising under the Income and Corporation Taxes Act 1970 and its predecessors.

For tax purposes the carrying on of a trade or business is a mixed question of law and fact. There are innumerable decisions for tax purposes where many and varied activities have been held to be the carrying on of a trade. However the rule for tax purposes (in the absence of any express statutory provision) is that the letting of property is not the carrying on of a trade. I turn now to regulation 6(1)(a)(vi) by which a reversionary interest is disregarded as a capital resource. There is no evidence whatsoever to support the view that Miss T's interest in the cottage in Finland was a reversionary interest. It is clearly one in possession.

(d) Evidence of Finnish Law

There was before the tribunal evidence of Finnish law. In my view this evidence was uncertain and unsatisfactory. In so far as the evidence of Finnish law is in any way meaningful it can I think be accepted by the adjudicating authorities. It is here given by a Finnish lawyer. The Commissioner is not bound by the rules of evidence but by an analogy with section 4(1) of the Civil Evidence Act 1972; evidence of Finnish law can be accepted from a Finnish lawyer as a person suitably qualified and competent to give expert evidence. When the matter comes before the appeal tribunal to whom I remit this matter it will be open to either party to produce further and more detailed evidence of Finnish law. I would add that questions of foreign law are questions of fact (and not of law) for the statutory authorities (and as such a matter for the appeal tribunal and not the Commissioner). Further in the absence of evidence of foreign law or any particular aspect thereof the foreign law (in the case of a claimant in England or Wales) is presumed to be the same as English law see The Marinero [1955] 1 ALL E.R. 676.

(e) The Urgent Cases Regulations

The tribunal erred in law in that they did not consider the Supplementary Benefit (Urgent Cases) Regulations 1981 in particular regulations 18 and 24 at all. The matter is at large before the tribunal to whom I remit this case and it is a matter for the benefit officer to make submissions before the tribunal.

There are not the necessary findings of fact made by the appeal tribunal in its record dated 16 September 1982 to determine whether the Urgent Cases Regulations apply in this case.

9. My decision is as set out in paragraph 1 of this decision. In accordance with my jurisdiction under rule 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 as amended by rule 6(2) of S.I. 1982 No. 40 - I direct that the tribunal to whom I remit this case in rehearing the matter shall pay particular attention to all the matters to which I have referred to in this decision above. It shall also consider carefully the exact wording of the relevant regulations and make and record their findings of all the material facts and give reasons for their decision.

10. Accordingly the claimant's appeal is allowed.

(Signed) J B Morcom
Commissioner

Date: 10 May 1984

Commissioner's File: C.S.B. 159/1983
C SBO File: 129/83
Region: London North