28.9.84

MOBILITY ALLOWANCE

Review on change of residence—meaning of "Ordinarily Resident".

An award of Mobility Allowance was made to a mother for the period 13.4.77 to 28.10.2041 on behalf of her handicapped daughter. Subsequently the mother wrote to say that she, her husband and her daughter had gone to Sri Lanka on 26.11.81 and that, as she was ill and her husband incapacitated, they did not intend to return until they were in a fit state to travel. A home in Great Britain was not maintained but their furniture was put in store. On 16.7.82 the Insurance Officer reviewed and revised the award so as to disallow Mobility Allowance from 27.11.81 on the grounds that there had been a relevant change of circumstances since the original decision had been given and that the claimant was no longer "ordinarily resident in Great Britain". The family returned to Great Britain on 19.8.83.

Held that:

1. section 104(1)(b) of the Social Security Act 1975 enables a review decision to be given where there has been a permanent change of residence; Section 37A(7) does not preclude such review (paragraph 3);

2. the exception from disqualification for absence from GB afforded by regulation 10A of the Social Security Benefits (Persons Abroad) Regulations 1975 does not remove the need for the claimant to satisfy the prescribed conditions of entitlement to Mobility Allowance (paragraph 4);

3. the words "ordinarily resident" should be given their natural and ordinary meaning unless the statute dictates otherwise (paragraphs 10 and 11);

4. the claimant was not ordinarily resident in Great Britain from 27.11.81 to 18.8.83, fails to satisfy regulation 2(1)(a) of the Mobility Allowance Regulations and is not entitled to Mobility Allowance for that period (paragraph 12);

5. the claimant was unable to comply with regulation 2(1)(c) of the Regulations until 18.8.84 and is not entitled to Mobility Allowance from 19.8.83 to 18.8.84 (paragraph 13).

The Commissioner considered the meaning of ordinarily resident as described in *Regina* v *Barnet London Borough Council* [1983] 2 WLR 16 where Lord Scarman had accepted that in their natural and ordinary meaning the words "Ordinary Residence" mean "that the person must be habitually and normally resident.....apart from temporary or occasional absence of long or short duration" and that the significance of the word "habitually" was that the residence should be adopted voluntarily and for a settled purpose.

1. My decision is that the original decision of the insurance officer awarding mobility allowance for the inclusive period from 13 April 1977 to 28 October 2041 should be reviewed and revised so that no such allowance is payable for the inclusive period from 27 November 1981 to 18 August 1984.

2. This is an appeal brought with my leave on the claimant's behalf by her mother against the decision of the local tribunal confirming the insurance officer's decision shown in box 1 of Form LT2.

3. On 31 March 1982 a letter was received from the claimant's mother at the local office stating that both she and her daughter had left for Sri Lanka. The claimant had previously been awarded mobility allowance for the inclusive period from 13 April 1977 to 28 October 2041. As a result of that letter enquiries were made concerning the claimant's date of departure, and on 16 July 1982 the insurance officer (now the adjudication officer) reviewed and revised the award so as to disallow payment with effect from 27 November 1981. The reason for this course of action was that there had been a relevant change of circumstances since the original decision had been given, in that as from 27 November 1981 the claimant was no longer

"ordinarily resident in Great Britain". A review decision is only permissible if the provisions of section 104 of the Social Security Act 1975 are satisfied. It is clear from the decision of the Court of Appeal in *Insurance Officer v Hemmant* (to be reported as an appendix to R(M)2/84) that section 104(1)(b) allows a review where there has been a permanent change of residence and section 37A(7) does not preclude such review. It follows from this that the insurance officer was empowered to review the award of mobility allowance if the claimant had in fact ceased to be ordinarily resident in Great Britain.

4. Section 82(5)(a) of the Social Security Act 1975 states that, except where regulations otherwise provide, a person shall be disqualified for receiving any benefit for any period during which he is absent from Great Britain. However, the relevant regulation, namely regulation 10A of the Social Security Benefit (Persons Abroad) Regulations 1975 as amended *does* otherwise provide, in that it specifically states that a person shall not be disqualified for receiving mobility allowance by reason of being absent from Great Britain. Accordingly, mere absence from Great Britain is not *per se* necessarily fatal to the claimant's case. Nevertheless, by analogy with the position under the attendance allowance regulations (see R(A)4/75) it is clear that the exception from disqualification does not remove the need for the claimant to satisfy the prescribed criteria for entitlement to mobility allowance under British social security legislation, or under the provisions of the European Community law relating to social security—in this case inapplicable—or under any reciprocal convention. There is no reciprocal convention between the United Kingdom and Sri Lanka, and accordingly the claimant will only be entitled to mobility allowance whilst in the latter country, if she can show that she satisfies the conditions for entitlement specified in the British legislation.

5. Section 37A(1) of the Social Security Act 1975 provides as follows:

"(1) Subject to the provisions of this section, a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so".

6. Regulation 2 of the Mobility Allowance Regulations 1975, in so far as it is material to this appeal, provides as follows:

"(1) Subject to the following provisions of this regulation, the prescribed conditions as to residence or presence in Great Britain to be satisfied by any person in respect of any day for the purposes of section 37A shall be—

(a) that he is ordinarily resident in Great Britain; and

(b) that he is present in Great Britain; and

(c) that he has been present in Great Britain for a period of, or periods amounting in the aggregate to, not less than 52 weeks in the 18 months immediately preceeding that day; and

(d) ...

(2) .....

(3) For the purposes of paragraph (1)(b) and (c) notwithstanding that on any day a person is absent from Great Britain he shall be treated as though he were present in Great Britain if his absence is by reason only of the fact that on that day—

(a) ....
(b) ....
(c) ....
(d) his absence from Great Britain is, and when it began was, for a temporary purpose and has not lasted for a continuous period exceeding 26 weeks; or

(e) his absence from Great Britain is temporary and for the specific purpose of his being treated for incapacity, or a disabling condition, which commenced before he left Great Britain, and the Secretary of State has certified that it is consistent with the proper administration of the Act that, subject to the satisfaction of the foregoing condition in this sub-paragraph, he should be treated as though he were present in Great Britain".

7. It is clear from the foregoing that to establish entitlement to mobility allowance the claimant must satisfy the 3 conditions (a), (b) and (c) set out in regulation 2(1). The first condition is that the claimant is ordinarily resident in Great Britain. The facts of the case are that the entire family including the claimant left Great Britain on 26 November 1981 and that, as the claimant's mother was ill and her husband incapacitated, they did not intend to return until they were in a fit state to travel. A home in Great Britain was not maintained but their furniture was put in store. On 6 January 1983 and 28 February 1983 the claimant's mother explained that she could not have left her daughter in Great Britain, as there would have been no one to look after her. In the event, the family returned to this country on 19 August 1983.

8. In decision R(F)1/62 a Tribunal of Commissioners considered the meaning of the phrase "ordinarily resident" in paragraph 13 of letter No 1 in the Schedule to the Family Allowance and National Insurance (Canada) Order, 1959. At paragraph 9 they stated as follows:

"With regard to ordinary residence in *Levene's* case Viscount Cave L.C. at page 225 of the report said 'I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences'. In the same case Lord Warrington of Clyffe said at page 232:

"Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered".

The Tribunal of Commissioners then went on to observe at paragraph 10, *inter alia,*

"4. An important factor is what the person does with one house and furniture while using another. If he retains them, that will help him to establish that he continued to be ordinarily resident where they are, even though living for a considerable period elsewhere (*Lewis' and Stransky's* cases). If on the other hand he gets rid of them and goes to live elsewhere, he may be found to be ordinarily resident in the latter place only, even during a period as short as six months (*Hopkins'* case).

5. The cases show that it is easier for a person to establish that he has continued to be or resumed being ordinarily resident in a country (especially if it is his own country), than that he has acquired a completely alien ordinary residence".

At a later point in their decision the Tribunal of Commissioners referred to the definition adopted by Somervell L. J. in *Macrae's* case [1949] P 397 at P403:

> "Where there are indications that the place to which [a person] moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone."

9. In the present case the claimant's family went on 26 November 1981 for health reasons to Sri Lanka with the intention of residing there for an indefinite period. They did not know exactly when the claimant's mother, and more particularly her father, would have recovered sufficiently to be able to return to this country. Although they had put their furniture into storage, they had not retained a house here, and, as was observed in R(F)1/62 "it is easier for a person to establish that he has "resumed being ordinarily resident in a country (especially if it is his own country), than that he has acquired a completely alien ordinary residence". As I understand it on the facts Sri Lanka was not a completely alien environment.

10. In a recent appeal before the House of Lords, *Regina* v *Barnet London Borough Council* [1983] 2W.L.R.16 Lord Scarman went into the question of what was meant by ordinary residence in very great detail. He accepted the interpretation adopted in the 2 tax cases of 1928, namely *Levene* v *Inland Revenue Commissioners* [1928] A.C.217 and *Inland Revenue Commissioners* v *Lysaght* [1928] A.C.234 and stated at page 25E

> "I agree with Lord Denning M.R. that in their natural and ordinary meaning the words mean "that the person must be habitually and normally resident.., apart from temporary or occasional absences of long or short duration". The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Summner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes".

Later, at page 27C Lord Scarman went on to define 'settled purpose'. He said:

> "And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely, indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purposes of living where one does has a sufficient degree of continuity to be properly described as settled".

In the present case the claimant's family went to Sri Lanka voluntarily and clearly they proceeded there for a settled purpose. They went there for health reasons.

11. Lord Scarman was, of course, as, for that matter were all the other learned judges whose observations have been referred to, considering the meaning of ordinary residence in the context of a different statutory provision from the one I have to construe. However in the particular statutory provision I have to consider the words must be given their natural and ordinary meaning, unless, at least, there is something in the statute which dictates otherwise. The rule of construction to be applied was laid down by Lord Scarman (at page 23G et seq.)

> "Two questions of statutory interpretation, therefore, arise. The first is: what is the natural and ordinary meaning of 'ordinary residence in the United Kingdom'....? The second is: Does the statute in the context of the relevant law against the background of which it was enacted, or in the circumstances of today, including in particular the impact of the Act of 1871, compel one to substitute a special, and if so, what, meaning to the words 'ordinarily resident in the United Kingdom'?
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> For the reasons which I shall endeavour to develop I answer the two questions as follows. The natural and ordinary meaning of the words has been authoritatively determined in this House in two tax cases reported in 1928. To the second question my answer is "No". The Act of 1962 and the Regulations are to be construed by giving to the words 'ordinary resident in the United Kingdom' their natural and ordinary meaning.
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> Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the 19th century. The words have been a feature of the Income Tax Acts since 1806. They were used in the English family law when it was decided to give a wife the right to petition for divorce notwithstanding the foreign domicile of her husband; Matrimonial Causes Act 1950, section 18(1)(b). Ordinary or habitual residence has, in effect, now supplemented domicile as the test of jurisdiction in family law: and, as Eveleigh L.J. in the Court of Appeal [1982] Q.B.688, 721–722, reminded us the concept is used in a number of 20th century statutes, including (very significantly) the Act of 1971".

In the present case I am satisfied that the words "ordinarily resident" should be given their natural and ordinary meaning, and that there is nothing in the statute to suggest that they should have a special or unusual meaning. Applying the above construction to the facts of the present case (as set out in paragraph 9) I am satisfied that the claimant was from 27 November 1981 until her return to this country on 19 August 1983 ordinarily resident in Sri Lanka.

12. It follows from what has been said above that the claimant is not able to satisfy regulation 2(1)(a) and that such failure is fatal to her claim. It is unnecessary for me to consider whether the claimant is able to satisfy regulation 2(1)(b) and (c). However, it may be helpful if I say that, had it been necessary for me to determine this matter, I would have accepted the submission admirably set out by the adjudication officer now concerned that the claimant was also unable to satisfy regulation 2(1)(b), and this in itself would also have been fatal to her appeal.

13. For the reasons set out above, the claimant is not entitled to mobility allowance for the inclusive period from 27 November 1981 to 18 August 1983. Furthermore, the claimant is not entitled to the allowance for the further period from 19 August 1983 to 18 August 1984 because until the latter date she was unable to comply with the condition contained in regulation 2(1)(c).

14. It should also be stated that because the claimant was no longer ordinarily resident in this country, the original decision awarding mobility allowance could properly be reviewed and revised (see paragraph 3).

15. Accordingly I dismiss this appeal.

(Signed) D. G. Rice
Commissioner