

*"Temporary Absence" - Invalidity Benefit.*

JBM/SH/3

Commissioner's File: CS/124/1992

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 Newcastle social security appeal tribunal dated 6 December 1991 is erroneous in point of law. Accordingly I set it aside and remit the case for rehearing to a differently constituted appeal tribunal.

2. This is an appeal by the claimant to the Commissioner with the leave of the Chief Commissioner against the decision of the appeal tribunal confirming the decision of the adjudication officer first involved in these appeals.

3. The facts of the case are dealt with by the adjudication officer first involved in these appeals in box 5 of his written submission to the appeal tribunal. In respect of those matters and of the submissions of the adjudication officers then and now involved in these appeals dated 15 July 1992, 12 November 1992 (this second submission being made in response to the Chief Commissioner's direction "leave to appeal is granted.") the further submission dated 17 June 1993 (resiling from the earlier submissions). This third submission being made in response to the direction of the nominated officer dated 19 May 1993 and the most recent submission dated 14 June 1994 of the adjudication officer now involved in these appeals (this submission being made in response to my direction dated 10 May 1994 which I set out in full as follows:-

"In the light of paragraph 13 of the submission dated 17 June 1993 I require a further full submission in respect of the present day position within 30 days hereof. The claimant to have a further 30 days for any comments she may

wish to make."

The claimant has had the opportunity to comment and I have his comments contained in the case papers including the most recent observations dated 2 July 1994. No useful purpose is to be served by my setting out these matters afresh here save to refer to the ruling of the nominated officer dated 8 November 1993 which is as follows:-

"The request for an oral hearing of this appeal is refused as I am satisfied that the appeal can properly be determined without a hearing."

I need only say in that regard that to my mind that ruling is rightly made.

4. The relevant statutory provisions are referred to in box 2 of the written submission of the adjudication officer first involved in these appeals to the appeal tribunal. Nothing is to be gained by my setting out those references afresh here. The issues of temporary absence from Great Britain are considered in the Court of Appeal decision in Chief Adjudication Officer and Secretary of State v. Ahmed and Ors. A copy of that decision should be before the newly appointed appeal tribunal to assist them in their labours.

5. In my judgment the decision of the appeal tribunal is erroneous in point of law in that they failed to give proper and separate consideration to the issue of the Malta Order. Article 9 of the Malta Order reads as follows:-

"Where a person is temporarily in one territory and is not entitled to receive sickness or benefit or injury benefit under the legislation of the territory would be entitled to receive such benefit under the legislation of the other territory if he were in the latter territory, he shall, subject to the approval of the competent authority of the latter territory to be entitled to receive that benefit for such period as that authority may determine."

I turn therefore to the latest submission of the adjudication officer now involved in these appeals dated 14 June 1994 which so far as relevant I set out in full below:-

" 2. The following law is relevant.

Court of Appeal judgment: Chief Adjudication Officer and Secretary of State v. Ahmed and Ors

Commissioners decisions: R(I) 37/55, CS/253/90, CS/140/91 and CS/301/91.

3. Since the adjudication officer's earlier submission was written, the definition of temporary absence from Great Britain has been considered by the Court of Appeal in Chief Adjudication Officer and Secretary of State v. Ahmed

and Ors. The Court quashed the Commissioner's decision in Cases CS/253/90, CS/140/91 and CS/301/91 and set out guidelines for deciding whether a person's absence from Great Britain is temporary.

4. In addition to setting out the general guidelines, the Court decided that:-

- (a) it is wrong to treat the word "temporary" as being synonymous with "not permanent", and
- (b) an indefinite absence does not prevent the absence being temporary

5. In the light of the Court's decision that "temporary" does not mean "not permanent", I submit that this means that the principles in R(I) 37/55 reflect the correct interpretation of the law.

6. Although the Court stressed that each case must be decided on its own particular facts, they also set out a number of factors that should be considered in deciding whether an absence is temporary. In this particular case the Court's statements on the following are relevant.

- (a) the claimant's intention,
- (b) the length of the absence.

7. The Court stated that the fact that no date is fixed before the claimant's return does not prevent the absence being temporary (page 8 of the judgment). They also said that a person's intention is always relevant but that it is not decisive when deciding whether an absence is temporary. Mr Mizzi has stated that he intends to return to Great Britain. I submit that Mr Mizzi's intention to return is not in doubt. But, it is his ability to carry out that intention which is crucial.

8. The evidence in the papers before me shows that:-

- Mr Mizzi is a Maltese national (page T30);
- he went to Malta for the benefit of his health (page T33);
- he intends to return to Great Britain (pages T27, T33, T35 and T37);
- his wife and children went with him to Malta (page T15);
- he did not keep a home in Great Britain (page T16);

He bought return air tickets which have since expired

(page 16);

9. The Court stated (page 9 of the judgment) that:-

The intention expressed by the claimant will always be relevant although it is not decisive. As time goes by it is likely that his plans for the future will have to be more and more closely scrutinized. It is also to be remembered that, whatever his intention, a claimant may be prevented from returning by circumstances beyond his control.

The period of absence, if any, before the date of the decision will be relevant as will the intended or likely period of absence thereafter. The two periods will have to be looked at together.

10. It is my submission that there are several factors which cast doubt on Mr Mizzi's ability to carry out his intention.

(a) he has no home to return to in Great Britain, and

(b) his family are with him in Malta.

11. In addition, at the date of his submission, Mr Mizzi's absence has lasted for almost 3 years. In view of that fact and the factors listed in paragraph 10, I submit that Mr Mizzi's intention to return must be closely examined.

12. Regarding the length of a person's absence from Great Britain, the Court stated (page 10 of the judgment)

"Nevertheless the word "temporarily" connotes that, although the date of return may remain uncertain, the absence contemplated is an absence for a limited period only."

They also stated, at page 11 of the judgment, that:-

".. it seems to us that save in an exceptional case, it would be difficult for a claimant to establish that he was only temporarily absent within the meaning of regulation 2(1) once the absence had become a matter of years rather than months."

13. At the date of the tribunal hearing Mr Mizzi has been absent from Great Britain for almost 18 months. However the absence has now become a matter of years rather than months. (paragraph 11 refers)

#### Conclusion

14. In the light of the statements of the Court, it is my submission that the length of the absence from Great Britain is sufficient to cast doubt on Mr Mizzi's

ability to carry out his intention to return. In view of all the Court's statements quoted on this submission, I submit that Mr Mizzi is not temporarily absent from Great Britain.

15. In his earlier submission the adjudication officer referred to Commissioner's decision CS/207/90 (page 96), the Commissioner will wish to know that the decision has been reported as R(S) 1/93.

16. I respectfully repeat the adjudication officer's request that the Commissioner should consider remitting the case to a fresh tribunal to consider the implications of the Malta Order."

I accept the above submission in particular that referred to immediately above and the conclusion at paragraph 14 to my mind Mr Mizzi is not temporarily absent from Great Britain.

6 In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I direct that the new tribunal to whom I remit this case in rehearing the matter shall pay particular attention to all the aspects to which I have referred in paragraph 5 above of this decision. Further they shall consider carefully the exact wording of the relevant statutory provisions and make and record their findings on all the material facts and give reasons for their decision. As indicated in paragraph 5 above they should have before them to assist them in their labours a copy of the judgment of the Court of Appeal in Chief Adjudication Officer and Secretary of State v. Ahmed and Ors. It would be helpful if the adjudication officer were legally represented at the rehearing of the case so that the issues there involved can finally be laid to rest. The claimant will be aware that success before me does not necessarily mean success before the appeal tribunal.

7. Accordingly the claimant's appeal is allowed.

(Signed) J B Morcom  
Commissioner

(Date) 20 September 1994