Temporarily Absent Norm GIS in Persons Abroad Regs Rep – meaning thereof.

MJG/SH/9

Commissioner's File: CS/253/1990

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Mohammed Din

Appeal Tribunal: Newcastle

Case No: 1:40:07879

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 17 August 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 aged 54 at the relevant time. The appeal is against the unanimous decision of the social security appeal tribunal dated 17 August 1990, which dismissed the claimant's appeal against a decision of the local adjudication officer issued on 28 February 1990 in the following terms,

> "I have reviewed the decision of the Adjudication Officer awarding invalidity pension from and including 13 April 1989 because the claimant no longer satisfies the requirements for entitlement to benefit. [Social Security (Claims and Payments) Regulations 1987, regulation 17(4)]. In respect only of the period from and including 1 January 1990 my revised decision is as follows:-

[The claimant] is disqualified for receiving invalidity pension from and including 1 January 1990 because his absence from Great Britain is not temporary. [Social Security Act 1975, section 82(5)(a). Social Security Benefit (Persons Abroad) Regulations [1975], regulation 2(1)]."

3. This appeal was one of three heard before me at a hearing on 18 November 1992. I have given decisions on the other two appeals on files CS/140/1991 and CS/301/1991. However, common

to all three appeals was the question of the effect of the Akbar decision (reproduced in full in Appendix II to this decision and discussed in Appendix I to this decision). Consequently I have set out a common Appendix I to all three decisions, including this one, and the new tribunal will need to have detailed regard to the guidance as to the law contained in Appendix I.

4. As the new tribunal will have to conduct an entire new rehearing, I will not go in detail in the facts here as they will have to be ascertained by the new tribunal in relation to the period of the claimant's absence in Pakistan.

5. I should explain that I have set the original tribunal's decision aside because, although they clearly took considerable trouble with the case (handicapped as they were at that stage by the claimant not being present in this country), their reasons do not discuss the principles of law involved. In any event those principles must now be interpreted in the light of the Akbar decision, which like any other appellate decision does of course have 'retrospective' effect. For that reason the tribunal's decision must be set aside.

(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.