SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *44/99

(Commissioner's File No.: CS/15000/96)

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CS/15000/1996

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Sutton C social security appeal tribunal dated 12 December 1995 is erroneous in point of law, for the reason given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraphs 24 and 25 below (Social Security Administration Act 1992, section 23(7)(b)).

2. The general circumstances are set out in the appeal tribunal's findings of fact (I have corrected some typing errors):

> "1. The claimant who is aged 59 came to England from Morocco in 1966 when he was aged 29 and since then has lived in England when not at sea with the British Merchant Navy, in which he served for some 17 years until made redundant in October 1991.
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> 2. He has been married twice. His first wife who died lived in England only for 3 months before returning to Morocco where she gave birth to the only child of the marriage a girl aged 14 who lives in Morocco with relatives.
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> 3. In 1981 or 1982 the claimant married his present second wife Rhimo Torara in Morocco. He was then in the British Merchant Navy. His wife has never lived in England and has always lived in Morocco. There are 5 children of the marriage all of whom live with their mother in Morocco. Neither the wife nor the children speak English.
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> 4. The claimant came to England in 1966 with the intention of getting work here which he did until October 1991. From October 1991 he has been unemployed and claiming benefit. he lives in a room in a bed and breakfast hotel. His intention is to return to Morocco when he reaches retirement age, ie 65. Through the years he has visited his family in Morocco when he could afford to do so and has sent money to them. It has never been his intention to bring his family to live with him in England because he takes the view he could not house and maintain them in England. He has not seen his wife or children for the past 4 years. He cannot afford to return to Morocco.
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> 5. The claimant has been receiving invalidity benefit from 8 February 1994. He suffers from depression.
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> 6. On 20 February 1995 he completed a form BF 225 claiming an increase of invalidity benefit for his wife, Rhimo

> Torara. On the form he stated that his wife did not live with him and that they did not normally live at the same address."

3. The adjudication officer's decision was that the claimant was disqualified for receiving an increase of invalidity benefit for his wife from and including 22 August 1994 because she was absent from Great Britain and not residing with the claimant.

4. That decision was made by reference first to section 113(1) of the Social Security Contributions and Benefits Act 1992:

> "(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--
> (a) is absent from Great Britain;"

That general rule would disqualify the claimant for receiving the increase of invalidity benefit, but it is modified by regulation 13 of the Social Security Benefit (Persons Abroad) Regulations 1975 ("the Persons Abroad Regulations"):

> "13. A husband or wife shall not be disqualified for receiving any increase (where payable) of benefit in respect of his or her spouse by reason of the spouse's being absent from Great Britain, provided that the spouse is residing with the husband or wife, as the case may be."

Then regulation 2(1) and (4) of the Social Security Benefit (Persons Residing Together) Regulations 1977 ("the Persons Residing Together Regulations") provides:

> "(1) As respects any requirement of the Act, or contained in any provision made for the purposes thereof, any question as to whether--
> (a) a person is or was residing with another person; or
> (b) persons are residing together,
> shall be determined in accordance with the following provisions of this regulation.
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> (4) Subject to the foregoing provisions of this regulation [not relevant in the present case], two persons shall not be treated as having ceased to reside together by reason of any temporary absence the one from the other."

Under section 83(2)(b) of the Social Security Contributions and Benefits Act 1992, an increase of invalidity benefit was payable to a claimant for his wife (a) for any period during which he was residing with her; or (b) during which he was contributing to her maintenance at a weekly rate at least as high as the amount of the increase and his wife's earnings did not exceed that amount.

5. An appeal was made against the adjudication officer's decision on the claimant's behalf, on the ground that he was still residing with his wife as they were not permanently separated. Commissioner's decision CSS/18/1988 was mentioned. The adjudication officer's submission was that, as the absence from one another of the claimant and his wife had been for a substantial period and there was no reasonable prospect of its coming to an end, it could not be said to be temporary.

6. The appeal tribunal disallowed the appeal. It set out the factors to be considered on temporary absence as "the duration of the absence from each other; the parties' intentions and the purpose of the absence from each other viewed in the light of the particular facts of the case". It said, after referring to a number of Commissioners' decisions, that each case had to be decided on its own particular facts. Then, after setting out the circumstances it considered relevant, it concluded that the claimant and his wife were not temporarily absent from each other and that his wife could not be said to be residing with the claimant within the meaning of regulation 13 of the Persons Abroad Regulations. Accordingly, the general disqualification in section 113(1) applied.

7. The claimant now appeals against the appeal tribunal's decision, with leave granted by a Commissioner. The ground is that the appeal tribunal did not take into account the effect of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 ("the Cooperation Agreement"). In particular, it is said that the claimant is protected by Article 41(1) of the Cooperation Agreement:

> "Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed."

8. Following some exchanges of written submissions, there was an oral hearing of the appeal on 12 November 1998. The claimant was represented by Mr Andrew Matheson of the Welfare Rights Unit of the National Association of Citizens Advice Bureaux. The adjudication officer was represented by Mr Jeremy Heath of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their thorough and helpful submissions. Following the oral hearing, I directed that there should be further written submissions on a consequential issue, which would also give the Secretary of State an opportunity to make submissions on the issue of justification of indirect discrimination. There has inevitably been some delay while those submissions were made. Apologies are due to the parties, and to the claimant in particular, for the further delay

before my decision was prepared.

9. Although this was not accepted at an earlier stage in the appeal, it is now not disputed that Article 41(1) of the Cooperation Agreement has direct effect, as it lays down in clear, precise and unconditional terms a prohibition of discrimination, on the grounds of nationality, in the field of social security against workers of Moroccan nationality. That was decided by the European Court of Justice in Office National de l'Emploi v Kziber (Case C-18/90) [1991] ECR I-199, Yousfi v Belgian State (Case C-58/93) [1994] ECR I-1353 and Hallouzi-Chouho v Bestuur van de Sociale Verzekeringsbank (Case C-126/95) [1996] ECR I-4807 (confirmed in Krid v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (Case C-103/94) [1995] ECR I-719 and Babahenini v Belgian State (Case C-113/97) [1998] ECR I-183 on the identical provision in the Algerian Cooperation Agreement).

10. Paragraph 27 of the judgment in Kziber (applied in paragraph 21 of the judgment in Yousfi) lays down that the concept of "worker" in Article 41(1) covers both active workers and those who have left the labour market after reaching pension age or after becoming a victim of the materialisation of one of the risks conferring entitlement to benefit in the field of social security covered by the Cooperation Agreement. The claimant in the present case comes within the personal scope of the Cooperation Agreement as his employment was interrupted by the materialisation of the risk of unemployment, which has now been overtaken by that of invalidity. It is plain from the same authorities that invalidity benefit comes within the field of social security, which phrase has to be interpreted by analogy with its meaning in Council Regulation (EEC) No 1408/71. So does incapacity benefit, which has replaced invalidity benefit. I am also satisfied that the question of entitlement to an allowance for a spouse, as part of the calculation of the amount of an invalidity benefit, falls within the field of social security for the purposes of the Cooperation Agreement.

11. All that being so, it follows that the appeal tribunal erred in law in not considering whether the result of the application of the British legislation to the claimant was contrary to Article 41(1) of the Cooperation Agreement. The members of the appeal tribunal of course cannot be faulted personally for that, because no-one had brought the existence of the Cooperation Agreement to their attention and it is not mentioned in the standard books available to them. Nonetheless, it is an error of law which requires me to set the appeal tribunal's decision aside. Therefore, I do not need to consider whether there was any error of law in the application of the British legislation. Despite some criticisms by Mr Heath, it seems to me that the appeal tribunal came to a conclusion there which it was entitled to reach on the evidence before it (especially in the light of the Court of Appeal's decision in Chief Adjudication Officer v Din and others (16 March 1994), appendix to R(S) 1/96) and

explained clearly why it had done so.

12. That leaves the difficult question of whether the claimant could be said to be discriminated against on the grounds of his nationality by the effect of the British legislation in a way which was contrary to Article 41(1) of the Cooperation Agreement. At the oral hearing, Mr Heath asked for an opportunity, if I thought that this question arose, for a submission to made on the issues of discrimination and objective justification, after taking instructions from the Secretary of State. That opportunity was given and a submission dated 16 December 1998 was made on behalf of the Secretary of State.

13. It was submitted by the Secretary of State that the claimant's wife was not within the personal scope of the Cooperation Agreement and therefore could not rely on it to claim a personal right to benefit. I agree, but I do not agree that in the present case the claimant was claiming a personal benefit on his wife's behalf. He was claiming an increase in his own personal benefit. It is irrelevant that his wife fell outside the personal scope of the Cooperation Agreement.

14. The effect of Article 41(3) must be considered, although not specifically mentioned in the Secretary of State's submission. It provides:

> "3. The workers in question shall receive family allowances for members of their family as defined above."

Is an increase of invalidity benefit for a spouse a "family allowance" for this purposes, and, if so, does Article 41(3) restrict the benefit of Article 41(1) and (3) to cases where the spouse is living with the claimant in the United Kingdom? As noted above, it has been held that the term "social security" in the Cooperation Agreement bears the same meaning as in Regulation 1408/71. It is therefore proper to look at the terms of Regulation 1408/71, there being no definition of "family allowances" in the Cooperation Agreement itself. The definition in Article 1(u)(ii) of Regulation 1408/71 is:

> "periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family;"

It seems to me that increases of invalidity benefit for a spouse do not come within that definition. The payment of the increase depends on the claimant's own entitlement to invalidity benefit and is also subject to rules about the earnings of the spouse. That conclusion is confirmed by Article 39(4) of Regulation 1408/71, mentioned by Mr Matheson in his submission dated 13 February 1997. Article 39(4) deals with cases where the amount of an invalidity benefit is to be determined taking into account the existence of members of the family other than children, and plainly contemplates that as part of invalidity benefit and not

as a family allowance. Thus, I am satisfied that Article 41(3) of the Cooperation Agreement does not apply to the present case.

15. The Secretary of State's submission on discrimination was as follows:

> "18. Ss. 83 and 113 [of the Social Security Contributions and Benefits Act 1992] and reg. 13 [of the Persons Abroad Regulations] apply equally to nationals and non-nationals. They are therefore not directly discriminatory.
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> 19. Furthermore, the Secretary of State does not concede that these provisions disproportionately affect non-UK nationals. The 'residing with' requirement in s. 83, unlike the provision in issue in Case C-237/94 O'Flynn [1996] ECR I-2617, does not disproportionately affect non-UK nationals, who are just as likely as UK nationals to live apart from their wives. In any event, it is plainly justifiable for the UK to pay dependency increases only in respect of those who can show that they are genuinely dependent on the recipient of benefit. As regards additional conditions placed on those who are absent abroad, in R(S) 2/93 Commissioner Hoolahan held that it was not discriminatory to deny SB to EEC Nationals who were absent from Great Britain: the appropriate 'pool' of comparison was not recipients of SB generally but those who were absent from Great Britain, and non-UK nationals would not predominate in that pool. Similarly, in this case, there would be no discrimination against Moroccan nationals whose spouse was absent from Great Britain if the appropriate comparison was with 'UK nationals whose spouse is absent from Great Britain'."

16. There is no dispute that paragraph 18 of that submission is correct. However, paragraph 19 does not come to grips with the nature of the indirect discrimination put forward on behalf of the claimant or with the test which the ECJ requires to be applied.

17. In my judgment, the arguable indirect discrimination stems from the position put so clearly in paragraph 7 of the Secretary of State's submission, that "the combined effect of s. 83 and s. 113 [plus regulation 13 of the Persons Abroad Regulations] was that a man receiving Invalidity Benefit was entitled to an increase in respect of his wife if he resided with or supported her; but if she was absent abroad, such an increase was only payable if he resided with her". There is thus a difference in effect according to whether or not the claimant's spouse is absent abroad. It can then be argued that, even taking into account the relaxation in regulation 2(4) of the Persons Residing Together Regulations that the couple are not to be treated as having ceased to reside together by reason only of a temporary absence, nationals of states such as Morocco who are working here are more likely than British nationals to have a spouse who is

absent abroad and for the couple's absence one from the other to be more than temporary.

18. Further, in asking whether that situation amounts to indirect discrimination, in my judgment the approach put forward in R(S) 2/93, requiring identification of an appropriate "pool" within which discrimination is to be judged, is not to be applied. The approach which must be applied is that laid down in paragraphs 18, 20 and 21 of the ECJ's judgment in O'Flynn (omitting the numerous cases cited):

> "18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers.
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> 20. It follows from the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.
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> 21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. ..."

That approach has recently been confirmed in Commission of the European Communities v French Republic (Case C-35/97), 24 September 1998.

19. On that approach, and using the term "migrant worker" here to cover a person of Moroccan nationality who is a worker in relation to the United Kingdom under the Cooperation Agreement, I am satisfied that the provisions of British law at issue in the present case are intrinsically liable to affect migrant workers more than national workers, to the disadvantage of migrant workers. Such a worker is more likely to have a spouse who is living outside the United Kingdom and is more likely to be living apart from the spouse on more than a temporary basis than a worker of British nationality. Thus a migrant worker is more likely than a national worker to be caught by the rule that where the worker's spouse is abroad an increase of invalidity benefit is payable only where they are treated as residing together and not when the worker merely provides financial support at a certain level. That seems to me to be in line with the process of reasoning by which the ECJ in O'Flynn found that the rule that

a social fund funeral payment could only be made when the funeral had taken place in the United Kingdom constituted indirect discrimination against migrant workers.

20. Accordingly, the rule as described above cannot be applied against migrant workers under the Cooperation Agreement unless it is justified by objective considerations independent of the nationality of the workers concerned and its effect is proportionate to the legitimate aim of the British provisions. The Secretary of State's submission was that it is plainly justifiable for dependency increases only to be paid for those who can show that they are genuinely dependent on the recipient of benefit. I tend to agree (though I might not have used the same terms), but that is not the rule which has to be justified. The rule which has to be justified is one which does not allow a dependency increase for a spouse abroad when the claimant is merely financially supporting the spouse and makes the sole criterion whether the couple are residing together, thereby indirectly discriminating against migrant workers. No justification for that rule has been put forward by the Secretary of State. Nor can I think of any obvious justification independent of nationality. The claimant's financial needs within the United Kingdom are the same where a spouse is merely being supported financially, whether the spouse is in the United Kingdom or outside it. Any problems of verification of whether the claimant is actually contributing to the spouse's maintenance at the required rate would seem to me to arise just as much where the spouse is within the United Kingdom as where she is abroad. And in my view it is relevant that, in the circumstances in which either Article 39(4) or 47(3) of Regulation 1408/71 applies and the amount of invalidity benefit takes account of the existence of members of the claimant's family, those members who are residing in other Member States are to be treated as if they were residing in the Member State calculating its benefit. As the United Kingdom has to apply that rule when required, I do not see what justifies a rule which excludes the award of an increase of invalidity benefit for a spouse resident in Morocco who is being supported financially by the claimant. I conclude as a matter of law that the indirect discrimination identified is not objectively justified.

21. The result is that the discriminatory British provision cannot be applied in the claimant's case. In my judgment, that leaves the rule to be applied in deciding whether he was entitled to an increase in invalidity benefit for his wife the ordinary one in section 83(2) of the Social Security Contributions and Benefits Act 1992, giving entitlement either if the claimant was residing with his wife or if he was contributing to her maintenance at the required rate and any earnings she had were not too large.

22. Unfortunately, on that basis I cannot substitute a decision on the claimant's appeal against the adjudication officer's decision, as Mr Matheson requested, either on the basis of the

facts found by the appeal tribunal or after making additional findings. I would not be prepared to conclude that the claimant was residing with his wife on the basis of the facts found by the appeal tribunal. If any fresh findings of fact are to be made on that point, the claimant and his representative should have the opportunity of putting forward additional evidence. The appeal tribunal made no findings of fact of any detail about any contributions to his wife's maintenance made by the claimant, as on its application of the British legislation it was unnecessary to do so. The claimant had given evidence that he sent money to his wife, and there was a copy of an International Money Order for £300 dated 29 June 1995. Copies of other payment orders were said to have been attached to the claim form signed on 20 February 1995, but apparently the Benefits Agency does not now have any of those in the claimant's file (see paragraph 11 of the adjudication officer's submission dated 18 December 1996). There was no evidence before the appeal tribunal of any specific payments, nor of their amount and regularity. On the claim form it was said that the claimant's wife was not in employment and had no earnings. No doubt that could be accepted (although one would like to know what she was living on). However, there is insufficient evidence from which to determine whether, for each week from 22 August 1994 onwards, the claimant was contributing to his wife's maintenance at the necessary weekly rate. A decision on the question should not be made until the claimant and his representative have had the opportunity to put forward evidence, bearing in mind the conditions most helpfully described on pages 380 - 82 of Ogus, Barendt & Wikeley, The Law of Social Security (4th edition, 1995) and the additional test in regulation 11(1)(a) of the Social Security Benefit (Dependency) Regulations 1977.

23. Therefore, the claimant's appeal against the adjudication officer's decision issued on 15 June 1995 must be referred to a differently constituted social security appeal tribunal for determination in accordance with the following directions.

24. There must be a complete rehearing of the appeal, on the basis of my conclusion of law in paragraph 21 above, on the submissions made and evidence produced to the new appeal tribunal. The new appeal tribunal will take account of the points made in paragraph 22 above in assessing whether on the evidence the claimant is entitled to an increase of invalidity benefit for any week from 22 August 1994 onwards down to the abolition of invalidity benefit on either of the conditions in section 83(2) of the Social Security Contributions and Benefits Act 1992.

25. In relation to any period in which the claimant has been entitled to incapacity benefit, it should be noted that the rules for increases for adult dependants in regulation 9 of the Social Security (Incapacity Benefit - Increases for Dependants) Regulations 1994 are more restrictive than the invalidity benefit rules, but there is protection in transitional cases, in particular under regulation 24 of the Social Security (Incapacity

Benefit) (Transitional) Regulations 1995 where a claimant is entitled to a transitional award of long-term incapacity benefit. I have had no submissions on these provisions. The adjudication officer should make a written submission to the new appeal tribunal on their possible effect in the claimant's case. Unless the adjudication officer makes a reasoned submission to the contrary, the new appeal tribunal should adopt the approach that it follows from my conclusion on discrimination in relation to invalidity benefit that the rules to be applied to the claimant in relation to incapacity benefit are the ordinary ones, free of the disqualification in section 113(1) of the Social Security Contributions and Benefits Act 1992.

(Signed) J Mesher
Commissioner

Date: 25 May 1999