

"Temporary Absence" - Claims for Invalidity Benefit

JMH/SH/4

Commissioner's File: CS/019/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal was not erroneous in point of law. I dismiss the appeal. However, in so far as the tribunal may have been guided by principles not exactly ad idem with the principles set out by the Court of Appeal in Chief Adjudication Officer v. Ahmed Ors (16.3.94) I substitute my own decision pursuant to section 23(7) of the Administration Act 1992.

2. This is an appeal with the leave of the Commissioner from the decision of a social security appeal tribunal dated 21.5.92. The claimant had been in receipt of invalidity benefit from and including 5.9.88. He originally went to Australia in 1989 to look after his brother. The Secretary of State issued a certificate pursuant to regulation 2(a) of the Persons Abroad Regulations 1975 in respect of the period 25.9.89 to 16.3.90. The claimant extended his stay, and did not return to Great Britain until July 1990, but was paid invalidity benefit during the whole period of that absence. However, on 7.3.91, he left Great Britain once again for Australia and was still there - in Tasmania - at any rate on 19.6.93. Since that date, letters from this office have gone unanswered and the last one which required a reply, dated 15.4.94, was "returned to sender".

3. On 10.6.91, the adjudication officer reviewed the award and held that from and including 8.3.91 the claimant was not entitled to invalidity benefit as his absence from Great Britain was not temporary. The appeal tribunal (first time round) dismissed the appeal on 7.11.91 for that very reason. However, that decision was set aside on 31.3.92 on the grounds that certain documents relating to an application allegedly made by the claimant for permanent residency in Australia were not before the tribunal. At the hearing before the tribunal (second time round), on

21.5.92, only one of those letters was produced - and that one did not carry the matter any further - for the remainder could not be found. Having regard to that, the tribunal expressly declined to make any finding of fact as to whether or not the claimant had actually made such an application, but admitted, as evidence of his intentions, statements and letters from the claimant that he had. I think I can summarise the evidence of the intentions of the claimant by referring to the statements or letters.

- (i) The claimant made a statement on 6.3.91 to the local office (T11) which states:-

"I am returning invalidity O/B because I am going to live in Australia. Would you please arrange as before to pay my benefit to [address]."

He then gave a poste restante address. He continued:-

"I will notify you of my address in Australia as soon as possible."

- (ii) On 20.5.91 he completed a form (T15/16) which stated that the reason for his absence in Tasmania was that he was staying there for health reasons and in reply to the question "Are you going abroad permanently?" He replied, "Yes".

- (iii) In what was evidently a covering letter he stated (T17/18):-

"I have filled in this form to the best of my ability. I am applying for residency on the grounds of health reasons, but it will take but 2 years to be finalised. ... I was in Australia before for an extended holiday and it helped me enormously health wise and my previous doctor in the UK ... told me that England would be bad for my chest and a warmer climate would enable me to breathe better ..."

- (iv) In a letter which was apparently received on 17.7.91 (T21/22) he wrote:-

"I stayed in the UK until March 1991, then winter was severe, snow etc and I was sick for a long period of time so I have returned to Australia in March 1991 having only applied for residency and am currently on a six months visa until 7 Sept when I can re-apply for another one until my residency is granted which apparently takes approx 2 years."

After the tribunal had turned down his appeal on 7.11.91 (first time around) the claimant altered his viewpoint and stated (T36):-

"When I left England in March 1991, I again did so for health reasons - but always intended to return to England."

He said that the chairman's note of evidence stated that he had applied for permanent residency. That - according to him was incorrect and there was evidence which indicated that. The documents relating to that evidence were not before the tribunal and it was on that basis that the tribunal's decision was set aside. As I have said, apart from one letter - which did not take the matter very far - those other documents cannot be found.

(v) On 20.8.92, (5) after the hearing second time round, he wrote:-

"I wish to appeal! I am disgusted because how? could I be tried when? you had not all the documents which had been sent by me stating the fact that I was only in Australia on holiday and that's what is printed in my British passport.

I am coming over in the near future and I am going to the press ..."

(vi) Finally in a letter received on 4.12.92 (55/56) he says:-

"I currently hold a British passport and I came here in March 1991 and have not received a penny since I want to return but am afraid to do so in case I starve ..."

4. The grounds of appeal appear to be that the claimant was and presumably still is only "temporarily absent from Great Britain". I must point out to him that under section 113(1) of the Contributions and Benefits Act 1992 (formerly section 82(5)(6) of the 1975 Act), except where regulations otherwise provide, a person is disqualified from receiving inter alia invalidity benefit for any period during which that person "is absent from Great Britain", which, after 7.3.91, the claimant undoubtedly was. But regulations do otherwise provide, for regulation 2(1) of the Persons Abroad Regulations 1975 provides:-

" 2. (1) ... a person shall not be disqualified for receiving any benefit in respect of incapacity by reason of being temporarily absent from Great Britain ... if

(a) [the Secretary of State has given the appropriate certificate

(b) the absence is for the specific purpose of being treated for incapacity which commenced before he left Great Britain or ...

(c) on the day on which the absence began

he was and had for the past six months continuously been incapable of work and on the day for which benefit is claimed he has remained continuously so incapable since the absence began."

No certificate under sub-paragraph (a) has evidently been issued and presumably consideration about issuing one will only be given after a favourable decision on the "temporarily absent" point has been made for the claimant. I would also add for the benefit of the claimant that as from 8.3.94 benefit is limited in any event to the first 26 weeks of absence only. That does not of course affect the case at present in front of me, so far as I am concerned.

5. When the tribunal reached their decision they did not have the benefit of the judgment of the Court of Appeal in Chief Adjudication Officer v. Ahmed and Ors (14.3.94). The court concluded that it was wrong to treat "temporary" as being synonymous with "not permanent". "The task to be performed is to apply the words of the regulation "temporarily absent" to the facts of the particular case." The court lay down nine guidelines for the assistance of tribunals.

1. It is necessary to look at the facts at the date of the relevant decision. In some cases the absence may wholly be in the future - as it was when the adjudication officer made the initial decision on 10.6.91; in others, the claimant have been away for a period and will not have returned; and yet again, he may have returned and a decision may yet have to be made as to what part his absence abroad, if any, could be regarded as temporary.
2. The burden of proof that he was "temporarily absent" is on the claimant. He has to show:
 - (a) he was temporarily absent,
 - (b) he has a certificate under sub-paragraph (a) of regulation 2(1); and
 - (c) the reason for his being temporarily absent was one of the reasons set out in sub-paras (b)-(d) of that regulation.
3. The quality of absence may change with the passage of time.
4. The fact that no date is fixed for the claimant's return does not prevent the absence from being temporary.
5. The intention expressed by the claimant will always be relevant although it is not decisive. In this case the tribunal took account of the very clearly

expressed intentions of the claimant to go and live in Australia and did not accept that he changed his mind but concluded that he had no real intention of returning permanently to Great Britain. It seems to me that that was a conclusion which, on the facts, the tribunal were entitled to take and it is not for me to interfere.

6. Periods of absence, if any, before the date of the decision will be relevant as will the intended or likely period of absence after.
7. "Temporarily absent" depends on the circumstances of each case and is a matter for the fact finding authority. Nevertheless "temporarily" connotes that though the date of return may remain uncertain, the absence contemplated is an absence for a limited period only.
8. Save in an exceptional case, it would be difficult for a claimant to establish he was only temporarily absent once the absence had become a matter of years rather than months.
9. Sub-para (b) must be for "a specific purpose", and is a question of fact.

6. Now it seems to me, that applying those guidelines to the facts found, the tribunal were entitled to reach the conclusion they did. I would also add that, in my view, it is significant whether or not a claimant retains a home in Great Britain - which evidently the claimant in this case had not. However, if and in so far as the tribunal may have been guided by authorities not exactly ad idem with the principles set out in Ahmed, I substitute my own decision pursuant to section 23(7) of the Administration Act 1992.

7. My decision is as set out above.

(Signed) J.M. Henty
Commissioner
(Date) 19 October 1994