SUPPLEMENTARY BENEFIT

Requirements—national of a Member State of the EEC.

The claimant, a German national, came to this country in 1980 and after an alleged period in paid work spent the academic year 1980/81 as a student. He was awarded supplementary benefit from October 1981. This was discontinued from 30 September 1982 by the application of paragraph 9A(b) of Schedule 2 to the Supplementary Benefit (Requirements) Regulations 1980, following notification by the Home Office that the claimant's permission to remain in the country had expired. The decision to discontinue benefit was confirmed by the appeal tribunal and the claimant appealed to a Social Security Commissioner.

Held that:

1. where a claimant had been granted leave under the Immigration Act 1971 to enter the United Kingdom, in the absence of any appeal or application for extension of leave the original decision of the immigration authorities was conclusive as to its effect (paragraph 6);

2. a person who requires but does not currently have permission to be in this country was not available for employment; decision R(U) 13/57 followed (paragraph 8);

3. the meaning of "worker" in the context of regulation EEC 1408/71 is of little bearing on the meaning of that word for the purposes of directive 68/360/EEC. However the conclusion of the European Court of Justice that in relation to regulation EEC 1408/71 a worker in one member state is a worker throughout the Community may be valid in the Context of Directive 68/360/EEC (paragraph 10). The term worker:—

   (a) was not to be given a restrictive meaning and includes part-time workers (paragraph 12);

   (b) does not cover a person who is presently a student (paragraph 13);

4. it was not a disproportionate sanction to deprive a person of supplementary benefit if he failed to comply with the "documentation requirements" imposed as a condition of residency in a Member State; decision R(SB) 10/84 followed (paragraph 15);

5. even though a person is a worker within Community Law, if he was present without leave Article 7(2) Regulation EEC/1612/68 does not necessarily confer the right to supplementary benefit, this issue may be resolved by the European Court in *Scrivner v Centre Public d'Aide Sociale de Chastre Case No 122/84* (paragraph 18);

6. though not applicable in the present case, voluntary unemployment (but not perhaps merely becoming a charge on public funds) would be grounds for excluding a person from the benefits of being a worker, by invoking the exception for public policy in Articles 48(3) and 56 of the Treaty of Rome (paragraphs 19 and 20).

The appeal was allowed.

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 25 January 1983 was erroneous in point of law and is set aside. The matter must be referred to a social security appeal tribunal.

2. In an attempt to make the matter intelligible I will state what I regard as material facts as they were presented to me irrespective of whether any findings were made as to them by the appeal tribunal. It must be remembered however that I have no power to find any facts, and it will be for the new tribunal to make findings as to what is material untrammelled by anything stated by me as a fact.

3. The claimant is a German national who came to this country in the year 1980 and after a period in paid work here he spent the academic year 1980/81 as a student. He was awarded supplementary benefit from October 1981, but it was discontinued from 30 September 1982 after the Department of Health and Social Security had been notified by the Home Office that the claimant's permission to remain in this country had expired. The decision to discontinue the award of supplementary benefit was confirmed on appeal by the supplementary benefit appeal tribunal, and it is against this confirmatory decision that the claimant now appeals to the Commissioner. He was represented at the oral hearing before me by Mr. L Grant, solicitor, of Messrs Seifert, Sedley & Co and the benefit officer (now the adjudication officer) was represented by Mr. C D'Eca of the Solicitor's Office of the Department of Health and Social Security.

4. The basis of the decision to withhold benefit was paragraph 9A(b) of Schedule 2 to the Supplementary Benefit (Requirements) Regulations 1980 [S.I. 1980 No 1299] as amended (from the inception of the Regulations) by regulation 3 of and the Schedule to the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980 [S.I. 1980 No 1774]. I shall refer to the regulations so amended as "the Requirements Regulations". This paragraph set at nil the normal requirements of any person who like the claimant was the sole member of his assessment unit if he was a person further defined in regulation 10(4A) of those Regulations as present with limited leave or without leave to enter or remain in the United Kingdom. The additional and housing requirements of such a person were set at nil also by virtue of 13(7)(f) and 14(6)(a) of those Regulations. Regulation 10(4A) contains four sub-paragraphs identifying those who fall within paragraph 9A of Schedule 2, of which only one sub-paragraph, lettered (b) has been suggested to be relevant in the present case. This provided that a person should be treated as present with limited leave, or without leave, to enter or remain in the United Kingdom if—

> "having only a limited leave to enter or remain in the United Kingdom he has remained beyond the time limited by the leave;..."

It was considered that the claimant had so remained. If he had a limited leave that had expired he seems to fall squarely within paragraph 9A and his claim must fail unless one of the arguments put forward on his behalf by Mr. Grant succeeds not only to the extent of persuading me to set aside the present decision but also substantively before a fresh tribunal.

5. Three main contentions were put forward by Mr. Grant as follows:—

1. The claimant's leave to remain had been permitted to expire unlawfully having regard to the Regulations of the European Economic Community (EEC);

2. The provisions of paragraph 9A were overridden in relation to an EEC national who is a worker by the provisions of the Treaty of Rome and Regulations and Directives made under it;

3. The claimant was not excluded from the benefit of the matters at 2 on grounds of public policy as that phrase is used in Articles 48(3) and 56 of the Treaty of Rome.

So far as I can judge only the first of these contentions was debated before the appeal tribunal, though they were (not very precisely) raised in correspondence before this hearing.

6. I start with this first point. The evidence about the claimant's leave (or want of leave) to be in the United Kingdom that was before the appeal tribunal comprised (according to the chairman's note) letters from the Home Office dated 2 June and 17 September 1982 and to his solicitors of 19 October 1982 which, according to the note, stated that his leave to enter and his permitted stay had expired. Only the last of these letters is in the case papers which contains also a letter from the Home Office to the Kensington office of the Department of Health and Social Security roughly to the same effect. If I make the assumption that the position was that the claimant had been granted leave to enter the United Kingdom which was limited within the meaning of regulation 10(4A) of the Requirements Regulations in accordance with the procedures laid down by the Immigration Act 1971, and that there has been no appeal under those procedures against any relevant decision or any application for review of any decision or for renewal of leave, then I consider that I am bound to treat the decisions of the immigration authorities and/or tribunals as conclusive as to their effect. And I am not at all events, in the absence of something like fraud, at liberty to enquire into the question whether the immigration authorities correctly applied the law or the EEC Regulations and Directives in granting only limited leave or in refusing leave. This I consider follows from the decision of the High Court in *Regina v Secretary of State for the Home Department, Ex parte Ram* [1979] 1 W.L.R. 148, where the Court declined to go behind an admittedly mistaken exercise of an immigration officer's powers so as to hold an indefinite permit to be ineffective. I am disposed to think that this is the ground on which the tribunal upheld the benefit officer's decision. They took the view that if the claimant had limited leave to remain that had expired he fell within regulation 10(4A)(b) irrespective of the correctness of the decision to accord him only limited leave. Their findings of fact on the nature of the leave were perhaps a little exiguous, but if that were the only matter in issue I should not have set their decision aside.

7. There is a further point about this aspect of the case that emerges from the Decision of a Tribunal of Commissioners given since the appeal tribunal's decision in the case on file C.S.B. 180/83 (to be reported as R(SB) 24/84). This laid down that the phrase "....has remained beyond the time limited by the leave" in regulation 10(4A)(b) has to be interpreted as if the words "without any further leave" had been added at the end; and that that further leave can be a leave granted otherwise than under the provisions of the Immigration Act 1971. This point will no doubt be borne in mind by the new tribunal though I do not think that it is likely to trouble them.

8. There is one matter with which I must deal before going on to consider the second contention. The claimant is a person who would be required to satisfy the condition of being available for employment as a condition of title to supplementary benefit under section 5 of the Supplementary Benefits Act 1976. A person who currently has not permission to be in this country is not available for employment (see Decision R(U) 13/57). The claimant would thus, apart from relevant provisions of EEC law, fail without its being necessary to invoke regulation 10(4A) of the Requirements Regulations at all. This obstacle to his success will be surmounted if he establishes a title by virtue of EEC law.

9. I turn therefore to Mr. Grant's contention that the claimant is a worker within the meaning of Article 48 of the Treaty of Rome and Regulations and directives made under it, and that accordingly in relation to him the restrictions on the right to benefit derived from the above mentioned provisions are overridden by the directly applicable or directly effective provisions of EEC law. This contention has two branches. First it is contended that EEC law makes it unlawful to withhold leave or give a limited leave to an EEC national working or seeking work in the United Kingdom, so that in substance an EEC national has an overriding EEC law leave (which I will call statutory leave) to remain in the United Kingdom. Secondly reliance is placed on Article 7(2) of Council Regulation (EEC) No 1612/68 which referring to a worker who is a national of a Member State provides as follows:—

> "He shall enjoy the same social and tax advantages as national workers."

This is a development of the principle of non-discrimination laid down by Article 7 of the Treaty of Rome. And the argument on this aspect of the case extended to the citation of Council Directive No 68/360/EEC.

10. It will be apparent that both branches of the argument depend on the claimant's being at the relevant time a "worker" within the meaning of the relevant provisions of the Treaty of Rome and secondary legislation made under it. The term "worker" had for many years a special significance in the field of the EEC law relating to social security. The terms appeared as part of the phrase translated into English as "wage-earner or other assimilated worker" in the former regulation 3 now replaced by Council Regulation (EEC) No 1408/71. In this latter regulation the term "worker" was (prior to the inclusion within the regulation of self-employed persons in general) specifically defined; see Article 1(a). But I question whether decisions on the meaning of the word "worker" in this latter regulation, depending as they do on the special definition, bear on the meaning of the word in the present context. It may well be, however, that the conclusion of the European Court of Justice in case 99/80 *Galinsky v Insurance Officer* [1981] E.C.R. 941 at page 956 (paragraph 9) that a person who is a worker in one Member State is a worker throughout the Community is valid in the present context. Both Mr. D'Eca and Mr. Grant were agreed that the findings of the tribunal through no fault of theirs were inadequate to enable any conclusion to be reached on the question whether at the time in question the claimant was a "worker". And it is primarily on this ground that I set aside the decision. The new tribunal should find the facts about the claimant's working history in Germany and the United Kingdom e.g. periods of work (part-time or full-time, employed or self-employed), periods of studentship and periods of unemployment (including particulars of any search for work during such periods) and any prolonged periods of incapacity for work. On these findings they will have to base their conclusions on the question whether the claimant was at the relevant time a worker in the sense that that term is used in the Treaty of Rome and the secondary legislation to which I have referred.

11. I was referred in this connection to three authorities on the meaning of the term "worker", two of which were decisions of the European Court of Justice. First the case 75/63 *Hoekstra (nee Unger) v Bedrijfsvereniging Detailhandel* [1964] E.C.R. 177 was concerned with the phrase (in the unofficial English translation) "wage-earner or assimilated worker" in the former Regulation No 3. But the judgment contains at page 185 the following important propositions:—

> "It follows both from the Treaty and from Regulation No 3, that the protected 'worker' is not exclusively one who is currently employed.

> Article 48(3) of the Treaty also applies to persons likely 'to remain in the territory of a Member State after having been employed in that State.....'
>
> Article 4 of Regulation No 3 mentions wage-earners or assimilated workers who are 'or have been' subject to the legislation of one or more of the Member States.
>
> The Treaty and Regulation No 3 thus did not intend to restrict protection only to the worker in employment but tend logically to protect also the worker who, having left his job, is capable of taking another."

12. Secondly in Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] E.C.R. 1035 the Court laid down that the concepts of "worker" and "activity as an employed person" define the field of application of one of the fundamental freedoms guaranteed by the Treaty and as such must not be interpreted restrictively. The substantive decision in that case was to the effect that the provisions relating to free movement of workers covered those who pursue within a Member State an activity as an employed person which yields an income less than that considered in that State to be the minimum required for subsistence. There are passages in the judgment to the effect that part-time work is not excluded (paragraph 16) and that the rules relating to freedom of movement for workers concern persons who pursue or wish to pursue an activity as an employed person. (paragraphs 18 and 21).

13. The third case to which I was referred on this issue was the decision of Dillon J. in *MacMahon v Department of Education and Science* [1983] Ch.227 to the effect that a person was not a worker so long as he remained a student. The plaintiff in that case had previously been a worker, but at the relevant time he had become a student. The judgment does not exclude the possibility of reversion to the status of worker after such a person has ceased to be a student; but this if relied on, has to be established.

14. There are no doubt other important decisions but I do not think that it will assist the new tribunal if I go into more of them. If it emerges that the claimant's title depends on whether he was a worker or not they will have to reach a conclusion on the point with the benefit of such guidance as appears above taken together with the submissions made to them.

15. If the claimant was at the relevant time a worker, he might then arguably succeed by virtue of either of the two branches of Mr. Grant's second contention indicated in paragraph 9 above. The first of these branches relates to the question whether the claimant as a worker and a national of a Member State has statutory leave to be in this country. This question was the subject of Decision R(SB) 10/84. That decision concerned a claimant who was actually in part-time employment in this country and the Commisioner after considering among others the decisions of the European Court of Justice in Case 48/75 *Royer* [1976] E.C.R. 497 Case 157/79 *Regina v Pieck* [1981] Q.B. 571 and Council Directive 68/360/EEC concluded that a Member State could properly impose what I may call "documentation requirements" as a condition of the exercise of a person's right of free movement; and could impose sanctions for failure to comply with such documentation requirements so long as they were not disproportionate to the failure to comply with them. He concluded further that deprivation of supplementary benefit for so long as those requirements were not complied with was not a disproportionate sanction. The claimant therefore did not have a statutory leave to remain here.

16. It would follow from this decision (if the facts are on all fours) that unless it be found that this claimant had at the material time complied with

documentation requirements he would fail. But the facts are not quite on all fours. The claimant in the decision cited was employed; whereas this claimant was at best seeking employment. Council Directive 68/360/EEC deals with the case of a person who is working or has work to go to, but not with the case of a person who is, however genuinely, seeking work. There are dicta in decisions of the European Courts of Justice (e.g. in *Levin* at paragraphs 18 and 21 and *Royer* at paragraph 12) suggesting that there does exist some right of free movement to look for work in another Member State but there is nothing specific in Article 48 of the Treaty of Rome to support the argument. At all events the provisions of the Directive 68/360/EEC do not cover the case or, as with those with employment to go to, indicate by inference that Member States can impose documentation requirements on persons seeking to exercise the right (if it exists) to go to or remain in another Member State for the purpose of seeking employment. For myself I find it impossible to believe that a person who has no employment but is looking for it can, indefinitely, be in a better position (free of documentation requirements) than a person who has employment to go to but has to comply with conditions as to documentation. Possibly he is in a better position for a reasonable time.

17. I was referred by Mr. D'Eca to a declaration recorded in the minutes of the Council of Ministers when Directive 68/360/EEC was under consideration. This declaration is referred to in the opinion of the Advocate-General in *Pieck,* [1981] Q.B. 571 at page 575. I do not clearly understand what the status of this declaration is. It is not an instrument of the kind mentioned in Article 189 of the Treaty of Rome; and it would seem to me at best to be one of what are sometimes referred to as "travaux preparatoires" at which under European law, as opposed to British domestic law, one is permitted to look as an aid to interpretation. According to the minute a person seeking employment in another Member State should have a minimum of three months in order to achieve that purpose and if employment was not found within that period the stay might be terminated. I find it difficult to identify any provision of the Directive that I could possibly interpret as having this effect. Mr. D'Eca referred me to the judgment of Lord Denning MR in *Bulmer Ltd v Bollinger SA* /1974/ Ch. 401 at page 418 where he indicated that the Court as part of the interpretation of Community legislation could fill gaps in the regulations. I suppose that the declaration above cited might be used as an aid to filling the gaps, though I should find it anomalous to fill a gap with a specific period like three months rather than with a phrase such as a reasonable time. It has to be admitted however that three months is in fact the period for which a person entitled to unemployment benefit in one Member State can (if he complies with certain conditions) continue to draw it if he goes to another Member State to look for employment (see Council Regulation (EEC) No. 1408/71, Article 69). In the present case I suspect that on the facts the claimant would be found to have exhausted his three months or other reasonable time by the date of period now in question.

18. I turn therefore to the second aspect of this part of the case. Can the claimant if, at the relevant time a worker, rely on Article 7(2) cited in paragraph 9 above and claim to be entitled to supplementary benefit as a social advantage which he is entitled to enjoy to the same extent as national workers? And if so can he do so notwithstanding its being found that he has not statutory leave to be in this country. There is authority of the European Court of Justice that the social advantages which a worker is entitled to enjoy under regulation 7(2) include advantages which are not related to the worker's contract of employment, (see per Dillon J in the *MacMahon* case, [1983] Ch. 227 at page 238); and the right to supplementary allowance based on unemployment and availability for

employment may be one such social advantage. For myself I should, if untrammelled by any authority, have been disposed to hold that a person who has no leave to be in this country and fails to establish statutory leave under the first branch of the present contention could not make out a claim under Article 7(2), but I forbear at this stage to give a firm ruling on the point as there is pending before the European Court of Justice a case which, as it seems to me, is likely to raise the issue directly, viz. Case 122/84 *Scrivner v Centre Public d'Aide Sociale de Chastre.* A decision of the Court on this case is likely to be available before the present matter is finally disposed of.

19. I come lastly to the third contention, which raises the question whether the United Kingdom authorities are entitled to exclude the claimant from the benefit of the Treaty of Rome and the European secondary legislation on grounds of public policy. The point is of significance only if the claimant could, apart from the question of public policy, make out a case under the EEC legislation. The debate at the hearing on this point concerned the question whether (a) the fact that a person is, or is likely to become, a charge on public funds or (b) the fact that a person is voluntarily unemployed constitutes a ground for excluding that person from the benefits of being a worker on grounds of public policy.

20. I will take (b) first. It has not in this case been suggested that this claimant is voluntarily unemployed and I know of no grounds for suggesting it. The possibility was primarily considered in contradistinction to (a) above. I take the view that voluntary unemployment is a ground for invoking the exception for public policy to be found in Articles 48(3) and 56 of the Treaty of Rome. I regard the emphasis on unemployment being involuntary that appears in Article 7 of Directive 68/360/EEC as confirming this view. Further I was referred by Mr. Grant to the decision of the Immigration Appeal Tribunal in the case of *Lubbersen v Secretary of State for the Home Department* (appeal No. EX TH/105210/83 (3131) notified on 3 April 1984 in which particular stress was laid on the importance of the distinction between voluntary and involuntary unemployment as it affected the Secretary of State's rights to curtail the right of residence.

21. The question of becoming a charge on public funds is somewhat wider, since even a person who is involuntarily unemployed can become a charge on public funds. Mr. D'Eca referred me to an earlier decision of the Immigration Appeal Tribunal in the case of *Leper v Immigration Officer, Folkestone* (Appeal No. TH/1548/76 (944) dated 30 March 1977 where a refusal of leave to enter the United Kingdom was upheld by reference to the public policy exception in the case of a French national who sought entry to the country with very little capital, no job to go to immediately and no income. Admission was refused on the ground that she was likely to become a charge on public funds. This decision, if correct, is undoubtedly authority for the view that the public policy exception can be invoked in such a case. I question however whether it is consistent with what was said in *Lubbersen* and I would refer to what was said by the Advocate General in *Levin* [1982] E.C.R. 1035 at page 1060), where in connection with the proposition accepted by the European Court of Justice that the principle of free movement of workers extends to cover a national of a Member State who pursues within the territory of another Member State an activity as an employed person which yields an income lower than that which in the latter State is considered as the minimum required for subsistence, he indicated the view that the existence of private means to bring such income up to the minimum subsistence level was irrelevant. I note also that in regulation 10(4A) of the Requirements Regulations themselves the provision (in sub-

paragraph (a)) about persons admitted here with a condition about there being no need of recourse to public funds does not apply to nationals of Member States. I conclude therefore that the fact that a person is or is thought likely to become a charge on public funds is not a ground on which that person can be refused leave to enter the United Kingdom, if he can otherwise bring himself within the relevant provisions of EEC law.

22. The appeal succeeds.

(Signed) J. G. Monroe
Commissioner