Bulletin 196

Estate

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CA/2650/2006

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Basildon appeal tribunal dated 26 October 2005 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the appeal against the Secretary of State's decision dated 25 January 2005, having made the necessary findings of fact (Social Security Act 1998, section 14(8)(a)(ii)). My decision is that the overpayment of attendance allowance of £572 in the period from 27 October 2003 to 4 January 2004 is not recoverable from the claimant under section 71 of the Social Security Administration Act 1992.

The background

2. The claimant had a life award of the higher rate of attendance allowance, made on 14 September 1999, when she was aged 69. In a letter received on 16 July 2003 she told the Disability Benefits Unit (DBU) that she and her husband were considering moving to Spain or France for health and family reasons and asking how that would affect her attendance allowance. The computer notepad print-out records a reply saying that the benefit was not exportable (although the claimant does not recall getting such a reply) and a letter to the claimant dated 28 October 2003 apparently about a change of address. On 20 January 2004 a letter and questionnaire were sent to the claimant (the address is not shown) thanking the claimant for telling the DBU that she had gone abroad and asking for some more information. On the questionnaire, signed on 31 January 2004, in answer to the question as to the date on which she had gone abroad, she wrote 24 October 2003. She had been in France since that date. The reason for going abroad was a better climate for health. She answered no to the questions "Will you come back to live permanently in Great Britain?" and "Do you have a home in Great Britain?".

3. On that evidence, a decision was given on 20 February 2004 superseding the decision of 14 September 1999 on the ground of relevant change of circumstances, in that the claimant had moved abroad indefinitely and was not ordinarily resident in Great Britain from 24 October 2003, and deciding that she was not entitled to attendance allowance from and including 27 October 2003. Regulation 2(1)(a)(i) of the Social Security (Attendance Allowance) Regulations 1991 makes it a condition of entitlement for any day that the claimant is ordinarily resident in Great Britain. That is a separate condition from that of presence in Great Britain (regulation 2(1)(a)(ii)), where in effect up to 26 weeks of absence is allowed before the condition bites. There is no such period of grace in the ordinary residence condition.

4. The claimant appealed against the decision. I do not know the precise case that she made, but it seems from the copy of a letter dated 17 June 2004 that she has sent in with a submission in the present case (page 105), that she was saying that she and her husband were in temporary holiday accommodation until 30 March 2004 and that completion of the sale of their house in England was not until 31 October 2003, with the implication that their intentions were not firmed up until the end of March 2004 and ordinary residence was not lost before them. In later letters the claimant has given much more detail of the family circumstances. The claimant's appeal was dismissed by an appeal tribunal sitting on 24 August 2004. It appears that the

decision notice signed on the day stated that she was not entitled from 25 May 2004, which was the date on which her appeal had been received. The Secretary of State applied for a correction. On 8 October 2004 the chairman of the appeal tribunal signed an amended decision notice stating that the claimant was not entitled to attendance allowance with effect from 25 October 2003. There was no further appeal.

5. There had obviously been some force in the claimant's appeal against the decision of 20 February 2004, as the questionnaire signed at the end of January 2004 could not fairly have been taken as necessarily expressing the claimant's intentions as at 24 October 2003. However, the decision of the appeal tribunal of 24 August 2004 on the question of entitlement to attendance allowance from 27 October 2003 (as the date from which the Secretary of State contended that entitlement ceased) cannot now be challenged directly. I shall come back below to the reason why the decision embodied a crucial error of law.

6. On 25 January 2005 the decision was given that as a result of the decision dated 20 February 2004 an overpayment of attendance allowance amounting to £572.00 had been made for the period from 27 October 2003 to 4 January 2004, which was recoverable from the claimant as the overpayment had been caused by her late notification of moving abroad, which she could reasonably have been expected to know would have affected her benefit. The claimant appealed against that decision, re-arguing her case that the move in October 2003 had not then been intended as permanent, but was for "research", and that when they decided to stay she informed the DBU.

The appeal tribunal's decision

7. The claimant did not attend the hearing on 26 October 2005. The appeal tribunal disallowed the appeal. It took the view that, in the light of the decision of the appeal tribunal of 24 August 2004 and the evidence that the claimant had not informed the DBU of her moving abroad until 20 January 2004, the overpayment was recoverable under section 71 of the Social Security Administration Act 1992. But it also went into the claimant's argument that, as the appeal tribunal put it, attendance allowance should have been payable until she had made up her mind to stay in France, ie to change her domicile from England to France. The statement of reasons continued:

> "Unfortunately that argument must fail because the test is not one of domicile but one of actual matter of fact residence. As a matter of fact the appellant has not been resident in England since 23 October 2003."

The appeal to the Commissioner

8. The claimant now appeals against the appeal tribunal's decision with my leave. She understandably sought to challenge the basis of the decision against her on ordinary residence and complained about the change in the decision of the appeal tribunal of 24 August 2004, which she considered had rightly allowed her 28 weeks' temporary residence outside Great Britain. When I granted leave to appeal I said this (I have corrected some typing errors):

"The Secretary of State's superseding decision dated 20 February 2004 was made on the ground of relevant change of circumstances, ie that the claimant was no longer ordinarily resident in Great Britain. It purported to take effect from 27 October 2003, the first day of the benefit week following that in which the claimant left Great Britain. The claimant has disputed whether at that date she had ceased to be ordinarily resident in Great Britain, rather than merely not being present here. But even on the assumption that she ceased ordinary residence immediately on leaving, the effect of regulation 7(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 would seem to be that the superseding decision could not take effect prior to 20 February 2004 under section 10(5) of the Social Security Act 1998. Regulation 7(2)(c)(ii) did not apply, as the change of circumstances was not in relation to the satisfaction or otherwise of the disability conditions for attendance allowance. Regulation 7(2)(c)(iii) did not apply, as the supersession was of a `disability benefit decision'. That leaves section 10(5) as the only applicable provision.

There is the difficulty that the claimant's appeal against the decision of 20 February 2004 had been disallowed by an appeal tribunal on 24 August 2004, whose decision (after a correction on 8 October 2004) expressly confirmed an effective date of 25 October 2003. But the overpayment recoverability decision was based on the decision of 20 February 2004 and it would seem that in an appeal against the decision of 25 January 2005 a fundamental objection to the scope of the decision of 20 February 2004 and of the appeal tribunal's decision of 24 August 2004 could properly be raised.

In addition, the statement of reasons of the appeal tribunal of 26 October 2005 moves around between the terms `residence', `ordinary residence' and `domicile' in a confusing way that appears to lead it into error. Towards the end of the statement, the appeal tribunal purported to reject the claimant's case (effectively that she did not cease to be ordinarily resident in Great Britain immediately on leaving on 24 October 2003, but only after later events and a making up of her mind) by saying that as a matter of fact she had not been resident in Great Britain since 23 October 2003. The appeal tribunal there seems to be saying that the claimant had not been present in Great Britain, which would not in itself have prevented her from continuing to be ordinarily resident here for a time. It was not clear whether the appeal tribunal of 26 October 2005 considered itself completely bound by the decision of the appeal tribunal of 24 August 2004 in relation to ordinary residence. The reasons given for rejecting the claimant's case were arguably inadequate independently of the point above about the effective date of the supersession decision."

I do not now need to go into what I said about a case before the European Court of Justice which might produce the result that disability living allowance (and presumably then attendance allowance) is exportable to other member states of the European Union.

9. Regulation 7(2)(c) of the Decisions and Appeals Regulations as in force in February 2004 provided (omitting the references to incapacity benefit decisions):

"(2) Where a decision under section 10 is made on the ground that there has been, or that it is anticipated that there will be, a relevant change of circumstances since the decision was made, the decision under section 10 shall take effect--

(c) where the decision is not advantageous to the claimant--

(i) in the case of a disability benefit decision, ..., where the Secretary of State is satisfied that in relation to a disability determination embodied in or necessary to the disability benefit decision ... the claimant failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,

(aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or

(bb) if more than one change has taken place between the date from which the decision to be superseded took effect and the date of the superseding decision, from the date on which the first change of circumstances ought to have been notified, or

(ii) in any other case, except in the case of a decision which supersedes a disability benefit decision, ..., from the date of change."

There has, with effect from 10 April 2006, been an amendment to regulation 7(2)(c) omitting head (ii) and adding heads (iii) and (iv). This makes a supersession of a disability benefit decision for a relevant change of circumstances not in relation to the disability determination take effect from the date of the change.

10. It turns out that the definitions of some of the terms used in regulation 7(2)(c) need to be looked at with care. Attendance allowance is within the definition of "disability benefit" in regulation 7A, where "disability determination" is defined in the cases of attendance allowance and disability living allowance (DLA) as meaning whether a claimant "satisfies any of the conditions in section 64, 72(1) or 73(1) to (3), as the case may be," of the Social Security Contributions and Benefits Act 1992. Section 64(1) provides:

"(1) A person shall be entitled to an attendance allowance if he is aged over 65, he is not entitled to the care component of a disability living allowance and he satisfies either--

(a) the condition specified in subsection (2) below ("the day attendance condition"), or

(b) the condition specified in subsection (3) below ("the night attendance condition"),

and prescribed conditions as to residence and presence in Great Britain."

Subsections (2) and (3) then set out the attendance conditions and subsection (4) empowers the making of regulations prescribing circumstances in which a person is to be taken as satisfying or not satisfying those conditions. Regulation 2 of the Attendance Allowance Regulations,

imposing residence and presence conditions, were made in exercise of the power in a predecessor of section 64(1).

11. The representative of the Secretary of State, in the submission dated 19 September 2006, supported the claimant's appeal and agreed with what I had suggested about the effective date of supersession when granting leave to appeal. It was submitted that the appeal tribunal's decision should be set aside and that the Commissioner should substitute a decision that the overpayment of £572 is not recoverable from the claimant under section 71 of the Administration Act. The claimant replied on 7 October 2006. I now conclude that the appeal tribunal did err in law in failing to deal with the issue of the effective date of supersession and in failing to apply the proper legal approach to the issue of ceasing to be ordinarily resident in Great Britain. I set its decision aside. The precise reasons why those issues were material to the appeal tribunal's decision will emerge from the explanation below of my substituted decision.

The Commissioner's decision on the appeal against the decision of 25 January 2005

12. There are two areas of technical difficulty that I must explore before making a substituted decision in the form suggested on behalf of the Secretary of State. The first is the meaning of "disability determination" in the context of attendance allowance. Does the definition in regulation 7A of the Decisions and Appeals Regulations in terms of "any conditions in section 64" and the requirement in section 64(1) to meet prescribed conditions as to residence and presence in Great Britain make the determination when making an award that a claimant satisfies those conditions a disability determination? Does a supersession adverse to a claimant for a change of circumstances in relation to one of the prescribed residence and presence conditions therefore fall within regulation 7(2)(c)(ii)? Those are difficult questions, but the answer to both is no.

13. There is a contrast in the definition of disability determination in regulation 7A between what is done for DLA, where there is careful reference only to the particular sub-sections in which the disability or medical conditions of entitlement are set out, and what is done for attendance allowance, where there is a reference to the whole of section 64, where all the conditions of entitlement are set out. At first sight, it looks as though a difference was intended. But in my judgment the draftsman of regulation 7A would have been in difficulty in referring only to sub-section (1) or (2) and (3) of section 64, as it is not crystal-clear which sub-section makes the disability conditions operative. Therefore, for safety there is a reference to section 64 as a whole. But there was only a reference to conditions <u>in</u> section 64. There is no reference to conditions under section 64 or in regulations made under the power in section 64. In my judgment, the definition must be construed as restricted to determinations whether the conditions set out in section 64(2) or (3) were satisfied (and possibly extending to age and non-entitlement to DLA). That is consistent with the following factors. It does not involve extending the definition to a determination about residence or presence that patently has nothing to do with whether a claimant is disabled or not. The ordinary meaning of a term may colour the interpretation of a special definition of the term. It does not leave recipients of attendance allowance worse off than recipients of DLA. It is consistent with the purpose of the regulations which inserted regulation 7A and the corresponding structure of regulation 7 into the Decisions and Appeals Regulations with effect from 5 July 1999 (the Social Security and Child Support

(Decisions and Appeals) Amendment (No 2) Regulations 1999). The explanatory note to those regulations described regulation 7(2)(c) as applying where there was a supersession on grounds connected with the claimant's condition.

14. Accordingly, that examination of the particular terms of regulations 7(2)(c) and 7A of the Decisions and Appeals Regulations does not alter the preliminary conclusion expressed when I granted leave to appeal. The Secretary of State's decision of 20 February 2004 that the claimant was no longer entitled to attendance allowance could only in law have been made effective from that date under section 10(5) of the Social Security Act 1998. That is the decision that the appeal tribunal of 24 August 2004 should have made, but did not.

15. The second area of technical difficulty is how that affects the question of whether an overpayment for the period from 27 October 2003 to 4 January 2004 is recoverable. The representative of the Secretary of State in the submission of 19 September 2006 agreed with the outcome I had suggested, but without quite explaining how one got over the fact the decision of the appeal tribunal of 24 August 2004 was final on the question of entitlement to attendance allowance (section 17(1) of the Social Security Act 1998 and also see paragraph 27 of Tribunal of Commissioners' decision R(CR) 1/02).

16. It has been decided that in such circumstances findings of fact made by a decision-maker or appeal tribunal deciding on entitlement are not binding on a subsequent appeal tribunal deciding on overpayment recoverability. That was held by Mr Commissioner Jacobs in decision CIS/1330/2002, following what was said by Mr Commissioner Sanders in CIS/1263/1997. Those were both cases where what had been decided about the amount of a claimant's capital was held not to be binding on an appeal tribunal dealing with a later appeal against a separate overpayment recoverability decision. No regulations have been made under section 17(2) of the 1998 Act to make such findings of fact or determinations conclusive. But that is only the first step. If the earlier decision is final and determinative of entitlement for the period it deals with, in the present case it has to be accepted that the claimant is not entitled to attendance allowance from 27 October 2003 onwards. How then can it be concluded that there was not a recoverable overpayment of attendance allowance for the period from 27 October 2003 to 4 January 2004?

17. The answer is, as has recently been pointed out by Mr Commissioner Levenson in decision CIS/3605/2005, in the wording of section 71(1) of the Administration Act in giving the Secretary of State an entitlement to recover an overpayment. The entitlement is granted only to recover "the amount of any payment which [the Secretary of State] would not have made" but for a person's misrepresentation of, or a failure to disclose, a material fact. In CIS/3605/2005, it had been decided on supersession that the claimant was entitled to a reduced amount of income support for a past period because she had ceased to receive child benefit and had not told the income support office. There was no appeal against that decision. An overpayment recoverability decision was then made covering the whole period, against which the claimant did appeal. It was discovered that for part of the period in question child benefit had been reinstated, so that the correct amount of income support had been paid for that part. The Commissioner held that the appeal tribunal was obliged to decide that the Secretary of State was only entitled to recover the amount that would have been paid if the end of receipt of child

benefit had been reported, taking into account the later reinstatement, ie the overpayment that had actually been made. In decisions CIS/1330/2002 and (rather more clearly) CIS/1263/1997, the ability of an appeal tribunal considering an appeal against an overpayment recoverability decision to take a different view of the amount of the claimant's capital than had been taken in the earlier supersession/review decision seems to have been linked to asking the question whether there had been a failure to disclose a material fact under section 71.

18. The approach in those cases cannot be applied in a simple way to the circumstances of the present case if one looks only at the failure to take into account the correct legal rule on the effective date of the supersession decision. If one asks what attendance allowance would have been paid by the Secretary of State (on the assumption for the present that he is right about the date of ceasing to be ordinarily resident in Great Britain) if the leaving had been disclosed on 24 October 2003, the answer is that nothing would have been paid from 27 October 2003 onwards. And the Secretary of State could then, by acting promptly, have made a supersession decision that took effect from that date. Nor on that basis could it be said that there was not a failure to disclose a material fact. The specimen instructions to attendance allowance claimants in the papers were to report if they were going to leave to the country for more than four weeks. In my judgment, any conclusion that there was no overpayment in such circumstances would cross the line between reaching a decision based on inconsistent findings of fact and reaching a decision that was inconsistent with the very decision on entitlement that is made final by section 17(1) of the Social Security Act 1998. On that basis, it would have to be accepted that there was an overpayment of attendance allowance, because of the decision of the appeal tribunal of 24 August 2004 on entitlement, despite its error of law. There was then nothing to stop the application of the conditions in section 71 of the Social Security Administration Act 1992 for making the overpayment recoverable.

19. However, in substituting a decision on the claimant's appeal against the decision of 25 January 2005, I, like the appeal tribunal of 26 October 2005, can take an independent view of the question of when the claimant ceased to be ordinarily resident in Great Britain. Taking a different view on that issue would, within the principles accepted in the Commissioners' decisions discussed above, not involve undermining the decision of the appeal tribunal of 24 August 2004 on entitlement.

20. The questionnaire signed by the claimant on 31 January 2004 was designed to be answered before or after a claimant went abroad, and many of the questions are more suited to the former situation. The claimant in the present case signed the questionnaire on 31 January 2004. As noted above, I do not think that her answers can fairly be taken as doing anything more than indicating what her reasons and intentions were at that date, rather than as at 24 October 2003. She just answered the printed questions fairly briefly, without giving any more explanation of the circumstances or of changes since 24 October 2003. There was no section of the questionnaire for "anything else you want to tell us". The evidence before the appeal tribunal of 26 October 2005 included two letters from the claimant dated 27 June 2005 and 29 August 2005. The second gave the fullest explanation of the circumstances:

> "Following a holiday in France in 2002 my husband decided that the more relaxed lifestyle and space in France might aid his prolonged recovery from a heart bypass operation and continuing high blood pressure, I was not keen as it would mean leaving my daughters and family, but agreed to spend some time in France, we arrived in France on the 23rd October 2003, and my plan was to return to England at Christmas and stay with my daughters. [In the letter of 27 June 2005 the claimant had said that she had initially agreed to stay on in the holiday accommodation to `research' and that she was in the United Kingdom for a week at Christmas] During the Christmas holiday my youngest daughter and family decided to visit France and stay with my husband who was staying in a gite. I travelled with them and decided to stay on in France with my husband and intended to return to England in the spring. When my daughter and family decided that they would like to live in France I stayed on to await their arrival, and then if necessary I could live with my eldest daughter in England for long breaks."

21. The appeal tribunal of 26 October 2005 did not give any indication of not believing that evidence from the claimant. I too see no reason not to accept that evidence, which is consistent with the answers given on the questionnaire. But the appeal tribunal considered that it did not matter when she made up her mind to live permanently in France, as she had not been resident in Great Britain since 23 October 2003.

22. That must have been based on a misunderstanding of the meaning of ordinary residence. I do not need to go through all the authorities on that issue, but can for convenience refer to the discussion in the House of Lords' decision in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, R(IS) 2/00. There was reference there to Lord Scarman's statement in *R v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309, at 344F, of the ordinary and natural meaning of the words as providing this simple test:

> "[I]f there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

There was also reference to the statement of Somervell LJ in *Macrae v Macrae* [1949] P 397 that ordinary residence can be changed in a day and to the proposition of Lord Brandon in *In re J (a Minor)* [1990] 2 AC 562, at 578 that a person may cease to be habitually resident in a country "in a single day if he or she leaves it with a settled intention not to return" but to take up habitual residence elsewhere". It should also be borne in mind that it is possible in law for a person to be ordinarily resident in more than one country concurrently.

23. The question is at what point the claimant ceased to be ordinarily resident in Great Britain rather than the point at which she became ordinarily resident in France. The important element of the test in these circumstances the settled purpose or intention. In my judgment, the evidence plainly points to the claimant not having adopted a settled intention that Great Britain was no longer to be her home as part of the regular order of her life until after Christmas 2003 when she informed the DBU that she had moved to France. That date was after 4 January 2004. I take her answer on the questionnaire that she would not be coming back to live permanently in

Great Britain as referring to that date. Although the selling of the claimant's property in Great Britain on 31 October 2003 could be said to point in the other direction, there are many other potential explanations for doing that apart from an already settled intention not to live in Great Britain as part of the regular order of her life. Accordingly, my conclusion is that throughout the period from 25 October 2003 to 4 January 2004 the claimant remained ordinarily resident in Great Britain.

24. The consequence on the application of the test in section 71 of the Administration Act for the recoverability of an overpayment is that the amount of £572 paid in attendance allowance in the period from 27 October 2003 to 4 January 2004 cannot be said to have been a payment that would not have been made if there had been no failure to disclose a material fact. On the basis of my conclusion above, the claimant's absence from Great Britain while remaining ordinarily resident here would not have affected her entitlement to attendance allowance under regulation 2 of the Attendance Allowance Regulations. Consistently with the approach in Commissioners' decisions CIS/3605/2005, CIS/1330/2002 and CIS/1263/1997, my conclusion may be given effect in this decision despite the different conclusion that underlay the decision of the appeal tribunal of 24 August 2004. As one of the essential conditions for recoverability is not met, my substituted decision is, as set out in paragraph 1 above, that the overpayment of £572 is not recoverable from the claimant.

(Signed) J Mesher
Commissioner

Date: 27 November 2006