

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

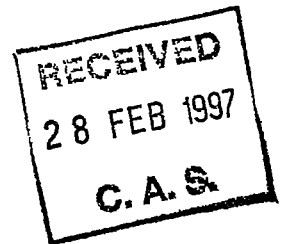
APPEAL FROM DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON
A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name :

Appeal Tribunal:

Case No:



1. This is an appeal by the claimant, with the leave of the chairman, against the majority decision of the social security appeal tribunal ("the appeal tribunal"), given on 24th July 1995, that the claimant was not habitually resident in the United Kingdom. For the reasons set out below, that decision is erroneous in point of law. I therefore set it aside and refer the case to another social security appeal tribunal ("the new tribunal") for rehearing in accordance with the guidance given below. I wish to emphasise that my decision does not imply any criticism of the majority of the appeal tribunal who considered the matter with care and made careful findings. However, since the hearing in July 1995, the meaning of the words "habitually resident" have been considered in detail in a number of Commissioners' decisions. The appeal tribunal did not have the benefit of these when they reached their decision.

2. The claimant applied for income support in January 1995. A person in Great Britain is entitled to income support if he or she satisfies the conditions set out in section 124 of the Social Security Contributions and Benefits Act 1992. The amount that a claimant will receive is calculated in accordance with the Income Support (General) Regulations 1987 (SI 1987/1967) ("the General Regulations"). Those regulations provide for various specified amounts to be paid to claimants who satisfy certain conditions or fall into certain categories. One such category is described as "a person from abroad". Paragraph 17 of schedule 7 to the General Regulations provides that, in the case of a person from abroad who is a single claimant, the applicable amount shall be nil. The expression "person from abroad" is defined in regulation 17(3) of the General Regulations. On 1st August 1994, that definition was amended by the addition of the following words:

"'person from abroad' also means a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man ..."

There then follow a number of exceptions, none of which apply in the present case. The effect of the appeal tribunal's decision was that the claimant fell to be treated as a person from abroad and therefore his entitlement to income support was nil.

3. It is unnecessary for me to examine the evidence in detail, particularly as the new tribunal will have to make its own findings of fact. However, in summary form, my understanding of the evidence is as follows. The claimant was born on 19th February 1960, in Pakistan. He is a Pakistani national and grew up there. His father, who owns some land, his mother and his six brothers and four sisters continue to live in Pakistan. However, he says that some of his father's cousins live in London and some of his mother's cousins live in Manchester. He first came to the United Kingdom in August 1984, in order to be married in Luton. He now has indefinite leave to stay. He lived in the United Kingdom until August 1987. He and his wife had a daughter at the beginning of February 1986. At that time he and his wife were living in rented accommodation but, in August 1986, they bought a house. For about a year, the claimant worked as a market trader on a

stall. Unfortunately, his wife left him in 1987. He became depressed and, in August of that year, he returned to his parents' home in Pakistan. He remained there for about seven months until March 1988.

4. The claimant then returned to the United Kingdom and stayed here for nearly three years. During this period, he and his wife were engaged in divorce proceedings and in disentangling their affairs. The house which they had bought was sold in 1989. The claimant then went to live in rented accommodation. In February 1991, he went back to Pakistan. He lived there for a year during which time he was supported by his father. He came back to England in February 1992 and lived here for two years in rented accommodation. At some point, he and his wife were divorced and he received a small amount, being less than £2,000, out of the net proceeds of sale of the house. He says that most of the net proceeds of that sale went either to his former wife or in payment of legal bills. At some stage, he ceased to have any contact with his former wife and his daughter. My understanding is that this was still the position down to the date of the hearing before the appeal tribunal.

5. At the start of 1994, the claimant's position was as follows. He was living in the United Kingdom in rented accommodation. At some point during his stays here he had attended one or more short, practical courses at a local college and had taken English lessons. He had a bank account with the National Westminster Bank and a few personal belongings. These apart, he owned no property in the United Kingdom. It appears from page T10 of the case papers that he was in receipt of income support which was last paid to him on 26th December 1993.

6. On about 4th January 1994, he left the United Kingdom and flew to Pakistan where he stayed with his parents for a year. He says that he went back to Pakistan for the marriage of one of his sisters. From remarks in the record of the hearing, it appears that he told the appeal tribunal that his sister was married in the middle of 1994 - about five or six months after his return. I assume that the claimant

was again supported by his father while in Pakistan. During the time that he was there, his personal belongings remained in the United Kingdom where they were stored in a garage belonging to a friend.

7. He returned to the United Kingdom on 4th January 1995. He had left on a return ticket which was valid for one year. 4th January 1995 was either the last day, or very nearly the last day, of that period. On the following day, 5th January, he applied for income support. He is recorded as having told an interviewer that: "His intentions are unsure - it depends on whether or not he finds a job whether or not he stays here. He doesn't know." See page T31 and also page T34.

8. On 26th January 1995, the adjudication officer issued a decision rejecting the claimant's application for income support on the ground that the claimant was not habitually resident in the United Kingdom. The claimant appealed against that decision. In his letter of appeal, the claimant said that he had been living in the United Kingdom since August 1984, that his centre of interest lay in the United Kingdom and that his future intention was to live and work in the United Kingdom. Prior to the hearing of his appeal, the claimant obtained employment. However, this only lasted from 10th April to 30th May 1995. At the time of the hearing, which took place on 24th July 1995, the claimant was not in work. He was represented by Mr Adam Griffith of the Luton Law Centre and he gave evidence on his own behalf.

9. The appeal tribunal made detailed findings of fact and considered the judgments of Lord Scarman in *SHAH -v- BARNET LONDON BOROUGH COUNCIL* [1983] 2 AC 309, in particular at page 343G to page 344D, and Bush J. in *KAPUR -v- KAPUR* [1994] 1 FLR 920. The majority decided that the claimant was not habitually resident in the United Kingdom. The dissenting member took the opposite view. At the conclusion of the hearing, the chairman granted the claimant leave to appeal to a Commissioner.

10. Mr Griffith, who continues to represent the claimant, made written submissions dated 19th September 1995 and the adjudication officer made her submissions on 7th December 1995. At that stage, the adjudication officer did not support the appeal. In her submissions she referred to decision CIS/1067/95 (starred decision 82/95) which was a decision of Mr Commissioner Howell given in October 1995. Mr Griffith replied to the adjudication officer's submissions on 15th February 1996. A Nominated Officer then directed the attention of the parties to three further decisions, all of which post-dated the hearing, namely CIS/4521/95 (starred as 30/96), CIS/11481/95 (starred as 31/96) and CIS/2326/95 (starred as 38/96), and invited further submissions. The adjudication officer made hers on 4th August 1996 and Mr Griffith made his on 9th September 1996. The adjudication officer now supports the appeal.

11. In view of decision CIS/1067/95 and the three decisions referred to by the Nominated Officer, I do not think it is necessary for me to review the grounds of the appeal in detail. It is clear that there must be a rehearing for three reasons. First, the test which both the majority and the dissenting member applied, but with different results, was not entirely in accordance with what has since been decided to be the test. Secondly, the appeal tribunal failed to consider whether the claimant was habitually resident in the United Kingdom when he left for Pakistan in January 1994 and, if he was, whether he remained habitually resident in the United Kingdom notwithstanding the year he spent in Pakistan. Alternatively, if they did consider this point, the majority have failed to make this clear in their reasons. Thirdly, as the recent decisions stress, the appeal tribunal were required to consider the matter not just at 5th January 1995, when the claim for income support was made, but down to the date of the hearing. Again, if the point was considered, the reasons do not make this clear.

12. The new tribunal should begin by considering whether the claimant was habitually resident in the United Kingdom when he left for Pakistan at the beginning of 1994 and whether he remained habitually resident here throughout that year. If the answer to both

those questions is "yes", then the claimant was still habitually resident in the United Kingdom when he arrived from Pakistan on 4th January 1995, and when he applied for income support the following day. Whatever decision the new tribunal come to, they must make findings of fact and give reasons for the conclusion to which they come. If they decide he was habitually resident in the United Kingdom on 4/5th January 1995, he will be entitled to income support provided that the conditions in section 124 of the Social Security Contributions and Benefits Act 1992 are satisfied. The new tribunal must also consider the matter down to the date of the rehearing. If they decide that the claimant was not habitually resident in the United Kingdom on 5th January 1995, they must go on to consider whether he became habitually resident here at some later date.

13. In his last set of submissions, Mr Griffith seeks to persuade me that the facts are sufficiently clear to enable me to find that between January 1994 and January 1995, the claimant did not cease to be habitually resident in the United Kingdom. This assumes that he was habitually resident here prior to his departure to Pakistan at the start of that period. I entirely disagree with this submission. First, the decision is one for the new tribunal. Secondly, if I were forced to come to a conclusion, that conclusion would be that, assuming the claimant was habitually resident in the United Kingdom when he left, he ceased to be so resident during the course of 1994. My reasons would be that he was a comparatively young man with no home, job or property in this country - apart from his bank account and the possessions stored in a friends garage. After his departure to Pakistan in January 1994, he did not possess a home in the United Kingdom. Furthermore, he had no close family here having lost contact with his former wife and his daughter. His family home, parents and brothers and sister are in Pakistan where he was brought up and of which country he is a national. Although he had spent much of the decade since 1984 in the United Kingdom, the reality was that he sometimes lived here and sometimes in Pakistan. That is not an unusual situation. My view would be that when in Pakistan for any length of time, he was habitually resident there and not in the United Kingdom. I appreciate

that when he left in January 1994, he was to his sister's wedding and had a return ticket. However, it appears that the wedding took place some five or six months after his arrival and he stayed on for a further six months. He only returned when his return ticket was about to expire. It would however be unfair for me to reach such a decision without giving the claimant an opportunity to appear and explain his side of the story. The claimant will have that opportunity before the new tribunal. The matter is one entirely for them after hearing what he has to say if he chooses to appear.

14. I turn to the recent Commissioners' decisions. Of those referred to, I need only concern myself with CIS/1067/95, and CIS/2326/95, a decision of Mr Commissioner Mesher. (For present purposes, the significance of the other two decisions is that they establish beyond doubt that the tribunal must consider the evidence down to the date of the hearing or, where appropriate, any rehearing.) In decision CIS/1067/95, Mr Commissioner Howell said this at paragraphs 20 and 21.

"20. Whether a person who has established *residence* in a particular country has also become *habitually* resident in it is a question of fact to be decided by reference to all the circumstances of the particular case: *Re J (a minor)* [1990] 1 AC 562 at 578G. In the absence of any statutory definition the expression, like the expression "ordinary resident" considered in *Shah's* case, should take its meaning from ordinary and natural usage and should not be given a specialised meaning, still less a variety of different specialised meanings, when used in legal contexts.

21. The most important factors to be looked at in deciding whether a person has become "habitually resident" in this country as a matter of ordinary usage are in my judgment the length, continuity and general nature of his or her *actual* residence here, rather than his or her intentions in the future. A habit is not established in a day. A man who announced yesterday his intention of

giving up his lifetime habit of smoking is not rightly described to day as an habitual non-smoker, nor will this description naturally apply to him until after some time has elapsed to see if new and healthier habits have become established in place of his old ones. Similarly a man who has just got off the bus in Laugharne and for some reason never got back on it again, has not become an habitual resident of the place until sufficient time has elapsed for a settled pattern of abode to be discerned; and it makes no difference if immediately after getting off the bus he announces his intention to stay in the boathouse there and write poetry for the rest of his life. Time must elapse before it can be seen that his presence as a resident there has in fact become habitual. As observed by Lord Brandon in *Re J* at [1990] 2 AC pp.578-9, a person may abandon habitual residence in a country in a single day but it does not follow that he thereupon becomes an habitual resident of another country to which he intends to move. An appreciable period of time, as well as a settled intention, will be necessary to enable him or her to become so. During that appreciable period of time, the person will have ceased to be habitually resident in the first country, but not yet have become habitually resident in the second."

Decision CIS/2326/95 was given after an oral hearing at which decision CIS/1067/95 was subjected to fierce criticism. However, after a careful review of the authorities, Mr Commissioner Meshier, at paragraph 20, arrived at the following conclusion.

"20. Consequently, my conclusion is that the Commissioner in CIS/1067/1995 was right to hold, following Re J, that for a person to be habitually resident in a new country an appreciable period of residence in the country must have been shown as well as a settled intention to reside there."

15. It follows from these two decisions, that if the claimant lost his status as an habitual resident of the United Kingdom in the course of 1994, assuming that he had such status when he left in January of that year, he was not habitually resident here when he made a claim for income support on 5th January 1995. In that event, it will be necessary for the new tribunal to consider matters down to the date of the rehearing - whenever that may be - to see whether the claimant became habitually resident here at any time after that date.

16. If that exercise has to be undertaken, the new tribunal may have to consider what amounts to an "appreciable time". At paragraph 28 of decision CIS/1067/95, Mr Commissioner Howell said this.

"28. What counts as an "appreciable time" for this purpose must depend on the facts of each individual case. At the risk of some circularity I would say it must be the kind of period which demonstrates according to the good sense and judgment of the tribunal a settled and viable pattern of living here as a resident, of the kind which would lead in normal parlance to the person being described as an habitual resident of this country. Without in any way detracting from the function of the tribunal to assess this for themselves on the facts of each actual case before them, a couple of simple examples may illustrate what I mean. ..."

He then gave examples. On the whole, Mr Commissioner Howell thought that the minimum period would be three months and that in some cases 12 or more months would be needed.

17. Mr Commissioner Mesher, at paragraph 24 of decision CIS/2326/95, expressed concern about these examples. He did so, not because he disagreed with them but because he felt that although put forward as examples there was a danger that the periods suggested might harden into some "rule of thumb". He was also concerned that there could be cases where very special circumstances applied. I do not think that this case is special in any way and it would be wrong for me to suggest any minimum period. I think the whole question is

one for the new tribunal to be determined in accordance with their good sense and judgment and applying the guidance in the passage quoted in the preceding paragraph. In practice, in this case, I doubt if it will prove a problem. If the claimant was not habitually resident in the United Kingdom on 5th January 1995, then the facts will either show that at some date thereafter he did become habitually resident here, in which case the period probably does not matter greatly, or else that he has never become habitually resident here.

18. In the submissions which she made on 4th August 1996, the adjudication officer has quoted from Mr Commissioner Mesher's decision where he says that there is no minimum period which is necessary to establish the acquisition of habitual residence. I do not consider that the Commissioner, who had at paragraph 20 of his decision held that for a person to be habitually resident in a new country an appreciable period of residence in that country must have been shown, was saying that an appreciable period could be a nil or negligible period. That would be both inconsistent and confusing. I consider that he was anxious to emphasise both that the facts of each case must be individually examined and that there might be exceptions to the general rule. One obvious possible exception, to which he drew attention, is the claimant who intends to retire to the United Kingdom and who, before ceasing to be habitually resident in another country, spends time here buying a retirement and making other necessary arrangements. That, however, is not the present case.

19. With regard to the submissions of 4th August 1996, I have already said that the appeal tribunal either erred by failing to consider the matter down to the date of the hearing or else failed to make it clear that they had done so. I now wish to make the following comments in relation to those submissions. First, in paragraph 7, the adjudication officer refers to the problems that can occur when a claimant has houses in two countries and spends part of the year in each. That is not this case. Secondly, if the claimant ceased to be habitually resident in the United Kingdom during 1994, then in deciding whether or not he became habitually resident after his return

here, the prior periods spent here are a factor which can be taken into account. Apart from anything else, the claimant had spent much time here and was familiar with conditions in the United Kingdom. Such periods are not, however, a predominant factor. Further, they cannot form part of any "appreciable period" following the claimant's return on 4th January 1995. Thirdly, while habitual residence is not lost by temporary or occasional absences abroad, what is an occasional or temporary absence is a question of fact for the new tribunal. In decision CIS/1067/95, the claimant went back to Myanmar because she thought that her husband, from whom she was separated, was dying and that she would have to arrange his funeral. She was only gone for a month. Fourthly, it is for the new tribunal to decide when, if at all, the claimant became habitually resident here. That will depend on the facts. That he had previously spent long periods here is a factor to be taken into account. It may mean that the necessary qualifying period is shorter than it might otherwise have been. It does not, however, automatically mean that only a short period is necessary.

20. One problem which has been canvassed by Mr Griffith in his submissions on behalf of the claimant, and also by the adjudication officer in her latest submissions, is the question of viability. That is, can a claimant be said to have a settled intention to remain in the United Kingdom if he or she can only remain here if a claim for income support is successful? Mr Griffith has raised the problem because it is one which both Mr Commissioner Howell and Mr Commissioner Mesher refer to in their decisions. I do not cite extracts. What they say can be found at paragraphs 29 and 30 of decision CIS/1067/95 and paragraph 28 of decision CIS/4521/95. Although the two Commissioners express themselves in different terms, I do not think there is any substantial difference between them. When considering whether or not a claimant has become habitually resident in this country, a tribunal must consider all the relevant circumstances. As Mr Commissioner Mesher puts it, "... habitual residence is essentially a factual concept to be determined by an unfettered consideration of all relevant circumstances". How a claimant proposes to support himself or herself will usually be of considerable relevance. In the real world, a desire to

become habitually resident in a particular country, however strongly held, does not carry matters very far if there is no realistic prospect that of being able to do so.

21. What then of a claimant, who is not already habitually resident in the United Kingdom, who arrives here and immediately claims income support? My answer is that if, as both Mr Commissioner Howell and Mr Commissioner Mesher held, an appreciable period must usually elapse before habitual residence is acquired, a claimant will not normally be entitled to income support on arrival but must support himself or herself for the appreciable period. If at the end of that period a claimant can show that he or she is habitually resident here in all respects save for the need for income support, then I do not think that that need should prevent such a person being held to be habitually resident here. He or she who will have a right to reside here and may be someone who was born in the United Kingdom and who has returned after, say, working abroad.

22. For these reasons I allow the appeal.

(Signed) J.P. Powell
Commissioner

Dated: 10 FEB 1997

FEB 1997