Non-remit

CIS (A)
23/1/98

ELN/SH/CM/3

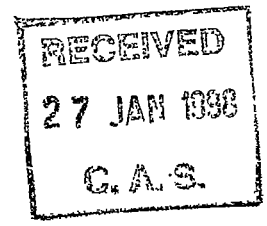
Commissioner's File: CIS/16097/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER



Name: ——

Social Security Appeal Tribunal:

Case No:

1. My decision is that the decision of the social security appeal tribunal given at Euston on 21 May 1996 is erroneous in law and I set it aside. It is expedient for me to substitute my decision for that of the tribunal on the basis of the findings of fact made by the tribunal, pursuant to my power so to do contained in section 23(7)(a)(i) of the Social Security (Administration) Act 1992. That decision is that the claimant was habitually resident in the United Kingdom on 23 December 1995 and that her claim for income support from that date received 28 December 1995 shall be assessed accordingly. She is consequently entitled to income support in connection with that claim provided she satisfies and continues to satisfy the other conditions for that benefit contained in section 124 of the Social Security Contributions and Benefits Act 1992.

2. This is an appeal by the claimant from the unanimous decision of the tribunal of 21 May 1996 brought with leave of the tribunal chairman.

3. The claimant claimed income support from 23 December 1995 by means of a B1 claim form received at the local office on 28 December 1995. On 1 February 1996 an adjudication officer decided that the claimant was not habitually resident in the United Kingdom. The claimant appealed to the tribunal. The tribunal dismissed the claimant's appeal, specifically deciding on 21 May 1996 that:-

"The appellant is not habitually resident in the U.K."

4. The claimant's grounds of appeal to the Commissioner are set out in a letter dated 30 July 1996 accompanying her notice of appeal. The claimant's appeal is supported by the adjudication officer concerned with the appeal to the Commissioner.

5. The tribunal found as fact that:-

"(1) The appellant visited England in 1993 for a holiday and stayed a month with friends.

(2) She applied for Income Support at the expiry of her Unemployment Benefit from Spain. The Income Support claim is dated 28 December 1995.

(3) She has many friends here. She has two bank accounts.

(4) She has been working since 11 March 1996 on a short term contract for the Borough Council of Islington. On its expiry she will be hired by another manager on a similar short-term contract in July 1996.

(5) From May to July 1995 she worked in a cafe but gave up that employment on account of its poor ventilation at the premises.

(6) She does voluntary work for the council. She worked as an administrative assistant in Spain before being unemployed.

(7) She has no family in the United Kingdom and arrived here on 26 February 1994. She received continuous payment of Income Support from 12 May 1994 to 11 September 1995.

(8) On 10 September 1995 she did an Information Technology course with Migrant Training Company and completed a work placement with Islington Council.

(9) She lives in privately rented accommodation and has no assets.

(10) She intends to reside here and came to the United Kingdom as there is no work in Spain.

(11) There was no pre-arranging of employment before arrival in the United Kingdom and the haste in which her claim to Income Support was made, was indicative of a desire to support herself by benefit."

6. The reasons given by the tribunal for rejecting the claimant's submission that she enjoyed actual habitual residence in the United Kingdom were:-

> "Moreover, when we considered her actual residence in the United Kingdom we agreed she was certainly physically present but hers was not a settled state of existence. All her family were outside the United Kingdom. She has been here just over 2 years, the home she lived in was shared with a friend and more importantly she is not economically viable."

7. In paragraph 28 of CIS/1067/95, the Commissioner talked of the claimant being required to demonstrate "a settled and viable pattern of living" and of residence of "a settled and viable nature". In paragraph 29 he said:-

> "I have used the word 'viable' because it seems to me that the practicality of a person's arrangements for their residence is a necessary part of determining whether it can be described in ordinary usage as settled and habitual. In particular in determining whether a person's plans for living in this country are viable, the possibility of claiming income support has to be left out of account, since otherwise one would be assuming the answer to the question that has to be decided. I do not mean that there must be no conceivable circumstances in which he or she might need to resort to income support, since that would be a test hardly anyone could meet; but if the chances of his or her establishing and keeping a home here at all are simply unrealistic unless bolstered by public assistance, such living arrangements cannot be considered settled and viable."

These passages were for some time after the promulgation of CIS/1067/95 given great emphasis by adjudication officers and tribunals alike when determining the issue of habitual residence for the purposes of assessment of income support entitlement. The emphasis became such in particular cases as to amount in effect to the imposition of a discrete condition of entitlement requiring the claimant to have an economically viable lifestyle regardless of whether that lifestyle was otherwise settled and habitual. The adoption of that approach is understandable bearing in mind the language used by the Commissioner in the passages to which I have referred. It is clear that in reaching their decision the tribunal in the case before me placed great emphasis on these passages and the

supposed requirement of economic "viability" contained in them, almost, if not entirely, to the exclusion of all other relevant factors. In effect their approach was tantamount to the imposition of the discrete condition of entitlement to which I have referred. The adjudication officer concerned with the appeal to the Commissioner submits that the tribunal erred in law in adopting that approach and further submits that I should set the tribunal's decision aside for that reason. I accept those submissions. In support of his submissions the adjudication officer relies in particular upon the decision of Commissioner Mesher in CIS/2326/95 in which it is said (at paragraph 28):-

> "I consider that paragraphs 28 and 29 of CIS/1067/95 should not be read as imposing an additional condition that only residence of a viable nature, in the sense of viable in the absence of resort to income support or public assistance, is relevant ... the viability or otherwise of a person's residency, either generally or with or without assistance from public funds is one relevant factor amongst others, to be given the appropriate weight according t the circumstances. It may be particularly relevant in assessing whether a person's intentions as to residence are truly settled."

I agree with the treatment of the matter by Commissioner Mesher. Similar sentiments were expressed by another Commissioner in CIS/12703/96 who said (at paragraph 10) -

> "It seems to me that what the tribunal were saying was that an intention to settle here which is solely dependent and is conditional upon payment of benefit went to intention. In those circumstances, it cannot be said that the claimant had a settled intention to stay come what may, but a conditional one if and only if she were awarded benefit. Viability is different. A person's residence may not be viable without assistance, but nevertheless a person may maintain a settled intention to stay here in the meanwhile, and reside here supported by means other than income support."

8. The adjudication officer concerned with the appeal to the Commissioner further submits that if the matter had been looked at properly by the tribunal, in that they had given appropriate weight to <u>all</u> the circumstances, they would have concluded that the claimant was already habitually resident in

the United Kingdom at the time of the claim for benefit which was under consideration by the tribunal. He points out that the claimant had resided in the United Kingdom for almost two years by the time of her claim to income support, she had lived in the same rented accommodation and had obtained part-time jobs as well as attending a full-time training course. These circumstances, he submits, clearly show a settled existence in the United Kingdom supportive of a conclusion of actual habitual residence at the time of the claim. The submission happily coincides with the principal ground of appeal of the claimant contained in his notice of appeal. I accept that submission and on the basis of it and of the other facts found by the tribunal I am prepared to make the decision as appears at paragraph 1 above.

9. Finally, although it is now somewhat academic, I find it incumbent upon me to make some comment upon the approach by the tribunal to the question of the claimant's "worker status". I accept that the tribunal were entitled to use their own judgment and to conclude that the claimant's work at a cafe in King's Cross in London for 12 hours a week over two days for three months in 1995 and with Islington Borough Council for 14 hours a week over two days under a short-term contract for three months in 1996 could be classed as marginal and ancillary, though I would not have reached such a conclusion myself. I cannot, however, see how the tribunal could legitimately conclude, as they did, that neither of the forms of employment was "genuine", except on the basis of mere suspicion or speculation. The only reason apparent from the record for finding that the cafe job was not genuine, is that it was a different form of employment from that undertaken by the claimant in Spain, which appears to have been that of administrative assistant. Even if that was a sufficient reason for the conclusion that the cafe work was not genuine, which I find hard to accept, I cannot see how that could have applied to the job with the Council, which appears to have been as an assistant in the Personnel Department, and which the tribunal concluded was "similarly" not genuine. I find the tribunal in error of law for inadequacy of reasoning at the very least in relation to their treatment of the issue of genuineness of the Council job. And indeed also, as the adjudication officer submits, the failure to make sufficient findings of fact before dismissing the Council job in the way they did. The matter is, as I have said, academic, though had the matter been remitted, any new tribunal would have had to have given serious consideration as to whether the claimant could have been treated as habitually resident in accordance with regulation 21(3) of the Income Support (General) Regulations 1987 and Council Regulation (EEC) No. 1612/68 even when not pursuing the forms of employment I have described (see the approach of the Commissioner in CIS/12909/96).

10. The appeal is allowed. My decision is as in paragraph 1. It will be for the adjudication officer to calculate the amount of entitlement. If there is any disagreement about the result of that calculation, then the appeal may be returned to a Commissioner for further decision. For the sake of completeness I report that it is not clear to me from the documents exactly from which date the claimant's claim for income support has been treated as effective. The adjudication officer concerned with the appeal to the Commissioner refers to a date of 28 December 1995. The adjudication officer's submission to the tribunal seems at the very least to imply that the effective date is 23 December 1995, which is the date upon which the claimant apparently requested the B1 claim form and signed-on as unemployed. My decision has been couched in such terms as to allow income support from the date upon which the claim has been treated as effective, whichever date that may be.

(Signed) **E L Newsome**
Deputy Commissioner

(Date) 15 January 1998