

cu/309/1983

VGHH/BC

SOCIAL SECURITY ACTS 1975 TO 1982 AND THE SUPPLEMENTARY BENEFITS ACT 1976

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Shaukat Ali

Local Tribunal: Huddersfield

Case No: 92/1

[ORAL HEARING]

1. This appeal fails. My decision is that by virtue of the provisions of regulation 7 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 and 1981 from 5 August 1981 to 26 February 1982 (both dates included) the claimant is not treated as available for employment (Supplementary Benefit (Determination of Questions) Regulations 1980, regulation 5; Supplementary Benefit (Conditions of Entitlement) Regulations 1980 and 1981, regulations 7 and 8; Social Security Act 1975, section 17(1)(a)(i)).

Representation

2. I held an oral hearing of this appeal. The claimant, who appeared, was represented by Mr Robin Allen of Counsel, instructed by the Harehills & Chapeltown Law Centre (Leeds) and the adjudication officer was represented by Mr G. Berry of the Solicitor's Office, Department of Health and Social Security.

Nature of the appeal

3. This appeal relates to the circumstances in which a claimant for supplementary benefit who is an immigrant with limited leave to enter or remain in the United Kingdom can be treated as available for employment.

4. It is settled law (see decision R(U) 1/82, which is that of a Tribunal of Commissioners) that a claimant who cannot lawfully take employment in this country is not available for employment.

An immigrant who enters this country in order to marry a person with a right to abode in this country (a patrial) is normally granted leave to stay for 3 months subject to a condition that he takes no employment. If he marries within that period and applies within the period for a variation of his leave, he will normally be granted leave to remain for one year, calculated (at any rate in the instant case) from the date of marriage without any restriction on taking employment. Such applications take time to process and it is apparently usual for the variation of leave to be given after the original 3 months period has expired. Until the expiration of the 28th day after the date of the decision on the application, the duration of the leave is extended by virtue of the Immigration (Variation of Leave) Order 1976. Two issues, which are of general importance, arise

in this case. First, what is the effect of the Order during the extended period while the application is being considered? Can the claimant lawfully take employment during that period? Secondly, when the extended leave is granted, and the restriction on taking employment is expressly lifted, does this have retrospective operation as regards availability for employment?

The facts

5. There is no dispute about the facts. The claimant, a national of Pakistan and holder of a Pakistan passport, and a non-patrial in terms of section 2(6) of the Immigration Act 1971 (which defines the word "patrial" as persons having the right of abode in the United Kingdom), arrived in the United Kingdom on 1 July 1981 in order to marry a woman who was settled here. On his arrival, he was granted leave to enter the United Kingdom for 3 months on condition that he did not take up employment. His passport was produced at the oral hearing before me. It contains (page 11) a visa which states:

"VISA FOR MARRIAGE. Valid for presentation at a United Kingdom port/
within SIX months from date of issue

Signed.....

Date 18 May 1981"

The leave to enter is endorsed on the previous page of the passport. It is stamped "IMMIGRATION OFFICER 1 JUL 1981 HEATHROW". The wording of the leave is as follows:

"Leave to enter the United Kingdom, on condition that the holder does not enter employment paid or unpaid and does not engage in any business or profession is hereby given for/until THREE MONTHS"

6. The claimant's marriage took place on 3 August 1981 and on 5 August 1981 he sent his passport and marriage certificate to the Home Office applying for leave to remain in the United Kingdom. On the same day he attended the unemployment benefit office and claimed benefit. However, he was not entitled to unemployment benefit as he did not satisfy the contribution conditions laid down in paragraph 1 of Schedule 3 to the Social Security Act 1975. He also claimed supplementary benefit at the Department of Health and Social Security, and the question of his availability for employment was referred to the local insurance officer in the Department of Employment for decision under regulation 5 of the Supplementary Benefit (Determination of Questions) Regulations 1980. There was a delay in the Home Office in processing the claimant's application for leave to remain in the United Kingdom and it was not until 26 February 1982 that the claimant was notified by the Home Office that he had been granted leave to remain in the United Kingdom for one year until 3 August 1982 and that the restriction prohibiting him from taking employment had been removed. The letter of 26 February 1982 is in these terms:

"Dear Sir,

You have been granted leave to remain in the United Kingdom as a foreign husband for one year. The restriction prohibiting you from taking employment has been removed, and it will be open to you to apply for residence in the United Kingdom on the basis of your marriage shortly before your present conditions expire.

Yours faithfully

..... "

The claimant's passport has been endorsed (page 13)

"Leave to remain in the United Kingdom is hereby given
until 3rd AUGUST 1982
[illegible]
on behalf of the Secretary of State
Home Office"

The endorsement is stamped "HOME OFFICE 26 FEB 1982 IMMIGRATION DEPARTMENT"

On 4 August 1982 the Home Office wrote to the claimant (enclosing U.K. Passport) and stated:

"I am writing to say that there are no longer any restrictions on the period for which you may remain in the United Kingdom. An appropriate endorsement has been placed in your passport which is enclosed.

You are now free to remain indefinitely in the United Kingdom. You do not require permission from a Government Department to take or change employment and you may engage in business or a profession provided you comply with any general regulations governing the business or professional activity.

....."

7. On 2 July 1982 a local insurance officer decided that the claimant was not to be treated as available for employment as at 5 August 1981. He appealed to a local tribunal against this decision. On 21 December 1982 the tribunal unanimously decided that from 5 August 1981 to 26 February 1982 the claimant was not available to be employed in employed earners employment and the claimant now appeals (with the leave of the chairman of the tribunal) to the Commissioner.

8. A supplementary benefit officer and supplementary benefit appeal tribunal decided that supplementary benefit was not payable to the claimant from 5 August 1981 and his application for leave to appeal to the Commissioner against the supplementary benefit appeal tribunal's decision was refused by the Commissioner on 3 August 1983.

9. The Parliamentary Commissioner for Administration (commonly called the Ombudsman) investigated the Home Office's handling of the claimant's case and reported on 25 November 1982. The Home Office acknowledged that their handling of the case fell far short of an acceptable standard and offered unreserved apologies. At the hearing before me, Mr Berry produced a letter to him from the Home Office which is dated 23 May 1984 in which the writer said that it was the view of the Department that by virtue of the Immigration (Variation of Leave) Order 1976 the claimant remained subject to a prohibition on employment until a leave more beneficial to him was granted on 26 February 1982 superseding the conditions first granted on 1 July 1981. He enclosed a letter to the Treasury from the Home Office dated 23 March 1983 which made clear that this was their understanding on which was based a decision to make an ex-gratia payment to the claimant. The Home Office in a letter which is dated 18 May 1983 and is in reply to a request for an ex-gratia payment dated 19 January 1983 refers to the Ombudsman's findings that there was delay attributable to the volume of work, to the making of justified enquiries but also to errors which should not have occurred. It states that the delay attributable to error amounted to one month and on this basis the Home Office was willing to make an ex-gratia payment to the claimant of £184.95 being the equivalent of 4½ weeks supplementary benefit at the material rate. A payable order for this sum was enclosed with the letter.

The relevant law

10. (1) Regulation 7 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 provides, by paragraph (1), that, subject to regulation 8 (not relevant in this case)

"a claimant shall be treated as available for employment if he is available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act [1975] (available to be employed for purposes of unemployment benefit) or regulations made under it, or if he is a person to whom paragraph (2) applies"

[Paragraph (2) is not relevant in this case]

- (2) Regulation 5 of the Supplementary Benefit (Determination of Questions) Regulations 1980, so far as material, provides:

"(1) This regulation shall apply to the following questions -

.....
(c) whether by virtue of regulation 7(1) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 a person is to be treated as available for employment ...
....."

Paragraph (2) of the regulation authorises a question arising under (c) to be referred by a benefit officer for decision to an insurance officer appointed under section 97(1) of the Social Security Act 1975

- (3) Section 17(1)(a) of the Social Security Act 1975 provides -

"17-(1) For the purposes of any provisions of this Act relating to unemployment benefit.....

(a)..... a day shall not be treated in relation to any person -

(i) as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, available to be employed in employed earner's employment"

[There is no regulation under which the claimant can be deemed to have been available for employment]

- (4) The Immigration Act 1971 (so far as relevant) provides:

3.-(1) Except as otherwise provided by or under this Act, where a person is not patrial -

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given a limited leave to enter or remain in the United Kingdom, it may be given subject to conditions restricting his employment or occupation in the United Kingdom, or requiring him to register with the police, or both.

(2)

(3) In the case of a limited leave to enter or remain in the United Kingdom, -

(a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and

(b) the limitation on and any conditions attached to a person's leave may be imposed (whether originally or on a variation) so that they will, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.

(4) A person's leave to enter or remain in the United Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter; but, if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply.

.....

4.--(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the Secretary of State; and, unless otherwise allowed by this Act, those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument."

(5) The Immigration (Variation of Leave) Order 1976 provides, so far as relevant:

"In exercise of the powers conferred on me by section 3(3)(a) and 4(1) of the Immigration Act 1971, I hereby make the following Order:-

.....

3(1) Where a person has leave to enter or remain in the United Kingdom for a limited period and applies to the Secretary of State before the expiry of that period for such limited leave to be varied, then, except in a case falling within paragraph (2) below, the duration of his leave shall, by virtue of this Order, be extended until the expiration of the twenty-eighth day after the date of the decision on the application

(2) Paragraph (1) above shall not apply -

- (a) in a case in which the date of the decision is earlier than 28 days before the expiration of the period of limited leave;
- (b) in a case in which the period of limited leave had expired before the coming into operation of this Order;
- (c) in a case in which the application is made at a time when, by virtue of the previous operation of this Order, an extension of the applicant's period of leave is taking effect."

The arguments on appeal

11. On behalf of the claimant, Mr Allen argued that the grant of leave on 26 February 1982 was retrospective to the date of the claimant's marriage and since that leave removed the condition forbidding the claimant to take employment, he was from that date available for employment. As regards the period from the expiry of the original leave (that leave expired on 30 September 1981), the claimant had an extension of leave by virtue of the Immigration (Variation of Leave) Order 1976. It was his submission that any such extension of leave was unconditional and did not operate to re-impose the conditions contained in the original leave. The claimant was accordingly also available for employment during the period 1 October 1981 to 26 February 1982. Mr Berry, on behalf of the adjudication officer, drew attention to the wording of sections 3(1)(a) and 4(1) of the Immigration Act, under which the Order was made and submitted that the subsequent leave of 26 February 1982 did not operate retrospectively and that the extension of leave under the Order did not vary the conditions originally imposed, which continued to operate. He did not attempt to support the written submission of the insurance officer to the effect that a claimant was not available for employment if in practice an employer would not be willing to employ him. Such a proposition is obviously wrong. The question at issue is the claimant's availability for employment, not his prospects of being employed.

"Retrospective" leave: 5 August 1981 to 30 September 1981

12. This is a hopeless argument, so far as regards availability for employment, and I reject it. Section 17(1)(a) of the Social Security Act 1975 provides that a day shall not be treated as a day of unemployment unless on that day he is available to be employed in employed earner's employment. This is the test imposed by regulation 7 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 for deciding the question referred to the insurance officer in the present case.

On each of the days falling within the period 5 August 1981 to 30 September 1981 the claimant was prohibited from taking employment by a subsisting leave to enter the United Kingdom which imposed a subsisting condition: see the wording of the leave dated 1 July 1981, which is set out in paragraph 5. Accordingly, even if the leave granted on 26 February 1982 were to operate retrospectively so that the claimant could be regarded, once that leave had been given, as free from any restriction on employment, because that leave imposes no such restriction, it would not assist the claimant. For at the relevant time, that is to say the actual day in question, the claimant was not available for employment. For completeness, I should add that I am in no way persuaded that the leave of 26 February 1982 was retrospective; cf Reg v Secretary of State for the Home Department ex parte Margueritte [1983] QB 180 at pages 189H to 190A where Lord Justice Kerr said "He therefore remained here unlawfully until he was given indefinite leave to remain on June 1, 1978. However, it has not been seriously contended that this provision had the effect of retrospectively rendering his presence lawful as from August 15, 1974, and I cannot see any justification for such a conclusion".

Is the extension of the duration of leave under the Immigration (Variation of Leave) Order 1976 free from the conditions of the original leave?
1 October 1981 to 26 February 1982

13. In my judgment, the effect of the Order is to enlarge the limit on the duration of the relevant leave. It does not remove the limit, because the relevant leave is still limited as to its duration, but the limit occurs later. There is therefore no question of the conditions attached to the original leave ceasing to apply by virtue of the provisions of section 3(3)(a) of the Immigration Act 1971, which is one of the sections under which the Order was made. For that section only provides that the conditions attached to the original leave shall cease to apply in cases where the limit on the duration of the leave is removed. (There is power to vary a person's leave by adding, varying or resolving conditions attached to that leave but there is no indication that the power was exercised in this case.) Section 4(1) of the Act, which is the other section under which the Order is made, refers back to section 3(3)(a) explaining that it is a power "to vary any leave under section 3(3)(a) (whether as regards duration or conditions)". It is here implied that a variation as to duration of leave does not operate to remove the conditions attached to that leave. There is, I am informed, no authority on the point; but in my judgment the simple extension of the duration of a leave, by imposing a new time limit, as opposed to the removal of the limit altogether, does not operate to remove the conditions attached to the original leave. This construction is the natural construction of an extension of time in this way. All the provisions of the original leave other than the original time limit continue to apply, so that the person to whom leave is given has the same rights and is subject to the same conditions, no more and no less, as operated when he had the original leave. The construction also gives a commonsense result. While the application for a variation of leave is being processed, the claimant remains in the same position as he was under his original leave i.e. the existing position or status quo is preserved. When leave is given, the Immigration Rule, as set out in the "Statement of Changes in Immigration Rules" laid before Parliament on 20 February 1980 under section 3(2) of the Immigration Act 1971 provides, by rule 116, that fiances arriving with entry clearances for the purpose of marriage to a woman settled here are normally admitted for 3 months and, if the marriage takes place within the

period, subject to paragraph 117, the man's stay should be extended for a further period not exceeding 12 months and that where an extension is granted any prohibition on the taking of employment should be removed. But all this is conditional on rule 117 which provides (among other conditions) that an extension will not be granted if there is reason to believe that (a) the marriage was entered into primarily to obtain settlement here or (b) the parties to the marriage have not met. (There are further conditions lettered (c) to (f).) Thus until leave is actually given, it cannot be known whether the man who has applied for leave will in fact obtain it. He may not, for he may fail to because he falls within one of the provisions in rule 117. It is accordingly entirely logical that the existing position or status quo should be preserved in this way.

14. The extension of the duration of the claimant's leave was accordingly subject to the original prohibition on taking employment which had been imposed when leave was originally granted to enter the country and which continued to subsist until the claimant's application for variation of leave had been processed and leave for a further 12 months granted, and the condition forbidding the taking of employment was removed. It follows that the claimant was not available for employment during any of the days falling within the period 1 October 1981 to 26 February 1982, because he was prohibited under his leave to remain in this country from engaging in employment.

Conclusion

15. The claimant is accordingly not to be treated as available for employment (a) during any days falling within the period 5 August 1981 to 30 September 1981 because he was prohibited from taking employment by the terms of his original leave to enter the country and (b) during any days falling within the period 1 October 1981 to 26 February 1982 because that prohibition continued to apply to the variation of leave granted by the Immigration (Variation of Leave) Order 1976. In the light of this express prohibition on the taking of employment, which was a condition of his entering and remaining in the country, the claimant was not able to take up employment in accordance with the legislation of the United Kingdom and for this reason cannot be regarded as available for employment: see decision R(U) 1/82 at paragraph 17, the principle of which clearly applies to the present case.

16. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 7 August 1984

Commissioner's File: CU/309/1983
C I O File: I.O. 3049/UB/83
Region: Yorkshire and Humberside