

## DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Leicester City Council

12/13 January, 23/24 February 2006

CH/2484/2005  
CIS/3573/2005**Representation:**

Mr Andy Miles for Leicester City Council

Mr Stephen Knafler of Counsel for the claimant.

Mr Jason Coppel of Counsel for the Secretary of State.

1. Our decision is that the decision of the tribunal given at Leicester on 20 June 2005 is erroneous upon a point of law. We set it aside. We make the decision the tribunal ought to have made, namely that the claimant is not entitled to housing benefit or council tax benefit from 1 June 2004.

2. This is an appeal by Leicester City Council, with the leave of the chairman, from the decision of an appeal tribunal dated 20 June 2005. As the Chief Commissioner considered that this appeal and the appeals CIS/3573/2005, CPC/2920/2005, CIS/2680/2005 and CIS/2559/2005 involved a question of law of special difficulty, he directed that the appeal be dealt with by a Tribunal of Commissioners, in accordance with the provisions of section 16(7) of the Social Security Act 1998. The Tribunal of Commissioners held oral hearings on 12 and 13 January, and 23 and 24 February 2006. These hearings covered the first four appeals while the hearing in CIS/2559/2005 was held on 29 March 2006. By direction of a Commissioner the Secretary of State was invited to state whether he wished to intervene in this case and, on his indication that he so wished, the Secretary of State was joined as a party to the proceedings on 30 November 2005.

3. At the hearing of this appeal Leicester City Council was represented by Mr Andy Miles, Appeals Officer, while the claimant was represented by Mr Stephen Knafler, of Counsel, instructed by the Leicester Law Centre. The Secretary of State was represented by Mr Jason Coppel, of Counsel, instructed by the Office of the Solicitor for the Department for Work and Pensions.

4. On 1 June 2004 the claimant claimed housing and council tax benefit. The claimant was refused her claims on 5 October 2004. That decision was reconsidered but also reconfirmed on 8 February 2005. She appealed to an appeal tribunal which heard and allowed her appeal on 20 June 2005.

5. The decision of the tribunal was in the following terms:

"The decision of the Appeals Tribunal sitting at the Leicester Venue of the Appeals Service on 20 06 05 is: -

1. [The claimant] is to be treated as habitually resident in the United Kingdom for the purposes of Housing and Council Tax Benefit from 01 06 04 as she has the right to reside in the United Kingdom as of that date."

6. The tribunal made the following findings of fact:

"1. [The claimant] came to the United Kingdom on 01 03 04 with her 3 children.

2. [The claimant] is a citizen of Sweden. She was born in Somalia. She subsequently went to Sweden as a refugee and was granted Citizenship of that country.

3. [The claimant] has not worked during her time in the United Kingdom.

4. [The claimant] claimed Housing and Council Tax Benefit on 01 06 04. She received a decision refusing her claim on 05 10 04 and that decision was reconsidered but reconfirmed on 08 02 05.

5. [The claimant] had a fixed and settled intention of residing in the UK by the 01/06/04."

7. The basis for the tribunal's decision was set out as follows:

"In each of the cases under consideration it is common ground that the appellant is economically inactive. The tribunal accept that the appellant is lawfully resident in the UK under National Law. Accordingly the tribunal considers that the appellant must be treated equally with British and Irish citizens. The tribunal find therefore that the right to reside test is incompatible with article 12 of the EC Treaty and that it cannot be applied to refuse benefit to EU Nationals.

There were arguments on both sides concerning the meaning of the phrase 'no person shall be treated as habitually resident'. The Department argued that there is no technical meaning to the words 'treated as' in this context. The tribunal again accept the argument of Mr Venables that the wording of Regulation 21 (3g) [sic] only means that someone who is not, in fact, habitually resident shall not be treated as if they were unless they a [sic] right to reside. The tribunal accept the argument that the appellant does not need to be treated as habitually resident because she is habitually resident by the date of decision under appeal."

8. For reasons which will become apparent, we consider that the tribunal's decision errs in law on the factual basis found by it and must therefore be set aside.

9. Section 137(2)(i) of the Social Security Contributions and Benefits Act 1992 provides that "Regulations may make provision ... for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable ..." Section 130 sets out the basic condition for entitlement to Housing Benefit.

10. Section 131(1) and (3) of the Social Security Contributions and Benefits Act 1992 provide that Council Tax Benefit cannot be paid to a prescribed member or a member of a prescribed class. Persons from abroad are prescribed under regulation 4A of the Council Tax Benefit (General) Regulations 1992.

11. Regulation 7A(1) of the Housing Benefit (General) Regulations 1987 and regulation 4A(1) of the Council Tax Benefit (General) Regulations 1992 provides:

"... 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..."

In order to find out whether a person is "a person from abroad" it is necessary to have regard to the definition of "person from abroad" set out in regulation 7A(4) of the Housing Benefit (General) Regulations 1987 and regulation 4A(4) of the Council Tax Benefit (General) Regulations 1992 (which are identical). The relevant parts of the Regulations are in the following terms:

"... "person from abroad" also means any person other than a person to whom paragraph (5) applies who –

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose no person shall be treated as not habitually resident in the United Kingdom who is –
  - (i) a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No 68/360/EEC or No 73/148/EEC [or a person who is an accession State worker requiring registration who is treated as a worker for the purpose of the definition of "qualified person" in regulation 5(1) of the Immigration (European Economic Area) Regulations 2000 pursuant to regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004; or
  - (ii) a refugee; or
  - (iii) a person who has been granted exceptional leave to enter the United Kingdom by an immigration officer within the meaning of the Immigration Act 1971, or to remain in the United Kingdom by the Secretary of State; or

- (iv) ...
- (v) ...
- (vi) ... ; or

(vii) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act and who is in the United Kingdom as a result of his deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom; ...

- (f) ...
- (g) ....”

12. This legislation is in substance identical to that dealt with in the related case of Abdirahman CIS/3573/2005 dealt with concurrently with this appeal, save for the addition of the word “also” in regulation 7A(4) of the Housing Benefit (General) Regulations 1987 and regulation 4A of the Council Tax Benefit (General) Regulations 1992 as compared to regulation 21(3) of the Income Support (General) Regulations 1987 (SI 1987/1967), the relevant legislation in Abdirahman CIS/3573/2005. This addition potentially has a significant effect on the meaning of the legislation.

13. Mr Miles pointed out that the addition of the word “also” appears to make what follows only an addition to the rest of the regulation which, in fact, does not define “person from abroad”. Therefore he submitted that regulations 7A and 4A make all “people from abroad” not entitled to benefit. He immediately conceded, however, that this could not be the intention of the legislature.

14. Mr Miles was correct to draw his concerns to our attention.

15. However, after counsel for both the claimant and the Secretary of State explained the relevant legislative history, it is clear that the word “also” refers back to a previous definition, now repealed. Accordingly, the word “also” is now mere surplusage or, perhaps more properly in the present circumstances, redundant. We hold that the relevant regulation must be interpreted as if the word “also” was not there.

16. However the definition of “person from abroad” in both Regulations is specifically subject to further qualification. Both regulation 7A(4B) of the Housing Benefit (General) Regulations 1987 (SI 1987 No 1971) and regulation 4A(4B) of the Council Tax Benefit (General) Regulations 1992 (SI 1992 No 1814) (both as amended by regulation 2(b) of the Social Security (Habitual Residence) Amendment Regulations with effect from 1 May 2004) are in the following terms:

“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, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.”

17. The legislation in the Income Support appeal CIS/3573/2005 is accepted by all representatives to be identical in substance to the relevant legislation in the present appeal. Accordingly we come to the same legal conclusion as in CIS/3573/2005, namely that:

(i) regulation 7A(4B) of the Housing Benefit (General) Regulations 1987 and regulation 4A(4B) of the Council Tax Benefit (General) Regulations 1992 do not merely qualify regulation 7A(4) of the Housing Benefit (General) Regulations 1987 and regulation 4A(4) of the Council Tax Benefit (General) Regulations 1992 respectively, but are general in their application;

(ii)(a) the claimant did not have a right under United Kingdom domestic law to reside in the United Kingdom, (b) nor did she have a right under European law to reside in the United Kingdom as any such right was restricted by European law and, in particular, EEC Directive 90/364;

(iii) regulations 7A(4B) and 4A(4B) are discriminatory under Article 12 of the Treaty of Rome;

(iv) any discrimination is objectively justified; it is proportionate.

18. We also conclude that the relevant provisions of Domestic law are not ambiguous but, instead, are entirely clear and are in accordance with the Treaty of Rome and the EEC Directive 90/364.

19. The reasoning for our conclusions is identical to that set out in CIS/3573/2005.

20. One of the curious features of this appeal was the significant departure by Mr Knafler in relation to the factual basis upon which he sought to present the claimant's case. It was his submission that, if we set the tribunal's decision aside, then the matter should be remitted to a freshly constituted tribunal. This was on the ground that the claimant was not in fact economically inactive but was what he described as a work seeker. He submitted that such a factual basis had different consequences. He fully conceded that this factual basis was not one which could be found in the record of proceedings and he accepted that this issue was not one which was raised before the tribunal. It is further not a factual basis upon which the income support claim, the subject matter of the appeal in CIS/3573/2005, was based and determined.

21. We do not consider that we should take the course suggested by Mr Knafler. The claimant was represented before the tribunal and the factual basis upon which she wished to proceed was set out by them. On the basis of the findings in fact made by the tribunal, we consider that we can make the decision that they ought to have made on the facts found by them. It is in our view too late to set out an alternative factual basis for the case before the appellate jurisdiction and then submit that, if we were not disposed to uphold the tribunal's decision which was made on one factual basis, we should remit it to a freshly constituted tribunal so that the claimant should have the opportunity of presenting an entirely different factual basis before it and seek to argue the matter at that stage.

(Signed)  
D J MAY QC  
Commissioner

(Signed)  
J M HENTY  
Commissioner

(Signed)  
HIS HONOUR JUDGE MARTIN QC  
Chief Commissioner, Northern Ireland  
Sitting as a Deputy Commissioner in Great Britain

Date: 12 May 2006