PLH *Commissioner's File: CH 1400/06*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	RB of Kensington and Chelsea
Respondent:	*[the claimant]*
Claim for:	Housing Benefit
Appeal Tribunal:	Fox Court
Tribunal Case Ref:	U/42/242/2005/10398
Tribunal date:	20 December 2005
Reasons issued:	2 February 2006

[ORAL HEARING]

1. My decision is that the decision of the Fox Court appeal tribunal (Mr M J Nye, chairman, sitting alone) on 20 December 2005 was erroneous in point of law in holding that the claimant had a "right to reside" in the United Kingdom and awarding her housing benefit accordingly on the claim she made on 27 July 2005. I set the decision aside and in accordance with paragraph 8(5)(a) Schedule 7 **Child Support Pensions and Social Security Act 2000** give instead the decision I am satisfied the tribunal ought to have given, which is that the claimant did not have a relevant "right to reside" and accordingly had to count as a "person from abroad" for the purposes of that claim, with the result that as originally determined by the local authority on 18 August 2005 she was not entitled to housing benefit and her claim was therefore correctly refused.

2. This case is one of a number that have arisen as the result of the Government's introduction of a "right to reside" test for means-tested benefits claimed by persons from abroad, supplementing the previous conditions based on habitual residence. The claimant is a woman now aged 43 who was born and brought up in what is now Slovenia but was then part of the territory of the Federal Republic of Yugoslavia. After working for some periods as a secretary she married and moved to the United States, where she had three children and lived with her husband until the marriage broke up in 1998. She continued to live in the United States, apart from relatively short spells in Slovenia, until the late summer of 2003 when she came to the United Kingdom, entering this country with her three children on 19 September 2003. I was told she was

originally admitted on a six- month tourist visa, though it was accepted as common ground that she was intending to find a course of study she could pursue and was hoping to remain here with her children for longer, despite having no previous connection with this country. She remained here after the end of her six months, I am not quite sure on what basis, and made two applications for housing benefit in the course of 2004, the first of which was not pursued and the second rejected.

3. Eventually after trying various possibilities she succeeded in obtaining admission to a postgraduate course at King's College London in "Contemporary Cinema Cultures" for one year from 27 September 2004 (obtaining the course fee of £9,300 from the US Government as a federal loan), and the following summer while still enrolled on that course made a further claim for housing benefit on 27 July 2005, the form being filled in for her by a welfare adviser at King's College. This claim was made in respect of the flat in Holland Park where she had been living since 21 April 2005, paying £780 a month rent. She claimed as a full-time student and single parent responsible for her three children, her only resources being £1,250 a month child support maintenance she was receiving for them from her former husband, and child benefit for which she had applied.

4. The claimant had entered the United Kingdom on a Slovenian passport issued on 17 December 1993, which expired on 17 December 2003. Slovenia only became an independent state in the latter part of 1991: its independence was declared on 25 June 1991, that declaration was implemented on 8 October 1991, and its constitution was adopted on 23 December 1991. All of that happened *after* the last of the claimant's periods of employment as a secretary in what was then the Republic of Yugoslavia had taken place. The Republic of Slovenia became a Member State of the European Union, and thus a Member State for the purposes of the EC Treaty, on 1 May 2004 under the Accession Treaty and Act of Accession of 23 September 2003.

5. The issues in this case concern whether the claimant's status as a national and citizen of that Member State exempts her from being treated as a "person from abroad" and thus excluded from housing benefit. Her claim of 27 July 2005 was rejected by the Council on 18 August 2005 on the ground that she did not meet the "right to reside" test, but on appeal to the tribunal she succeeded on this. By its decision of 20 December 2005 she was held to have such a right as a person who had come to the United Kingdom to "purchase services", identified as the postgraduate course for which she enrolled at King's College just over 12 months after coming here. The Council seeks in this appeal to challenge that conclusion and the tribunal's consequent award of

housing benefit to the claimant as erroneous in law. The claimant seeks to uphold the tribunal's decision on the same or other grounds.

6. I held an oral hearing of the appeal which had been directed by another Commissioner. I was assisted by able written and oral arguments on both sides: from Clive Jones of Counsel, instructed on behalf of the Borough Council by its Director of Law and Administration, and from Martin Williams, Appeal Representative, London Advice Services Alliance, on behalf of the claimant who also attended the hearing. Following the hearing I gave leave for supplemental written submissions on both sides to deal with various points that arose and these too I have taken into account.

7. The provisions which were considered by the Council to prevent the claimant qualifying for entitlement to housing benefit on her claim of 27 July 2005 are contained in regulation 7A of the **Housing Benefit (General) Regulations** SI 1987 No. 1971 as in force at the time of the claim and the Council's decision of 18 August 2005 rejecting it, which omitting the parts agreed to be irrelevant to this case are as follows:

> **"Persons from abroad**
>
> **7A.- (1) A person from abroad who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable ...**
>
> **(4) In paragraph (1) 'person from abroad' ... means any person ... who ...**
>
> **(e) is not habitually resident in the United Kingdom, ... but for this purpose no person shall be treated as not habitually resident in the United Kingdom who is –**
>
> **(i) ... a person with a right to reside in the United Kingdom pursuant to Council Directive ... No. 73/148/EEC ...**
>
> **(4B) In this regulation, for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, ... if he does not have a right to reside in the United Kingdom, ..."**

8. To sum up those provisions in broad terms, there continues to be a test of habitual residence for entitlement to housing benefit but that test is modified in two directions: a person with a right to reside under the EEC Directive mentioned in paragraph (4)(e)(i) is treated as satisfying the test whether he or she would otherwise do so or not; and a person without a right to reside in the United Kingdom travel area under any provision of UK or EU law is treated as *not* satisfying the habitual residence test even if he or she otherwise would. For practical purposes it can be taken that this claimant had been living with her children in the United Kingdom for long enough, and with a settled enough intention of making this country her home, by the time of her claim

on 27 July 2005 to satisfy the normal habitual residence test, and there is no suggestion that the rent for her flat was other than a genuine legal liability; so everything depends on whether the application of these "right to reside" rules to the facts of her case stopped her being entitled to benefit.

9. It was not argued on behalf of the claimant that the "right to reside" provisions in regulation 7(7A) were in themselves invalid, or rendered inapplicable so far as she was concerned, as discriminatory on grounds of her nationality contrary to what is now Article 12 of the Treaty establishing the European Community (EC), or Article 18 EC under which every citizen of the Union has the right to move and reside freely within the territory of the Member States.

10. Mr Williams was in my judgment entirely right not to pursue such points. The provisions of both Articles 12 and 18 EC are, as regards the right to reside, subject to any special provisions, limitations and conditions in the Treaty itself and the measures adopted to give it effect such as the terms of the various Directives; and the linking of a benefit entitlement to a right of residence does not amount to discrimination on the ground of nationality against those who do not have such a right: see the decisions of the Tribunal of Commissioners in cases CH 2484/05 and CIS 3573/05, the Commissioner in CIS 3182/05, and Jackson J in *R (Mohamed) v. London Borough of Harrow* [2005] EWHC Admin 3194, 13 December 2005, esp. at paragraphs 50 to 59.

11. Equally rightly, and very fairly, Mr Williams agreed that the tribunal's decision in this case could not be sustained as correct so far as the chairman purported as he did to extend its effect back from the date of the decision actually under appeal of 18 August 2005, so as to include the rejection of the earlier claim in 2004 (which had itself never been appealed) and award housing benefit for periods when the claimant had never applied for or obtained a national insurance number.

12. The consequence of those two points is that I am only concerned in this decision with the arguments on whether the claimant did or did not have, as at the date of her claim of 27 July 2005 and its rejection on 18 August 2005, a right to reside in the United Kingdom for the purposes of housing benefit regulation 7A, or some alternative route to entitlement to housing benefit, under some specific provision of EC legislation in a relevant Council Directive or regulation made pursuant to the EC Treaty. It was not suggested that any provision of United Kingdom domestic law conferred such a right independently of the EC legislation.

13. The first issue was whether the tribunal was right in holding the claimant had such a right under Council Directive 73/148/EEC, which is a directive made under the "services" chapter of the Treaty title dealing with the free movement of persons, services and capital, now Articles 49 to 55 EC. By Article 49, within the framework of those Articles, restrictions on freedom to provide services within the Community are prohibited in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended; and by Article 50:

> **"Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.**
>
> **'Services' shall in particular include:**
>
> **(a) activities of an industrial character;**
>
> **(b) activities of a commercial character;**
>
> **(c) activities of craftsmen;**
>
> **(d) activities of the professions."**

14. Directive 73/148/EEC of 21 May 1973, on the abolition of restrictions on movements and residence within the Community for nationals of Member States with regard to establishment and the provision of services, recites that:

> **"Whereas freedom of establishment can be fully attained only if a right of permanent residence is granted to the persons who are to enjoy freedom of establishment; whereas freedom to provide services entails that persons providing and receiving services should have the right of residence for the time during which the services are being provided;"**

and by Article 1 lays down that:

> **"1. Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:**
>
> **(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;**
>
> **(b) nationals of Member States wishing to go to another Member State as recipients of services; ..."**

By Article 4 each Member State is required to grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons and to issue a residence permit as proof of the right of such residence, and then by Article 4.2:

"2. The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory in which the services are performed shall issue a right of abode as proof of the right of residence."

15. By Article 6, an applicant for a residence permit or right of abode "**shall not be required by a Member State to produce anything other than the following, namely:**

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4."

No residence permit or right of abode document has ever been applied for issued to this claimant; but the case was argued before me on the basis that if she does come within the protected category of a person "receiving services" within the proper scope of the Directive she would have a right to reside here while doing so and be entitled to one.

16. Mr Williams relied, as he had successfully before the tribunal, on what was said by the European Court of Justice in Case 286/82 *Luisi and Carbone v. Ministero Del Tesoro* [1984] ECR 377 where the definition of "services" in what is now Article 50 EC and the general programme for the abolition of restrictions on the freedom to provide services were referred to, and the Court said at paragraph 16 of its judgment:

"16. It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments, and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."

17. However the apparent breadth of that statement, which if read as the tribunal did would make every student attending a course of any kind in another Member State a "recipient of services" entitled to reside there without qualification, sweeping aside the separate EC legislation considered below that makes specific provision for education and the residence of students, must in my judgment be read subject to what the Court said when actually considering whether attending an educational course in another Member State came within the scope of the Directive in cases 263/86 *Belgian State v. Humbel* [1988] ECR 5365 and C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447, in each of which a more limited view was taken.

18. It is sufficient for this purpose to refer to what the Court said in paragraphs 14 to 19 of its judgment in the latter case, as follows:

"14. It must first be borne in mind that under the first paragraph of Article 60 of the [EEC] Treaty [Article 50 EC] the chapter on services covers only services normally provided for remuneration.

15. As the Court has already emphasised in Case 263/86 *Belgian State v. Humbel* [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

16. Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

17. However, as the United Kingdom has observed, while most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.

18. However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees ... from the students.

19. The answer to the first part of the first question must therefore be that courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty."

19. In my judgment, Mr Jones was right in submitting that that passage shows why the claimant's enrolment for her postgraduate course at King's College, which is a purely charitable foundation established by Royal Charter and a constituent part of the University of London, does not bring her within the scope of this Directive as a "recipient of services" under chapter 3 Title III EC. The reasons are a combination of the nature of the educational institution concerned and that of the activities it undertakes, which the paragraphs just quoted show are to be viewed for this purpose as a whole, rather than giving rise to different answers in individual cases according to the precise circumstances of each individual student and any amounts he or she is required to pay. I think Mr Williams was justified in pointing out that the behaviour and attitudes adopted by at any rate some of our universities in recent years in response to pressures on education funding, particularly in relation to attracting foreign students to whom higher fees may be charged, can make it more difficult from the individual student's standpoint to see the difference between one of Europe's great liberal universities and the kind of profit- seeking commercial establishment identified in paragraph 17 of the Court's

judgment as on the other side of the line, a mere provider of services at which the essentially economic and commercial provisions of Article 50 EC and the Directive are aimed. However I accept Mr Jones' submission that we are not yet reduced to the point where the difference between education and commercial activity has disappeared altogether. Without meaning to disparage the value of economic activities or the Treaty measures designed to provide a level playing field for them within the Community, not everything is to be regarded as a commodity; not every transaction or relationship is that of buyer and seller; and the Community legislation and jurisprudence both recognise that there is a difference between a student engaged in a course of study at a university and a person visiting another country as a customer for services of a business or professional nature.

20. Of course education is always, one hopes, of "service" in the wider sense to those who take part in it but in my judgment it does not follow that a normal postgraduate degree course at an institution such as King's College, which according to the documents before me receives the bulk of its funding from public or endowment sources and as a charitable institution does not and cannot itself engage in any commercial activity at all, brings the students attending it within the scope of the Treaty provisions and Directive that deal with the provision of services as part of the economic life of the Community. As the ECJ pointed out in Case C-408/03 *Commission v. Belgium* [2006] 2 CMLR 41 at paragraphs 64 to 65, the right of residence under Art 18 EC is not unconditional and the applicable conditions as regards students are dealt with by a separate Directive, 93/96/EEC, considered further below.

21. In view of my conclusion I did not need to consider in this case the question touched on in the Commissioner's decision in CIS 3875/05 of whether the claimant could in any event claim the benefit of Articles 49 and 50 EC when, as here, she did not enter the United Kingdom for the purpose of receiving the specific "services" in question; though that too seems debatable when she had not arranged and enrolled for her course until a year later.

22. In my judgment therefore the claimant fails to establish that she was a person with a right to reside in the United Kingdom pursuant to Council Directive No. 73/148/EEC and the tribunal was wrong in law to hold that she did.

23. That does not however conclude the case against the claimant, since as already seen a person like her who has actually been here long enough to establish habitual residence in this country by the normal test can only be excluded from benefit

under housing benefit regulation 7A(4B) if the person or tribunal making the decision is satisfied that he or she does not have a right to reside in the United Kingdom travel area. On this the main argument was whether she had such a right under Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, a provision made under what is now Article 12 EC prohibiting discrimination within the Community on the ground of nationality.

24. Directive 93/96/EEC recites that that Article, in conjunction with Article 128 of the EEC Treaty, prohibits any discrimination between nationals of the Member States as regards access to vocational training in the Community and that in order to guarantee access to vocational training the conditions likely to facilitate the effective exercise of the right of residence necessarily implied should be laid down, though beneficiaries of that right must not become an unreasonable burden on the public finances of the host Member State. Article 1 of the Directive thus requires that:

> **"... the Member State shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State."**

25. Article 1.1 provides that the right of residence shall be restricted to the duration of the course of studies in question and be evidenced by the issue of a residence permit document; Article 3 that the Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence; and Article 4 that the right of residence shall remain for so long as beneficiaries of that right fulfil the conditions laid down in Article 1.

26. In my judgment, Mr Jones was again right in submitting that the claimant had no right of residence under the terms of this Directive at the date of her housing benefit claim on 27 July 2005, the matter having to be tested at that date (or at the date of the rejection of the claim on 18 August 2005, when the facts were not materially different) and it being clear from use of "for so long as" in Article 4 that no such right can arise or continue when the conditions laid down in Article 1 are not satisfied.

27. Even accepting for this purpose that the claimant's course in "Contemporary Cinema Cultures" in the School of Humanities could be accepted as a "vocational training course" within the scope of the relevant Treaty provisions and the Directive, (which I think questionable), what cannot be disputed is that at *neither* of those dates was either of the two conditions in Article 1, as to a declaration of sufficient resources to the relevant national authority for a residence permit, and the claimant being covered by sickness insurance in respect of all risks, satisfied at all. It is agreed that the claimant had not in fact made any such declaration in terms or applied for a residence permit; nor did she have sickness insurance.

28. I do not agree that in the circumstances of this case it would be disproportionate, as Mr Williams suggested, to apply the terms of these two conditions for which the Community legislation itself expressly provides; and I also reject his further submission that for this purpose the claimant's application to the Council for means-tested assistance in the form of housing benefit could itself count as the required declaration under Article 1 that she had sufficient resources to avoid becoming a burden on the social assistance system of the United Kingdom during her period of residence. Even if, which I doubt, the Council rather than the Home Office is the "relevant national authority" for the purposes of the declaration and residence permit procedure envisaged by Article 1, it seems to me completely impossible to construe an application for social assistance as a declaration that the applicant has sufficient resources to manage without it. I do not agree that anything said in the European Court of Justice in case C-413/99 *Baumbast v. Secretary of State* [2002] ECR I-7091, which as the Tribunal of Commissioners pointed out in case CIS 3573/05 was decided on its own distinctive and peculiar facts, could justify me in this case disregarding the express provisions of the Directive as Mr Williams' argument (perforce) suggests.

29. Applying the express terms of the Directive itself therefore, the claimant did not have a right to reside in the United Kingdom under it at the relevant times.

30. That makes it also necessary to consider whether she might have had an alternative right under Directive 90/364/EEC, which as pointed out by the Court in *Commission v. Belgium* already cited is a residual provision setting to the conditions for the grant of a residence permit as regards nationals of Member States who do not enjoy a right of residence under other provisions of Community law. It is only necessary to refer to Articles 1 and 3 of that Directive, which provide that:

> **"1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of**

their families as defined ... provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid become a burden on the social assistance system of the host Member State during their period of residence. ...

3. The right of residence shall remain for so long as beneficiaries of that right fulfil the conditions laid down in Article 1."

31. Thus the conditions in Article 1 of this Directive are similarly to be complied with on a continuing basis if a person is to have and maintain a right to reside, and it is in my judgment equally clear that when this claimant's application of 27 July 2005 was made and rejected they were not. Neither did she have sickness insurance for herself and her children, nor did she in fact have sufficient resources to avoid becoming a burden on the social assistance system when she herself asked for such assistance in the form of housing benefit. There is no more reason for ignoring the express terms of this Directive than there is in relation to the other one dealing with students on vocational training.

32. It was not suggested that any other right of residence under Community legislation could be in point, and accordingly in my judgment the Council was right in its original determination that the claimant had no right to reside in the United Kingdom travel area to prevent her counting as a "person from abroad" under regulation 7A.

33. The final alternative argument I have to consider is that advanced on her behalf by Mr Williams that by reason of her previous periods of employment in the geographical area of Yugoslavia which some time after the last such period had been completed in 1991 became the Republic of Slovenia, she was entitled to housing benefit by the overriding application of Council Regulation No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

34. For this purpose Mr Williams argued that the claimant came within the personal scope of the regulation as having worked within what is now Slovenia and, according to copy records produced from the old age and invalidity insurance bureau of Slovenia, having been recorded as having had periods of employment there for such insurance purposes, though all before Slovenia became an independent state and of course long before it became a Member State of the European Union. He further claimed that housing benefit should for this purpose be treated as within the material scope of the regulation, whose effect was therefore to entitle the claimant while actually

resident here to housing benefit on the same basis as resident nationals of the United Kingdom.

35. In my judgment this argument too must fail. There are obviously some very difficult conceptual questions involved in whether a person who has worked and been credited for insurance purposes with periods of employment in a State which has ceased to exist, but the relevant part of whose territory has since become an independent state which still later has become a Member State of the European Union, can claim for the purposes of Articles 1 and 2 of regulation 1408/71 to be within the class of "persons covered" defined by Article 2 as "**employed or self-employed persons and ... students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States**". This is especially so as the definitions in Article 1 require that to count as an employed person one must be a person who "**is [sic] insured ... for one or more of the contingencies covered by the branches of a social security scheme**"; or as a student, a "**person other than an employed or self-employed person ... within the meaning of this regulation who studies or receives vocational training leading to a qualification officially recognised by the authorities of a Member State, and is [sic] insured under a general social security scheme or a special social security scheme applicable to students**".

36. I frankly doubt on the information before me whether the claimant here can fall within the proper scope of either of those definitions, or whether her periods of employment in the former Yugoslavia show her to have been "**subject to the legislation of one or more Member States**" in the relevant sense; at least without some express provision to deal with the particular circumstances of Slovenia in the Accession Treaty, there being no suggestion to me that any such provision had been made.

37. But however that may be, I again accept Mr Jones' submission that the conclusive answer to any claim for housing benefit based on the regulation is that housing benefit is a social assistance benefit outside its scope, and not brought within it by any special declaration such as has been made by the United Kingdom government in relation to income support or income-based jobseekers allowance.

38. By paragraph 1 of Article 4 ("**Matters covered**") it is provided that the regulation shall apply to "**all legislation concerning the following branches of social security:**", followed by the list of the eight main branches of social security or social insurance schemes comprising benefits in respect of sickness and maternity, invalidity, old age, survivors' benefits, accidents at work and occupational diseases, death grants, unemployment and family benefits. The branches of social security thus intended to be

covered do not include social assistance benefits for the relief of poverty or homelessness, which are not among the list of risks enumerated; as is emphasised by Article 4.4 which says expressly that the regulation is not to apply to social and medical assistance.

39. Under Article 4.2(a) (in both its forms: it was amended with effect from 5 May 2005 but the alterations are for this purpose immaterial) the effect of the regulation can be extended to "**special non-contributory benefits**" intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1; and by Article 10A a Member State can make express provision for persons to whom the regulation applies to be granted special non-contributory cash benefits specially listed in an annex. Housing benefit has not been so listed, and nor in my judgment can it otherwise fall within the material scope of Article 4 by inclusion under Article 4.2(a), since although as pointed out by Mr Williams it can certainly benefit insured persons and others covered by the social security schemes in respect of sickness, invalidity, old age and so forth, its purpose is independent of any of those risks. The circumstances for which it provides assistance are those of poverty and possible homelessness through inability to pay the rent, and those are risks outside the insurance risks enumerated in paragraph 1 of the Article: in Community law terms they are needs dealt with by social assistance, rather than social security schemes.

40. For those reasons the claimant in this case was not entitled to housing benefit either on a proper application of the requirements of regulation 7A of the housing benefit regulations or by the overriding effect of EC regulation 1408/71, and accordingly this appeal by the Council is allowed and my decision substituted in the terms set out above.

(Signed)

P L Howell
Commissioner
8 November 2006