CPAG

MJG/SH/9

108/92.

Commissioner's File: CS/140/1991

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 23 April 1990 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a man born on 9 August 1930, against the decision of the social security appeal tribunal dated 23 April 1990, which dismissed the claimant's appeal against a decision of the local adjudication officer issued on 22 August 1989, in the following terms,

> "The claimant is disqualified for receiving invalidity benefit from and including 10 October 1988 because he is absent from Great Britain and during this period he is not temporarily in Malta. [Social Security Act 1975, section 82(5)(a) and the National Insurance and Industrial Injuries (Malta) Order 1958, Article 9A]".

3. The appeal was one of three heard by me at an oral hearing on 18 November 1992. The other two appeals were on file CS/140/1991 and CS/253/1991 and I have given separate decisions on those files. However an issue common to all three appeals was the meaning of the words "temporarily absent from Great Britain" in regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 [S.I. 1975, No. 563], in particular in the light of the decision of Hodgson J. in R v. Social Security Commissioner, Ex Parte Akbar, 28 October 1991 (set out in Appendix II to this decision). In Appendix I, common to this decision and the other two decisions, I have given my rulings on that question. The new tribunal in this case will need to

apply those rulings to the facts of the present case. As I am remitting the case to a new tribunal, I do not propose to go into the facts of this case in detail since it is a matter for the new tribunal to take the necessary evidence and then apply the law as I have defined it in Appendix I to this decision.

4. An additional feature of this case is that it was to go to Malta that the claimant left Great Britain on 9 October 1988. Consequently, in addition to applying regulation 2 of the Persons Abroad Regulations, the new tribunal will also have to consider in this case the provisions of Article 9A of the National Insurance and Industrial Injuries (Malta) Order 1956, S.I. 1956, No. 1897, (as inserted by S.I. 1958, No. 772), reading as follows,

> "Article 9A
>
> 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 but 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, be entitled to receive that benefit for such period as that authority may determine,."

5. In practical terms, that necessitates an enquiry as to whether the claimant was "temporarily" in Malta, in which case (subject to the terms of Article 9A) he should not have been disqualified for receipt of U.K. invalidity benefit for the time that he was in Malta. Two unreported Commissioners' decisions were drawn to my attention, relating to the interpretation of the Malta Order on this point. They are on files CS/2/76 (see in particular paragraphs 12 + 13) and CS/207/1990. The new tribunal should be supplied with copies of those decisions.

6. It should be noted that, in paragraphs 12 and 13 of CS/2/76, the learned Commissioner (Mr Hilary Magnus Q.C.) stressed that the question whether a claimant is temporarily in Malta is not necessarily concluded by any ruling that the claimant was not temporarily absent from Great Britain for the purposes of regulation 2(1) of the Persons Abroad Regulations. Indeed in paragraph 13 of that decision, the learned Commissioner stated,

> "Considering all the facts, and the respective contexts of the statutory provisions, I conclude that the claimant's absence from Great Britain is not temporary in terms of regulation 2(1), but that he is temporarily in Malta in terms of Article 9A."

7. Each case of course depends on its own facts and the tribunal will also need to look at the guidance given in decision CS/207/90. The tribunal should bear in mind that that decision is supplied to it only for the purposes of considering the interpretation of the Malta Order. What it may say about the interpretation of "temporarily absent" in regulation 2(1) of the

Persons Abroad Regulations must now of course be read in the light of what I have said in Appendix I to this decision.

8. Lastly, I should say that I have set the original tribunal's decision aside because, despite the obvious care which they took with the case, I accept the concurring submissions of Mr. Drabble and Mr.Griffiths that the tribunal may well have erred in its treatment of the purchase and subsequent sale by the claimant of a house in Malta.

(Signed) M.J. Goodman
Commissioner

(Date) 8 December 1992

MJG/SH/9

CS/253/1990 - DIN MOHAMMED (MR)

CS/140/1991 - BALMER ROWLAND JOHN (MR)

CS/301/1991 - AHMED NISAR (MR)

APPENDIX I

1. These three appeals by claimants were the subject of an oral hearing before me on 18 November 1992. The claimants on files CS/253/1990 and CS/301/1991 were not present but the claimant on file CS/140/1991 was present and addressed me. The claimants on files CS/253/1990 and CS/140/1991 were represented by Mr R Drabble of Counsel. The claimant on file CS/301/1991 was represented by Mr S Foster, Solicitor. The adjudication officer was in all three cases represented by Mr W Griffiths of Counsel. I am indebted to all those persons for their assistance to me at the hearing.

2. This Appendix is concerned to give a ruling by me on the issue of legal principle which was common to all three appeals, namely the effect on existing case law as to benefit entitlement during absence abroad of the decision of Hodgson J. in the Queen's Bench Division of the High Court on an application for judicial review, in the case of R. v. Social Security Commissioner, ex parte Javed Akbar, 28 October 1991, briefly reported in The Times for 6 November 1991 and in [1992] Crown Office Digest 245 but otherwise not reported. A transcript of the Akbar decision was available at the hearing and has been made Appendix II to this decision. Mr.Drabble and Mr Griffiths had appeared in the Akbar case.

3. That case is concerned with section 82(5) of the Social Security Act 1975 (now replaced by section 113(1) of the Social Security Contributions and Benefits Act 1992) and the exception thereto in regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 (S.I. 1975 No. 563). Those provisions read as follows:-

Social Security Contributions and Benefits Act 1992

" 113. (1) Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Parts II to V of this Act, and an increase of such benefit shall not be payable in

respect of any person as the beneficiary's wife or husband, for any period during which the person ... is absent from Great Britain .." (Section 82(5) of the Social Security Act 1975 was in the same terms).

Social Security Benefit (Persons Abroad) Regulations 1975

" 2. (1) A person shall not be disqualified for receiving sickness benefit, invalidity benefit, severe disablement allowance, and unemployability supplement or a maternity allowance by reason of being temporarily absent from Great Britain for any day if -

(a) the Secretary of State has certified that it is consistent with the proper administration of the Act that, subject to the satisfaction of one of the conditions in sub-paragraphs (b), (bb), (c) and (d) below, the disqualification under section 82(5)(a) of the Act should not apply, and

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

(bb) in the case of sickness benefit and invalidity benefit, the incapacity for work is the result of a personal injury of a kind mentioned in section 50(1) of the Act, and the absence is for the specific purpose of receiving treatment which is appropriate to that injury, or

(c) on the day on which the absence began he was, and had for the past 6 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, or

(d) in the case of severe disablement allowance, he is absent only by reason of the fact that he is living with a serving member of the Forces and is the spouse, son, daughter, father, father-in-law, mother or mother-in-law of that member."

4. The Akbar case was concerned with the meaning of the phrase in regulation 2(1), "by reason of being temporarily absent from Great Britain". Hodgson J. was hearing an application for judicial review to quash a refusal by a Social Security

Commissioner of leave to appeal from a decision of a social security appeal tribunal which had held that the claimant in that case (Mr Akbar) was not "temporarily" absent from Great Britain, with the result that he was disqualified for receiving invalidity benefit. The present three cases all concern the same problem. The transcript of the Akbar decision is set out in full in Appendix II to this decision. At this stage I adopt the summary of the Akbar case in [1992] Crown Office Digest, pages 245-246, reading as follows,

> "On November 1, 1987, the applicant went for a visit to Pakistan to alleviate his depression and notified the Department of Social Security accordingly. He was in Pakistan for approximately 15 months and was unable to indicate to the Department in May and September 1988 in response to enquiries raised by the Department, when he would return to the UK. The Adjudication Officer therefore decided that the applicant's absence from the UK could no longer be considered temporary and disqualified him from receiving invalidity pension from September 1, 1988 to October 13, 1988. This was notified to the applicant on October 20, 1988 and he appealed this decision to the [social security appeal tribunal]. On February 9, 1989, he returned to the UK. On March 17, 1989, the [tribunal] promulgated its majority decision. It upheld the Adjudicator's ruling and decided the referral in respect of the period October 14, 1988 to January 4, 1989, against the applicant. The [tribunal] ruled that during the period under appeal, the applicant's stay in Pakistan had become indefinite and could no longer be regarded as temporary.
>
> Held
>
> The [tribunal's] decision was, on its face, wrong in law. There was no justification for importing into regulation 2 [of the Social Security (Persons Abroad) Regulations 1975] any such qualification as to the ordinary English word 'temporary'. The legislature clearly intended that social security benefit entitlement should cease if a claimant permanently severed his ties with the UK. There was however no reason why the word 'temporarily' should not be given its primary meaning of 'not permanently.' It is then a matter of fact and degree whether what was temporary has become permanent. The fact that an absence is or becomes indefinite does not necessarily render it 'not temporary.' There were however considerable conflicting authorities as to how 'temporarily absent' should be construed as was evident from comparison of [R(S) 9/55 with R(S) 1/85.] It was therefore desirable to resolve this conflict as soon as possible. That factor alone should have persuaded the Commissioner to grant leave to appeal."

5. The question at issue at the hearing before me on 18 November 1992 was to what extent the decision of Hodgson J. in the Akbar case was binding authority on adjudication officers; social security appeal tribunals; and Social Security

Commissioners, all of which authorities I shall refer to as the "statutory authorities". That question is particularly important because what was said by Hodgson J. would appear to be at variance with paragraph 20 of reported Commissioner's decision R(S) 1/85, reading as follows,

> "The phrase 'temporarily absent from Great Britain' ... is to be so construed as to give rise to the position that whilst demonstration that an absence is 'permanent' will preclude it counting as 'temporary', demonstration that it is not necessarily 'permanent' does not of itself establish that it is 'temporary'. In particular, an absence may though intended as 'temporary' at its outset cease to count as such if by force of circumstances no certain time (and I do not by a 'certain time' mean necessarily a precise date or hour, but something broader) can be set as to when it will terminate. It is not a 'temporary' absence if it is 'indefinite'."

6. Moreover in paragraph 24 of R(S) 1/85 the learned Commissioner cast doubt on the correctness of reported Commissioner's decision R(S) 9/55, in which it had been held that an absence from Great Britain of three years and nine months by the claimant, who was undergoing treatment for tuberculosis in Switzerland, was still temporary.

7. At the hearing before me on 18 November 1992, both Mr Drabble and Mr Griffiths submitted that the Akbar decision was binding on the statutory authorities but with varying degrees of emphasis. In effect Mr Drabble submitted that the whole of the Akbar judgment bound the statutory authorities. Mr Griffiths however submitted that Hodgson J. was wrong in his statement (at page 11, E-F of the transcript), "I can see no reason of policy or fairness why the word 'temporarily' should not be given its primary meaning of 'not permanently'. Mr Griffiths submitted, moreover, that not only was that statement wrong in law but was also obiter, with the result that it did not bind the statutory authorities.

8. Despite the concurrence of both Mr Drabble and Mr Griffiths that the Akbar decision to some extent bound the statutory authorities, I ought to deal fully with this matter from my own independent researches as it is a matter of considerable importance in social security law generally. I have therefore considered not only the two social security decisions cited to me by the parties but I have also considered a number of decisions of the Supreme Court on the same point. The social security authorities are but two in number. In R(SB) 52/83, a decision of a Tribunal of Commissioners, the Tribunal, after having held that a decision of a Divisional Court on certiorari from a supplementary benefit appeal tribunal was not binding on the Social Security Commissioners because the jurisdiction was co-ordinate then went on to add,

> "Where there has been a ruling of the Divisional Court in exercise of any other of their jurisdictions e.g. on

certiorari from a Commissioner, then of course we regard the rulings of that Court as binding on us (see the statement of a Tribunal of Commissioners to this effect in R(I) 12/75) paragraph 22). In this connection we might usefully add that a Commissioner's refusal of leave to appeal is of course subject to judicial review, when appropriate (Bland v. Chief Supplementary Benefit Officer [1983] 1 All E.R. 537, C.A. at 541 - Decision R(SB) 12/83 Appendix). However the Divisional Court's powers are, in our judgment, limited to setting aside the Commissioner's refusal to grant leave, the practical effect of which is that the Commissioner will grant leave and then proceed to deal with the appeal. The Divisional Court does not itself have jurisdiction to hear the appeal, that being the function which Parliament has entrusted exclusively to the Commissioner."

I should add that paragraph 22 of R(I) 12/75, above referred to, merely referred to the Social Security Commissioners being bound by a decision of "the High Court and Superior Courts".

9. In R(SB) 6/85, Appendix, the Court of Appeal affirmed the decision of a Tribunal of Commissioners that a decision of the High Court on law on an appeal under the Tribunals and Inquiries Act 1971 from a supplementary benefit appeal tribunal was not binding on the Commissioners because the jurisdiction was co-ordinate. At pages 605H and 606A, however, the Court of Appeal added,

> "A distinction has to be drawn between decisions of the High Court exercising its supervisory jurisdiction" [eg on certiorari or judicial review] "which are, and always have been, binding on the Commissioners and the particular jurisdiction conferred on the High Court by the [Tribunals and Inquiries Act 1971] ... The supervisory jurisdiction of the High Court is wide and discretionary."

10. Although the point in issue now before me was not directly in issue in the security decisions referred to above, I consider that other authority generally compels me to the conclusion that the decision of a Divisional Court is binding upon the statutory authorities.

11. I will deal briefly with the cases. In Police Authority for Huddersfield v. Watson [1947] 1 K.B. 842 (D.C.) at page 848, Lord Goddard L.C.J. said of a "judge of first instance" that, "he is only bound to follow the decisions which are binding on him, which, in the case of the judge of first instance, are the decisions of the Court of Appeal, the House of Lords, and the Divisional Court." In Ettenfield v. Ettenfield [1939] P. 377, at p.380, Langton J. held that he was bound by a decision of the Divisional Court, even though in a Division of the High Court different from the particular Division in which the Judge sat. In R v. Greater Manchester Coroner, ex parte Tal [1985] 1 Q.B. 67, a strong Divisional Court considered in detail the nature of a decision of a Divisional Court pointing out that

there is "no court known as the 'Divisional Court'" [1985] 1 Q.B. at 79. They concluded that a Divisional Court exercising a supervisory jurisdiction must follow the "stare decisis" principle of binding precedent. They also noted that in so far as the Divisional Court was exercising a supervisory jurisdiction over "inferior tribunals", a technical phrase which would include the statutory authorities, "the requirement that an error of law within the jurisdiction must appear on the face of the record is now obsolete" [1985] 1 Q.B. at p.82. The whole judgment offers considerable guidance on the rules of precedent in relation to a Divisional Court and the nature of its supervisory jurisdiction over inferior tribunals.

12. I therefore hold that the decision of Hodgson J. in the Akbar case is binding on the statutory authorities. It must now be determined to what extent the actual words of that decision bind those authorities. Mr Drabble submitted in effect that the whole of the decision was binding. He summarised it as holding (i) that long periods of indefinite absence may be regarded as "temporary" and (ii) that the word "temporarily" should be given its primary meaning of "not permanently". On the other hand Mr Griffiths submitted that that part of the judgment of Hodgson J. (page 11E-F) which held that "temporarily" should be given its primary meaning of "not permanently" was obiter and therefore not binding on the statutory authorities. In support of that, he pointed to a subsequent part of Hodgson J's decision (page 13 A-C) where the learned Judge said,

> "The Commissioner's decisions cited to him clearly show there is considerable doubt and conflict as to how the phrase 'temporarily absent' should be construed. Comparison of [R(S) 9/55 with R(S) 1/85] demonstrates this clearly. I have myself no doubt that this conflict should be authoritatively resolved as soon as possible. To my mind this factor alone should have persuaded the Commissioner to grant leave."

13. Mr Griffiths argued that, as the learned Judge spoke of a conflict needing still to be authoritatively resolved, it must follow that what he had said as to "temporarily" meaning "not permanently" was only obiter, particularly bearing in mind that he had also said (pages 8-9),

> "It is, I think, obvious that, in applying one of the principles laid down by the Court of Appeal I am concerned only with the refusal of leave. If I conclude that the decision of the Tribunal was on its face erroneous in law and that the Commissioner could only have refused leave because she fell into the same error, that will in no way be binding upon a Commissioner when he or she comes to consider the appeal."

At page 13E the learned Judge said:-

> "I end by making it clear once again that my decision is not, in any way, binding upon the Commissioner who tried

this appeal."

14. I hold that those caveats by the learned Judge do not prevent the whole of his decision (including that part equating temporarily with not permanently) is binding on the statutory authorities. All that the learned Judge was saying was that, although he considered the tribunal had shown an error of law in its reasoning and that therefore the Commissioner was wrong in not granting leave to appeal, he himself would not actually be deciding the appeal, that being a function reserved to the Social Security Commissioner (compare paragraph 12 of R(SB) 52/83). The learned Judge was merely stating that his decision did not necessarily imply that the Akbar appeal itself must succeed (hence his citation of Slade L.J. in the Connolly case at pages 7G-H and 8A-C of the transcript). But all his rulings on the relevant principles of law are nevertheless binding. It follows that in so far as any earlier reported Commissioner's decisions, eg. in particular R(S) 9/55, are inconsistent with the rulings as to principle in the whole of Hodgson J.'s judgment then they are no longer good law and the judgment of Hodgson J. must prevail.

15. It follows from this that I do not need to rule on the alternative submissions that were made to me on behalf of the various parties as to what should in fact be the correct test of temporary absence if the decision of Hodgson J. in the Akbar case were not binding. I expressly decline to do so. Henceforth the guidance necessary in these cases must be found by the statutory authorities in the decision in the Akbar case itself, as I have indicated above.

APPENDIX II

IN THE HIGH COURT OF JUSTICE CO/0202/90

QUEEN'S BENCH DIVISION

Royal Courts of Justice,

Monday, 28th October 1991.

Before:

MR. JUSTICE HODGSON

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Crown Office List

THE QUEEN

-v-

SOCIAL SECURITY COMMISSIONER

Ex parte JAVED AKBAR

- - - - - -

(Computer aided transcript of the Stenograph Notes of Marten Walsh Cherer Ltd., Pemberton House, East Harding Street, London EC4A 3AS. Telephone Number: 071-583 7635. Shorthand Writers to the court.)

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MR. RICHARD JOHN BLOOR DRABBLE (instructed by Messrs. Sharpe Pritchard, London agents for Messrs. Ingham and Bridge of Burnley) appeared on behalf of the Applicant.

MR. WILLIAM ROBERT GRIFFITHS (instructed by The Solicitor, The Department of Social Security) appeared on behalf of the Respondent.

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J U D G M E N T
(As approved by Judge)

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MR. JUSTICE HODGSON: Jarved Akbar seeks judicial review of a decision of Mrs. Commissioner Heggs refusing him leave to appeal from the decision of the Burnley Social Security Appeal Tribunal made on 17th March 1989. Refusal of leave was notified by letter dated 16th November 1989. The relief sought is certiorari to quash.

The case raises a short but important point as to the proper construction of Regulation 2 of the Social Security Benefit (Persons Abroad) Regulations 1975 statutory instrument 1975 No.563 (as amended). The question raised is: What is the proper meaning of the words "being temporarily absent" in the Regulation.

The facts appear from paragraph 5 of the Adjudication.

> "The claimant who is a 39 year old man became incapable of work on 1.12.86 due to depression and pain right side of head. He claimed and was paid statutory sick pay by his employer up to and including 18.6.87. He then claimed and was awarded invalidity pension from 19.6.87. On 10.9.87 the claimant advised his local office of the Department that he was going to Pakistan on 1.11.87 to visit and to try and clear his depression. He also advised that his absence would be temporary and that he would return to the United Kingdom on 1.2.88, but added that he would notify the Department if his absence was longer.
>
> As his absence was not to exceed 3 months, the local office continued to pay invalidity pension by means of an order book. The claimant was still abroad at that date and the papers were therefore referred to the Department's Overseas Branch, who issued a questionnaire to him on 16.5.88.
>
> In reply to the questionnaire, Mr. Akbar advised that he definitely intends to return to Great Britain, but could not give a precise date, as this depended upon the progress of the medical treatment.
>
> His claim was then referred to the Adjudication Officer

at the Department's Overseas Branch who accepted, on the evidence, that the claimant's absence was temporary up to and including 31.8.88, and benefit continued to be paid.

In response to a questionnaire issued to him on 7.9.88 the claimant replied on 25.9.88 advising that it was still his intention to return to Great Britain but could not give a precise date of return as this depended on the progress of his treatment.

The claim for benefit was again referred to the Adjudication Officer who decided that the claimant's absence from Great Britain could no longer be considered temporary and disqualified him for receiving invalidity pension from 1.9.88 to 13.10.88 (both dates included).

The Adjudication was issued on 20th October 1988 and, on the same day, the applicant intimated his intention to appeal. He did so in these words:

> "I was really surprised to learn that I have been disqualified from receiving invalidity pension from 1st September 1988, while I am still sick and undergoing medical treatment and to this effect regular sick notes are being sent to you. Secondly how do you say or reach this conclusion that my stay in Pakistan is not temporary. My absence from Great Britain is certainly temporary. It is only because of illness that I have not been able to return to England so far. The moment I feel relieved, I will definitely come back to England.
>
> In case you do not intend releasing my pension from the 1st September - 13th October 88, then please give me general explanation which will help me making an appeal to the independent tribunal. Thanks."

He attached a sick note for the period.

The appeal was heard by the Tribunal and its decision was promulgated on 17th March 1989. It was a majority decision, Mr. T. Fallows dissenting. By the date of the hearing the applicant had returned to the United Kingdom on 9th February 1989. The Tribunal upheld the Adjudication Officer's decision to disqualify the applicant for the period

from 1st September 1988 to 13th October 1988 and decided the referral in respect of the period 14th October 1988 to 4th January 1989 against the applicant. As already recorded the applicant sought and was refused leave against the Tribunal's decision. The Commissioner gave no reasons for her refusal.

The relevant statutory provisions are contained in the Social Security Act 1975 and the Regulations made thereunder.

Invalidity pension is a Contributory Benefit payable under the Act (see s.12). Section 15(1) provides so far as it is relevant.

> ".... where in respect of any period of interruption of employment a person has been entitled to sickness benefit for 168 days (including, in the case of a woman, any day for which she was entitled to a maternity allowance), then --
> (a) he shall cease to be entitled to that benefit for any subsequent day of incapacity for work falling within that period; and
> (b) he shall be entitled to an invalidity pension for any day of incapacity for that period for which, by virtue only of paragraph (a) above, he is not entitled to sickness benefit if on that day either --
> (i) he is under pensionable age, or ....

Section 82(5) provides:

> "Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit, and an increase of benefit shall not be payable in respect of any person as the beneficiary's wife or husband, for any period during which the person --
> (a) is absent from Great Britain ....

The relevant Regulation is 2(1). Again, so far as it is relevant it reads:

> "A person shall not be disqualified for receiving .... invalidity benefit, ... by reason of being temporarily absent from Great Britain for any day if --
> (a) the Secretary of State has certified that it is consistent with the proper administration of the Act

that subject to the satisfaction of one of the conditions in subparagraphs (b),(bb),(c) and (d) below, the disqualification under section 82(5)(a) of the Act should not apply, and

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

(bb) in the case of sickness benefit and invalidity benefit, the incapacity for work is the result of a personal injury of a kind mentioned in section 50(1) if the Act, and the absence is for the specific purpose of receiving treatment which is appropriate to that injury, or

(c) on the day on which the absence began he was, and had for the past 6 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, or

(d) in the case of severe disablement allowance, he is absent only by reason of the fact that he is living with a serving member of the forces and is the spouse, son, daughter, father, father-in-law, mother-in-law, mother or mother-in-law of that member."

The certificate of the Secretary of State and the conditions in (b) to (d) are separate requirements. Subsection (a) is not in issue in this case. The applicant qualified under (c).

The Tribunal gave its reasons in paragraph 4 of the decision:

> "We considered the appellant's circumstances in R(S)1/85. The appellant was in Pakistan for approximately 15 months. He had returned to his old home and to his parents and had taken his family with him. He was unable to indicate to enquiries from the DSS in May 88 and also in September 1988 .... when he would return to the UK.
>
> During the period under appeal we consider that the appellant's stay in Pakistan had become indefinite. It could no longer therefore be regarded as temporary."

Accordingly the appellant is disqualified from receiving the invalidity pension from 1.9.88 to 13.10.88 (both

dates included) because the appellant's absence from Great Britain was not temporary.

It was common ground, we agree, that if the finding of this tribunal was that the appellant's absence was not temporary for the period above stated then it followed, and we so decide that Invalidity Pension is not payable either for the period 14.10.88 to 4 January 1989 (inclusive) because the appellant's absence from Great Britain was not temporary."

Mr. Fallows gave these reasons for his dissent:

"Mr. Akbar was encouraged to go to Pakistan by his doctor, mainly to help clear one of his medical conditions(depression). He bought a ticket in July 1988 in Pakistan with a view to returning to England. He was advised that he was not fit enough to travel. His doctors could not tell him when he would be able to travel. He returned on 9.2.89 when clearance to travel was given. Accordingly in my view he was at all times temporarily absent from Great Britain and forfills the conditions of the Regulations."

I have first to consider how I shall approach my task. Section 101(1) of the 1975 Act provides for an appeal from a Tribunal to a Commissioner on the ground that the decision of the Tribunal was erroneous in point of law. Appeal from the decision of a Commissioner lies directly to the Court of Appeal. Appeal to a Commissioner lies only with leave. In refusing leave a Commissioner is specifically exempted from the requirement, under section 12(1) of the Tribunals and Inquiries Act 1971, to give reasons (see article 2 of the Tribunal and Inquiries of the Social Security Commissioners order for 1980). There is no appeal to the Court of Appeal from a Commissioner's refusal to give leave. A refusal to give leave can therefore only be attacked by an application for judicial review.

In R.v. Secretary of State for Social Services ex parte Connolly [1986] 1 WLR 421 the Court of Appeal laid down the principles which this court should apply in considering an application for judicial review of a refusal of leave. In that case, unlike this, an attack was made on both the decision making body and the Commissioner, who, as here, gave no reasons. At page 430 C to F Slade LJ stated the issues:

> "I now revert to the instant case. The application for leave to apply for judicial review seeks review, not only of the ruling of the commissioner refusing leave to appeal against the decision of the board dated 11 May 1983, but also review of the board's decision itself the jurisdiction of the court to grant either form of relief has not, I think, been disputed before us. Nevertheless, I think the primary question must be whether this is a proper case for the court, in the exercise of its discretion, to grant judicial review of the commissioner's ruling refusing leave to appeal.
>
> The latter question, in my opinion, itself gives rise to three issues. (1) Should the commissioner in refusing leave have given reasons for his refusal? (2) What is the proper inference to be drawn from the omission of a commissioner to give reasons in refusing leave in cases such as this? (3) In the light of its answers to the first two issues, is this a proper case for the court to interfere with the ruling of Mr. Commissioner Monroe?"

Having held that the Commissioner was in no way at fault in not giving reasons Slade LJ turned at 432 C the second issue.

> "What then is the proper inference to be drawn from the omission of a commissioner to give reasons in refusing leave in a case such as this? As appears from the passage in his judgment which I have already quoted, the judge considered that the only proper inference to be drawn in the present case was that the commissioner considered that no substantial point of law was involved which would or could result in a different decision from that which was reach be the board. If the commissioner had had other reasons, the judge thought he would have expressed them. Mr. Dabble, on behalf of the applicant

submitted that the proper inference is that the commissioner refused leave in the belief that there was no arguable or alternatively no substantial point of law. On that footing, he submitted, the commissioner was plainly wrong in refusing leave, because there plainly was an arguable point of law.

I do not think that either of these inferences is necessarily the correct one to be drawn in a case where a commissioner refuses leave without giving reasons. If an applicant presents to him an arguable, even substantially arguable, point of law, it may still, in some circumstances, substantially arguable, point of law, it may still, in some circumstances be open to th commissioner to refuse leave in the proper exercise of his discretion, for example, if he is satisfied that the point of law will have no effect on the final outcome of the case.

In a case where a commissioner has refused leave to appeal without giving reasons and an applicant seeks to challenge such refusal by way of judicial review, the onus must, in my judgment, lie on the applicant to show either (a) that the reasons which in fact caused the commissioner to refuse leave were improper or insufficient, or (b) that there were no good grounds upon which such leave could have been refused in the proper exercise of the commissioner's discretion. He may well discharge this onus by showing that the decision sought to be challenged was on the face of it clearly erroneous in law or, alternatively, gave rise to a substantially arguable point of law. However, if it can be seen that there are still good grounds upon whi the commissioner could have been entitled to refuse leave in the proper exercise of his discretion, the court should, in my opinion, assume that he acted on those grounds unless the applicant can point to convincing reasons leading to a contrary conclusion."

I should also refer to the way in which the Court of Appeal dealt with the direct attack on the Board's decision (an attack not made in this case). At page 436, letters A to D, Slade LJ said:

"I would only add a few word on the alternative claim by the applicant for a judicial review of the decision of the board given on 11 May 1983 -- in addition to or instead of a review of the refusal of leave to appeal. In my view, where Parliament has provided for an

appellate structure, the High Court should be very slow to intervene before the statutory machinery for appeals has been exhausted; it should do so, if at all, only for the purpose of ensuring that in an appropriate case this procedure is followed in accordance with the law. If the High Court were to make an order quashing the decision reached at an intermediate level in this appellate structure, it would almost inevitably be interfering with the statutory machinery. Thus in the present case, if we had come to the conclusion that it was likely that the board had misdirected themselves in law, it seems to me that the right course would have been for us to have quashed the order refusing leave to appeal, but to have left the determination of the correctness of the decision by the board to the commissioner, rather than to pre-empt the commissioner's determination by quashing the decision ourselves. There may be cases where the quashing of both decisions would be appropriate, but they are likely to be rare."

In this case Mr. Drabble on behalf of the applicant submits that the decision of the Board was, on its face, clearly erroneous in law. Alternatively he submits that the decision gave rise to a substantially arguable point of law. For the respondent Mr. Griffiths submits that no point of law is involved at all; that the decision of the Tribunal is one of fact and degree. Alternatively, if there was an error in law or arguably error in law or aguable error in law he argues that there are still good grounds on which the Commissioner would have been entitled to refuse leave in the proper exercise of her discretion and that I should assume in her favour that it was on those good grounds that she refused leave.

It is, I think, obvious that, in applying one of the principles laid down by the Court of Appeal I am concerned only with the refusal of leave. If I conclude that the

decision of the Tribunal was on its face erroneous in law and that the Commissioner could only have refused leave because she fell into the same error, that will in no way be binding upon a Commissioner when he or she comes to consider the appeal. Even more obviously this will be the case if I decide only that there was a substantially arguable point of law.

I have to consider three questions:

1. Has the applicant shown that the Tribunal's decision was on its face wrong in law?
2. If that is not shown was the decision arguably wrong in law?
3. Were there any good grounds which could justify the Commissioner's decision although she herself was of the opinion that either the Tribunal erred in law or arguably so erred?

Before considering whether the Tribunal fell into an error of law it is necessary to decide what the ratio decidendi of its decision was. I do not think this presents any problem at all. Having, in paragraph 2, adopted the adjudication officer's summary of facts and added those facts which have occurred since, including the applicant's return to the United Kingdom since the adjudication, the Tribunal gave its reasons. I set them out again:

> "We considered the applicant's circumstances in the light of the decision in R(s)1/85. The appellant was in Pakistan for approximately 15 months. He had returned to his old home and .... had taken his family with him. He was unable to indicate to enquiries from the DSS in May 1988 and also in September 1988 .... when he would

return to the UK.

> During the period under appeal we consider that the appellant's stay in Pakistan had become indefinite. It could no longer therefore be regarded as temporary.
>
> Accordingly the appellant is disqualified ....".

It seems to me clear that the Tribunal was of the opinion that an absence under Regulation 2 ceased to be temporary if it became "indefinite". That this is so becomes even clearer when one looks at the reasons for decision of the Commissioner in the case relied upon by the Tribunal. In paragraph 2 of the holding the head note reads:

> "Although initially intended to be 'temporary', an absence may cease to count as such if by force of circumstances no certain time can be set as to when it will terminate. An indefinite absence is not temporary."

It follows that, in the opinion of the Tribunal, a temporary absence must, when it begins, contemplate a definite end. In my judgment that cannot be correct. I can see no warrant for importing into the Regulation any such qualification to the ordinary English word "temporary". I do not myself think that one need do more than look at the Regulation itself to see that the Tribunal's reasoning must be wrong. "Temporarily absent" must have the same meaning throughout the Regulation. But it is clear the "absence" provided for in (b), (bb) and (d) are, or in the case of (d) may well be indefinite when the absence begins.

It seems to me that the scheme and purpose of the legislation is clear and fair. Section 82 lays down the

general rule that benefit will only be paid to people in the United Kingdom, to people who are in the care and responsibility of the United Kingdom Welfare State. Regulation 2 corrects what, in the case of a long term benefit to which the claimant has contributed, would otherwise be unfair. Sub-paragraph (b) prevents disqualification when the claimant's position is changed only because he is having necessary treatment abroad rather than in the United Kingdom. Sub-paragraph (bb) provides for the case where he becomes incapacitated while absent and sub-paragraph (d) when his only reason for absence is that he is living with a relative who is a serving member of the forces. Sub-paragraph (c) equally equates the position of the claimant to that which would appertain if he had continued to be in the United Kingdom.

It would have been possible to have left out of the Regulation the word "temporarily" but the legislature clearly thought that the entitlement should end if a claimant severed his ties with the United Kingdom permanently. I can see no reason of policy or fairness why the word "temporarily" should not be given its primary meaning of "not permanently".

Once that meaning of "temporary" is accepted then, of course, it is a matter of fact and degree whether what was temporary has become permanent and many factors will have to be taken into account. Primarily, but not conclusively, must be the claimant's intention but as was pointed out in argument, and in one decision of a Commissioner cited to me,

circumstances may arise which objectively make it impossible for the claimant to return no matter how much he may wish and intend to do so. There may be many factors which would lead an adjudication officer to decide that an absence has become permanent even when the claimant protest his intention to return; he may not be believed because he has not returned even though his treatment has ended. It is not, I think, helpful to try to lay down strict rules as to when a temporary absence becomes permanent. I am however of the firm opinion that merely because an absence is or becomes indefinite that does not necessarily mean that it has also become not temporary.

It follows that, in my judgment, the Tribunal's decision was, on its face, wrong in law.

I should perhaps add in parenthesis that if the Tribunal had approached the facts on a proper legal basis and still disqualified the applicant such a decision would, in my judgment, have given rise to a substantial argument that it was Wednesbury irrational. In a sense it follows that I am of the opinion that there is substantial argument that the Tribunal fell into error. In adding this avenue of attack upon a refusal of leave Slade LJ highlighted the important distinction between granting leave to appeal and deciding an appeal. In this jurisdiction it is a distinction which is very clearly understood. When the Commissioner's leave was sought there was already a substantial body of contradictory

authority on this point. I have been taken through some seven reported and unreported decisions. They clearly show there is considerable doubt and conflict as to how the phrase "temporarily absent" should be construed. Comparison of Regulation (s)9/55 with Regulation (s)1/85 demonstrates this clearly. I have myself no doubt that this conflict should be authoritatively resolved as soon as possible. To my mind this factor alone should have persuaded the Commissioner to grant leave.

I have considered carefully whether there is any ground which would have justified the Commissioner in refusing leave even though she thought that the Tribunal had erred in law or that it was substantially arguable that it had. Mr. Griffiths has tried to persuade me that there are, but I am wholly unable to think of one.

It follows that this application succeeds and the Commissioner's decision must be quashed. I end by making it clear once again that my decision is not, in any way, binding upon the Commissioner who tried this appeal.

MR. LITTON (for Mr. Drabble): I would ask for the costs and legal aid taxation.

MR. GRIFFITHS: I cannot oppose that my Lord.

MR. JUSTICE HODGSON: Payment of the costs.

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