

CHAPTER 16

**Absence from Great Britain
(other than in cases of sickness)
and reciprocal agreements**

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CHAPTER 16

Absence from Great Britain (other than in cases of sickness) and reciprocal agreements

Part 1: Disqualification for benefit due to absence abroad

Section 82(5)(a) of the Social Security Act 1975 and the Social Security Benefit (Persons Abroad) Regulations 1975 (hereinafter in Chapter 16 referred to as 'the Act' and 'the Regulations' respectively). (And see also the cases referred to in Chapter 19).

1 Unemployment benefit

i It was held that 'that person' in the context of section 29(1) of the National Insurance Act 1949 (see now section 82(5) of the Act) refers also to a dependant, so that an increase of unemployment benefit was not payable to a claimant in respect of his wife, who was in the United States of America. CU 28/49

ii A claimant for unemployment benefit had lived and worked in Australia for some 8 years. On arriving in Great Britain he claimed unemployment benefit for the period of the voyage from Australia, but it was held that, notwithstanding the reciprocal agreement with Australia, he was disqualified from receiving unemployment benefit until his arrival in Great Britain on the grounds that until then he was absent from Great Britain. See also R(F) 1/62, 16.3.1 ii *below*. R(U) 18/60

iii The widow of a man who had been insured in the Irish Republic, and who was in receipt of a widow's pension under Irish law, had for some years paid contributions as an employed person or employed earner in Great Britain. She made a claim for unemployment benefit but it was disallowed by the insurance officer and, on appeal, by the local tribunal. On appeal to the Commissioner it was held that the claimant was entitled to the benefit claimed and that it was not subject to adjustment in accordance with any regulations relating to overlapping benefits on account of her widow's pension since Article 12(2) of Council Regulations (EEC) No. 1408/71 does not operate to reduce benefits that are obtained under the national law of one or more member states without recourse being had to the 1971 Regulations. See also 19.2.20 i. R(U) 2/78

iv A man who was in receipt of unemployment benefit in England went to West Germany to look for work. He was wrongly advised before going that there was no benefit he could claim while he was abroad and was further advised to sign off the unemployed register while seeking work in Germany. On his return to Great Britain he made a late claim for unemployment benefit, but it was held that he was disqualified for receiving benefit for the period of his absence on the ground that he was absent from Great Britain (section 82(5)(a) of the Act), and because he did not register in the Federal Republic of Germany as a person seeking work in accordance with Article 69(1)(b) of Council Regulations (EEC) No. 1408/71. See also 19.2.5 i. R(U) 5/78

R(U) 2/91 v A day for which a person is disqualified for being absent from GB is not a day of unemployment. There is no distinction in regulation 7(1)(b) of the Social Security (Unemployment, Sickness and Invalidity) Benefit Regulation 1983 between disqualifications for different reasons (for example, misconduct and being absent abroad). The days for which the person is disqualified do not form part of the period of interruption of employment. Therefore, none of the days of disqualification can be included as the 3 “waiting days” (Social Security Act 1975, section 14(3)). See also 19.2.5 vi.

2 Injury benefit

- i At the material time there was no reciprocal agreement with Ireland covering industrial injuries benefit and a man was held not to be entitled to an increase of injury benefit for his wife who had remained in Ireland when he came to work in England. C.I. 43/49
- ii A man was held to be disqualified from receiving injury benefit when, while recovering from an accident, he went to visit his sister who lived in France. His absence in France was not for the purpose of undergoing medical treatment. (But see no E.E.C Social Security Regulations and cases referred to in Chapter 19.) C.I. 275/49
- iii A man in receipt of injury benefit went to his home in Ireland when the seasonal employment for which he had been engaged came to an end. He returned to England some 8 months later when the new season began in order to take up employment again with his former employer. It was held that his absence from Great Britain, which had exceeded the maximum period for which injury benefit was payable, could not reasonably be regarded as a temporary absence and that he was not, therefore, entitled to injury benefit during the period of his absence from Great Britain. See also R(P) 1/82. R(I) 73/54
- iv A man who was employed by the Minister of Works as a carpenter suffered person injury caused by accident arising out of and in the course of his employment while working in the British Embassy in Moscow. It was contended on his behalf that, although in fact he was not in Great Britain at the time of the accident, he should be treated as if he had been in Great Britain when the accident happened. It was held that injury benefit was not payable to him because he was 'outside Great Britain' within the meaning of the relevant statutory provision when the accident occurred. See paragraphs 4-6. See also R(S) 7/81. R(I) 44/61

3 Retirement pension

- i A claimant who had emigrated to Australia in June 1949 received a retirement pension from and after the following March. In August 1952 he visited Great Britain and stayed for some 10 months, after which he returned to Australia. If he had been resident in Great Britain on 29th September 1952 he would have been entitled to an increase in the rate of his pension under legislation which came into force on that date, but it was held that he was disqualified from receiving the increase because, having emigrated to Australia, he would not be regarded as resident (which was then the relevant requirement) in Great Britain whilst paying a 10-month visit. See and compare R(F) 2/67, paragraph 11, and see also R(P) 6/59. See now R(P) 1/78. R(P) 4/54
- ii A retirement pensioner was absent from Her Majesty's Dominions for more than 12 months, but before the end of that period amending regulations removed power to disqualify a person for receiving a retirement pension by reason of being absent abroad. The claimant contended that she should be treated as if her absence had not lasted 12 months, but it was held that she was disqualified for receiving a retirement pension for that part of her absence which occurred before the amendment of the regulation came into force. See also R(P) 2/67, 16.2.2iv *below*. R(P) 10/56
- iii An elderly woman was divorced from her husband remarried, whereafter she disposed of her home and furniture and went to live with her second husband in his home in Rhodesia, it being her intention to remain in that country for so long as the political situation remained stable. She returned to Great Britain and stayed with friends for a period of 2 to 2 months in 1974, 1975 1976 and 1977, and again came to Great Britain in 1078 with the intention of remaining permanently in the country. She was at all material time in receipt of a retirement pension under what was then the National Insurance Act 1965 and it was not disputed that while R(P) 1/78

she was in Great Britain she was entitled to the increases of the weekly rate of her pension which became operative from time to time between 1st October 1973 and 17th November 1975. The question arose, however, whether the increases were payable to her during the periods of her absence from Great Britain and the answer to that question depended upon whether it could be said that during those periods she was 'ordinarily resident' in Great Britain as required by the relevant statutory provisions upon satisfaction of which entitlement to the increases depended. It was held that during the periods the claimant was absent from Great Britain she could not be said to be ordinarily resident in the country and it was concluded (see paragraph 9) that by substituting the phrase 'ordinarily resident' for simply 'resident' in regulation 5 of the National Insurance (Increases of Benefit and Miscellaneous Provisions) Regulations 1967 (and in the subsequent similar provisions) the legislation authority 'was thereby seeking to exclude from entitlement to an increase persons like the claimant who live mostly abroad and come to reside here intermittently without the intention of settling indefinitely'. See also paragraphs 5-8. And see R(P) 2/67, 16.6.6iv *below*.

- R(P) 1/82 iv A claimant for retirement pension was born in England in 20 June 1914. He worked in England (as veterinary surgeon) from 1940 to 1946; then in New Zealand until 1948 and then in Australia until 1973. He then returned to England where he worked for a few months and then went to work in north Africa until 1977, when he retired. He then lived for a few months in Gibraltar and thereafter he divided his time between England, where he lived with his mother-in-law in her flat which he had always regarded as home when in England, and Gibraltar, where he had a flat, spending rather more than half of his time in Gibraltar. In Australia he had retained a seaside house for his children until 1976. His wife had expectations of inheriting her mother's flat. In April 1980 the claimant returned permanently to live in England. The question arose as to when he could be treated as being permanently resident in the United Kingdom for the purposes of Article 3(1) of the reciprocal Convention with Australia (S.I. 1958 No. 422) (which would, if applicable, have enhanced his contribution record), the insurance officer, apparently relying on Art 27(b) *ibid*, having ultimately decided that this was not until a year after the claimant permanently to live there. The Commissioner also considered whether the question of permanent residence, which was ancillary to a contribution question, was one for the determination of the Secretary of State or of the Statutory Authorities. He held that, as once the permanent residence question had been resolved no question (in the sense of issue) would arise on the contribution question, the permanent residence question was for him to determine: that article 27(b) was an enlarging provision, but that no question under that Article could arise when a third country other than Australia and the United Kingdom were involved; and that the claimant had been permanently resident in England since his return there in April 1980. R(P) 6/59 and R(G) 1/82 followed.

4 Maternity benefit

- R(G) 5/53 i A woman of Belgian nationality who was married to an Englishman went to Belgium to visit her grandmother and while there was confined. It was held that a maternity allowance was not payable to the claimant during the period of her absence from Great Britain. Compare R(G) 3/54 and R(G) 2/51.
- R(G) 3/54 ii A married women went to her mother's home in Ireland, where she was confined. It was accepted that her reason for going to her mother's home was because of her bodily disablement and difficulties over accommodation in England and it was held that, as she had gone to Ireland after her incapacity commenced, she was not disqualified from receiving a maternity allowance. Compare R(G) 5/53, 16.1.4i *above*. See also C.G. 32/49, 16.2.2i *below* and C.G. 202/49.

5 Death grant

i A man aged 51 died in South Africa, where he had gone from GB some 20 months previously. The local tribunal held that death grant was payable to the widow under reg. 5(h) of the National Insurance (Death Grant) Regs. 1949 on the ground that she would have satisfied one of the conditions in paras. (a) to (g) of the regs., namely the provision contained in para. (b) i.e. that she was entitled to WB. It was held that in so deciding the local tribunal were in error because reg. 5(h) required that the deceased “immediately before death”, was the husband of a person who satisfied the specified conditions, and his wife could not, before his death, be his widow and so could not be entitled to WB immediately before his death. See now reg. 7(1) of the regs. See also and compare R(G) 13/59. R(G) 6/57

6 Widow’s benefit

i A widow would have been entitled to an increase of the weekly rate of her widow’s pension if she had been resident in GB, but in June 1952 she had written to the local national insurance officer saying that she was leaving GB permanently and giving an address in Kenya. In fact she returned to GB a little over a year later with the intention of making England her permanent home, but it was held that she was disqualified for receiving the increase which she had claimed on the ground that, having notified her intention to reside permanently in Kenya, she could not be said to be resident in GB until she had actually reached GB. See also 16.2.2ii *below*. R(G) 1/54

7 Dependency benefit

i A man born in Pakistan worked in the UK from 1961 until 4 October 1980 when he was made redundant. He visited his wife, whom he had married in 1968, from September 1980 to April 1982. He then returned to GB. On 11 May 1987 he became entitled to RP and claimed an increase of benefit for her. She has never been in the UK. The claim was disallowed because she was absent from GB and not residing with the claimant. It was also decided that the couple could not be treated as residing together because their absence from one another was not temporary. The tribunal decided that the claimant was not entitled to an increase of benefit from 11 May 1987 but that there was entitlement from 4 December 1987 when he formed the intention to return to Pakistan to live with his wife. The Commissioner decided that R(P) 1/90

1. once it has been decided that the couple's absence from each other was no longer temporary there would have to be evidence of them living together before it could be decided that the absence was temporary. An intention to resume living together is not sufficient for again deciding that the absence is temporary;

2. on the balance of probabilities the claimant was still temporarily absent from his wife. Therefore they are not treated as having ceased to reside together (Social Security (Persons Residing Together) Regs., reg. 2(4)). As a result the claimant is not disqualified for receiving the increase of benefit because she is absent from GB (Social Security (Persons Abroad) Regs., reg. 13).

ii A Moroccan national claimed for an increase of invalidity benefit for his wife who resides in Morocco. The AO decided that the increase was not payable because the claimant’s wife was absent from GB. The Commissioner decided that the tribunal erred in failing to take into account of Article 41(1) of the Co-operation Agreement between the EC and the Kingdom of Morocco which prohibits discrimination against workers of Moroccan nationality. The reg. which provides that an increase can only be paid if a person **is residing** with his wife who is absent from GB indirectly discriminates against Moroccan workers. That discrimination cannot be objectively justified and could not therefore be applied to workers covered by the Co-operation Agreement. The appeal was remitted to a new tribunal to decide entitlement under the normal rules which permit payment if a claimant is residing with or supporting his wife financially. R(S) 1/00

Part 2: Resident in GB

See also 31.1.6

1 Claimant held to be “resident” or “ordinarily resident”

- CG 202/49 i After being demobilised from the Royal Air Force the claimant’s husband obtained employment in Nigeria and she accompanied him when he went to live there. She did not know how long her husband would be kept on by his employers in Nigeria, nor did she know whether she would be able to stand the climate. She was confined while she was in Nigeria and returned to GB three weeks later. It was held that she was ordinarily resident in GB and that a maternity grant was payable to her. See also as to meaning of “ordinarily resident” R(P) 1/78 16.1.3 iii *above*.
- R(F) 1/62 (T) ii The claimant’s husband, who was born in Canada, gave up his home in that country and came to England for a period of at least two years. The claimant and her family accompanied him to England, where he made a home for the time being. Under the reciprocal agreement with Canada which was then in force he could fulfil the conditions of the right to family allowances that the man is a British subject whose place of birth was in the UK. It was held by a tribunal of Commissioners that the claimant and her husband had become ordinarily resident in GB on their arrival and that the family allowances were payable from that date. See as to the meaning of “resident” and “ordinarily resident” paras. 7 to 12 and see also R(F) 2/63, 16.3.3 i and R(M) 1/85 *below*.

2 Claimant held not to be “resident”

- CG 32/49 i To reside means to dwell permanently for a considerable time, have one’s settled or usual abode, to live in a particular place. A member of the Control Commission in Germany married a German who intended to come to England when her husband’s contract came to an end, but at the material time she had in fact never been in England. It was held that she could not be said to be ordinarily resident in GB and was not, therefore, entitled to maternity benefit. See also CG 165/50 but compare CG 204/49.
- R(G) 1/54 ii Residence in GB may continue during a temporary absence if there is an intention to return, but if that intention has once been changed residence could only be said to be resumed when the person concerned has actually reached GB. Thus a widowed pensioner who claimed an increase of her pension but who had notified her intention to reside permanently in Kenya was held not to be entitled to the increase. See also 16.1.6 i *above*.
- R(P) 6/59 iii A woman who was in receipt of RP on her own insurance record left GB with the intention of living permanently in Portugal. She

was, however, unable to obtain the necessary residence permit from the Portuguese authorities until some 6 months later, and meanwhile she returned to Great Britain for about 2 months. While she was in Portugal, and before her return to England, amending Regulations came into force which made effective an increase of the weekly rate of a retirement pension for persons resident in Great Britain. It was held that the claimant was not a person resident in Great Britain immediately before the date on which the amending Regulations came into force and that she was, therefore, disqualified for receiving the increase except when she was actually in Great Britain.

iv A person is not resident in Great Britain merely because he is physically present in Great Britain, nor will a person who is in Great Britain merely as a bird of passage normally be resident. The fact that a person is in Great Britain merely in the capacity of a holiday maker or tourist would normally tell against the view that he was resident, although there is no fundamental antithesis between residence and temporary visits. Whether a temporary visit constitutes residence must be determined in relation to all the incidents attaching to the visit, such as the duration of it and whether it is one of a repeated series, but the fact that a temporary visitor who had no house of his own stays with close relatives who make their home available to him as a temporary home may assist the view that he is resident in Great Britain. The question whether a person is or is not resident in Great Britain is one of fact and degree, but the word 'resident' is not synonymous with 'ordinarily resident'. For the purposes of the relevant statutory provision a person can be resident in more than one country at the same time. It was held on the facts of the case that a man and his wife who had left Great Britain for Australia in 1948, but has paid visits to Great Britain at various time since then, had become resident in Great Britain on a date in September 1963. R(F) 1/62, 16.2.1 ii, *above* was distinguished and R(P) 4/54, 16.1.3 i *above*, was not followed for the reasons given in paragraph 11. See also paragraphs 8-9. R(P) 2/67

3 Claimant held not to be 'ordinarily resident'

i An award of mobility allowance was made to a mother for the period from 13.4.77 to 28.10.2041 on behalf of her handicapped daughter. Subsequently the mother wrote to say that she, her husband and daughter had gone to Sri Lanka on 26.11.81 and that, as she was ill and her husband incapacitated, they did not intend to return until they were in a fit state to travel. A home in GB was not maintained, but their furniture was put in store. The family returned to GB on 19.8.83. The questions in issue were whether, in view of s.37A(7) of the Social Security Act 1975, the award of the allowance could be reviewed under s.104(1)(b) of that Act on the grounds of change of ordinary residence and whether there had in this case been a change of ordinary residence. The Commissioner held that there could be such a review where there had been a change of permanent residence and section 37A(7) did not preclude it (para. 3); that the exception from disqualification for absence from GB afforded by reg. 10A of the Social Security Benefits (Persons Abroad) Regs. 1975 did not remove the need for the claimant to satisfy the prescribed conditions of entitlement to the allowance; that the words 'ordinarily resident' should be given their natural and ordinary meaning unless the statute dictated otherwise (paras 10 and 11); and that the claimant was not ordinarily resident in GB from 27.11.81 to 18.8.83, she failed to satisfy reg. 2(1)(a) of the Mobility Allowance Regs. 1975 and was not entitled to that allowance for that period (para. 12). Meaning of 'ordinarily resident' as described in *R. v. Barnet London Borough Council* [1983] 2 WLR 16 considered. Also considered R(F) 1/62 (T) and R(M) 2/84, Appendix. R(M) 1/85

Part 3: Child Benefit

Section 13 of the Child Benefit Act 1975 and the Child Benefit (Residence and Persons Abroad) Regulations 1976. See also Ch. 31.1.6.

1 Ordinarily resident in Great Britain

- R(G) 2/51
(T) i The claimant's husband was employed as a 'UK based member' of the British Control Commission in Germany. The claimant joined him in Germany, where she was confined. It was held by the majority of a Tribunal of Commissioners that she was 'ordinarily resident' in Great Britain and entitled to a maternity grant. See also CG 206/49. And see R(P) 1/78, 16.1.3 iii *above*.
- R(F) 1/62
(T) ii The claimant and her husband came to England from Canada for a period of at least 2 years and brought their family with them. They gave up their home in Canada and made a home for the time being in England. It was held that, in view of the Family Allowances and National Insurance (Canada) Order 1959, the claimant and her husband had become ordinarily resident in Great Britain from the date of their arrival and that a family allowance was payable accordingly. See also R(M) 1/85.

2 Whether 'temporarily absent from Great Britain'

- R(F) 1/63 i A claimant and her husband left Great Britain to go to Nigeria as missionaries and took their children with them. Some 18 months later the whole family returned to Great Britain, where they stayed for some 6 months, and then returned to Nigeria. It was held that after 6 months had elapsed since the claimant's first departure from Great Britain her absence could no longer be treated as temporary and that during the whole period from her return up to the time when she again left for Nigeria her presence in Great Britain must be regarded as temporary, with the result that she was not entitled to a family allowance before leaving again for Nigeria.
- R(F) 3/64 ii The claimant and her husband, who were both citizens of Uganda and had been staying in England, where the latter was studying law, returned to Uganda, where he was to take up an appointment as Crown Counsel. It was not expected that they would return to Great Britain other than on visits to two of their children, who had been left at school in England, unless official duties required it. It was held that the claimant's husband had returned to his home country to live and earn his living there, that this was a purpose other than a temporary purpose and that therefore his absence from Great Britain was not to be treated as temporary even if he intended to return to this country to visit the children or in connection with his official duties.
- R(F) 1/88 iii The claimant became an employed person subject to United Kingdom legislation. He claimed child benefit for his son and daughter who were resident in the Irish Republic. The Commissioner held that a child who had never been in Great Britain could not be regarded as temporarily absent from that country. For other synopses of this decision see 19.2.8 iii and 19.2.20 ii *below*.
- R(F) 1/89 iv The claimant's husband, an established Home Civil Servant, took up a position on secondment to the Government of Hong Kong. The question arose whether the claimant was entitled to child benefit for the periods she and their two children had resided with him in Hong Kong. The Commissioner held that the claimant was entitled. During the relevant periods the government of Hong Kong had not gained a separate existence, so as to create a division of the Crown. The claimant's husband was therefore employed "by or under the Crown in right of the United Kingdom" and satisfied regulation 6(1)(a) of the Residence and Persons Abroad Regulations. The claimant was his spouse, residing with him within the meaning of regulation 6(1)(d) and she was absent from Great Britain "by reason only" of being such a person, in accordance with regulation 7(1) of the same regulations.

v The claimant and her family left GB on 30 March 1988 to go to Spain. The adjudication officer decided that a claimant was not entitled to child benefit from 30 May 1988 because she was not, and could not be treated as being, in GB and her absence had exceeded 8 weeks. After considering both domestic and European law, the tribunal confirmed the adjudication officer's decision and the claimant appealed to the Commissioner who held that: R(F) 1/94

- a. in order to come within regulation 6 of the Child Benefit (Residence and Persons Abroad) Regulations 1976 a person must satisfy at least three conditions, one of which is that UK tax must be paid on at least half that person's earnings from employment outside GB (paragraph 4). The claimant did not satisfy these conditions as neither she nor her husband was employed outside GB and income tax was paid only in relation to a pension and not on earnings from employment;
- b. Article 73 of Regulation (EEC) No. 1408/71 applies only to people who are employed (or self-employed) at the relevant time and whose families reside in a Member State other than the competent State;
- c. Article 77 of Regulation (EEC) No. 1408/71 provides for a pensioner to receive family benefits from the Member State responsible for the pension. A pension for the purposes of Article 77 must be awarded on the grounds of old age; invalidity; industrial accident or occupational disease and must be paid out of public funds (Article 1(t)). A Fire Brigade Medical Discharge pension does not fall within this category.

vi This appeal was one of three heard by the Commissioner in which he held that he was bound by a decision of the High Court on the meaning of 'temporary absence'. On a judicial review Hodgson J had held the word 'temporary' should be given its primary meaning of 'not permanent' and the Commissioner followed that judgement. On appeal by the adjudication officer the Court of Appeal held that in construing regulation 2(1) of the Social Security (Persons Abroad) Regulations 1975 it was wrong to treat the word 'temporary' as synonymous with 'not permanent'. The Court held that the correct approach was to look at the facts at the date of the decision including past absence and future intended or likely period of absence. The quality of absence may change with the passage of time and as time passes it may be more difficult to demonstrate it is temporary. Although the claimant's intentions will always be relevant as time goes by his plans should be more closely scrutinised. R(S) 1/96

3 Adoption under foreign law

i The wife of a Royal Air Force officer serving in Germany and her husband adopted 2 children born in West Germany in accordance with West German law. When the family came home to GB at the end of January 1962 both children were adopted under English law. It was held that, for the purposes of the Family Allowances Act 1945, the children were not adopted until the adoption under English law; and further that the word 'person' in the relevant provision of the Family Allowances, National Insurance and Industrial Injuries (Germany) Order 1961 (i.e. Article 31(2)) could apply to a child as well as to an adult. The children were, therefore, to be treated as if their place of birth was in the UK and that their presence in Germany was to be treated as presence in GB by reason of the Order. R(F) 2/63

ii While domiciled in the Republic of Ireland a claimant adopted a child who was also domiciled there. The family, which included 2 other children, then came to GB and a claim was made for family allowances for the adopted child as an 'issue' child. It was held that, as the effect of the adoption under the law of the Republic of Ireland was to give the child the status of a legitimate child born to the adopter, the child should be accorded that status for the purposes of the Family Allowances Act 1945 and R(F) 1/65

16.3.3-4

regarded as issue of the claimant within the meaning of that Act. See paragraph 4 *et seq* for a discussion of the general principles when the status of a child adopted under the law of a foreign country is being determined.

- R(F) 3/73 iii The claimant and her husband, who were Pakistani Muslims, had resided permanently in GB for some 5 years. The claimant was in receipt of family allowances for a family of 4 children, but she then claimed additional allowances in respect of her 2 young brothers who had arrived in GB from Pakistan and she contended that they had been adopted by her husband some 8 years previously under the 'Law of Inheritance' which, it was said, was part of the unwritten law and culture of Pakistan. Expert legal opinion however, was that adoption was not recognised in Islam and that the assertion that the adoption took place under the 'Law of Inheritance' was incorrect because Moslem law as applied in Pakistan does not recognise adoption as a mode of filiation. Further, while it may be theoretically possible for a Muslim to prove that he is by custom subject to the law of adoption, the onus of establishing that is very heavy indeed. It was held that the two boys could not be treated as legitimate issue of the claimant's husband. Their presence in GB had to be treated as temporary for 6 months from the date of their arrival by force of regulation 10 of the Family Allowances (Qualification) Regulations 1969 (now no longer in force) That the claimant was not entitled to family allowances for them before the expiration of the 6 months from the date of their arrival in GB.

4 **Absence in Canada**

- R(F) 2/92 i Paragraph 13 of the Schedule to the Canada Order 1959 enables a person to overcome the residence and presence conditions contained in section 13 of the Child Benefit Act 1975 when migrating from Canada to the UK. It does not enable benefit to be paid during any period of absence in Canada.

Part 4: Reciprocal agreements

But see also Chapter 19.

1 Unemployment benefit

i A claimant for unemployment benefit went to Australia in 1951 and worked there for the next 8 years. In September 1959 he sailed for Great Britain and, on arrival, made a claim for unemployment benefit. The question was whether he was entitled to benefit during the voyage from Australia (which took approximately 4 weeks) by force of the National Insurance (Australia) Order 1958. It was held that he was not entitled to unemployment benefit during the voyage. The Order provided that a person claiming benefit in one country should be treated as if he had been resident there during any period while proceeding from the other country if that period did not exceed 13 weeks. Subject to that, the claim had to be decided under the provisions of the National Insurance Act 1946 in exactly the same way as in the case of a claimant who in fact resides in this country. As the claimant was absent from Great Britain during the relevant period he was disqualified for receiving benefit during the period of the voyage by force of (what was then) the relevant statutory provision, i.e. section 29(1)(a) of the National Insurance Act 1946. See paragraphs 8-11. R(U) 18/60

2 Sickness benefit

i A claimant for sickness benefit who was resident in the Republic of Ireland had served in H.M. Forces until he was discharged because he was unfit. He claimed and was paid sickness benefit in Great Britain for 6 months until his insurance and his claim were transferred to the Department of Social Welfare in Ireland. He was not, however, entitled to benefit under Irish legislation. Later he returned to England and after a period of 6 months his insurance and claim were again transferred from the Republic of Ireland to this country. It was held that the effect of the relevant provisions of the National Insurance (Reciprocal Agreement with Eire for Sickness and Maternity Benefit) Order 1948 (as amended in 1952) was that, as the claimant would not have been entitled to sickness benefit under the legislation in force in the Republic of Ireland, he must also be disentitled under the legislation in force in Great Britain. See now the Republic of Ireland Orders referred to in Schedule 1 to, and modified by, the Social Security (Reciprocal Agreements) Order 1976. R(S) 7/54

ii A man who normally worked in England was entitled by the terms of his contract of employment to spend a month's holiday with pay in France each year. While on such a holiday he was taken ill and was obliged to prolong his stay in France in order to have treatment. It was held that he was not entitled to sickness benefit under the National Insurance and Industrial Injuries (Reciprocal Agreement with France) Order 1949, which applied to persons *employed* in a country other than that of their normal residence. See now the National Insurance and Industrial Injuries (France) Order 1958 as modified by the Social Security (Reciprocal Agreements) Order 1976. See R(S) 2/86, 2.6.9 iii, in which a Tribunal of Commissioners held that this decision had been correctly decided. R(S) 19/54

iii A claimant who had lived with his mother in Italy came to work in Great Britain and 3 years after doing so became ill. He claimed an increase of sickness benefit in respect of his mother, who was still in Italy. There was no intention that she should come to Great Britain or that the claimant would return to Italy. It was held that, although under the National Insurance and Industrial Injuries (Reciprocal Agreement with Italy) Order 1953, the claimant's mother could be treated as if she were in the United Kingdom, the interruption of her and the claimant's residing together could not be treated as temporary and that the increase of sickness benefit could not be payable under United Kingdom legislation. See now the 1953 Order as modified by the Social Security (Reciprocal Agreements) Order 1976. See also R(I) 37/55. R(S) 10/55

R(S) 11/61 iv A mariner of Netherlands nationality who was a member of the crew of a British ship met with an industrial accident whilst on board. Three months later he was taken off Articles and put ashore in Italy. He was then sent to Rotterdam and returned to his home in the Netherlands. At the end of the injury benefit period he made a claim for sickness benefit under the National Insurance Acts. It was held that under the National Insurance (Mariners) Regulations 1948, as amended, the claimant had ceased to be exempted from disqualification for sickness benefit as from the date on which he returned to a 'proper return port', namely Rotterdam; that under the reciprocal agreement made between the United Kingdom and the Kingdom of the Netherlands it could not be said that he fell ill in the territory of the United Kingdom; and that he could not rely upon Article 28 of the National Insurance and Industrial Injuries (Netherlands) Order 1955 because it did not relate to sickness benefit. See now the 1955 Order as modified by the Social Security (Reciprocal Agreements) Order 1976. See also 2.9.4 i.

R(S) 5/85 v The claimant lived in the Republic of Ireland. In 1982 his continued entitlement to invalidity benefit under the SS Act 1975 was reviewed by an insurance officer in England and his decision was upheld by a local tribunal in England. On appeal to the Commissioner the claimant requested an oral hearing and also requested that that hearing should be in Northern Ireland to enable him and his solicitor to attend and give evidence (sic). On that point the Commissioner in GB held that, by virtue of art. 39(1) of Reg. (EEC) No. 1408/71, the appellate jurisdiction in this case was that of GB and that no jurisdiction was conferred on Northern Ireland; that art. 3 of Schedule 1 to the SS (Northern Ireland Reciprocal Arrangements) Regs 1976 did not operate to transfer jurisdiction to the Commissioner in Northern Ireland, but only conferred jurisdiction upon him by removing an otherwise conclusive impediment to jurisdiction; but that that article did not assist the claimant because his presence in Northern Ireland solely for the purposes of attending an oral hearing of the appeal would not, in the circumstances of this case, suffice to render Northern Ireland 'the territory in which the claimant is' for the purposes of that article. (Paras 9 and 17 to 20.) Northern Ireland Decision, Appeal No. 31/82 (IVB) distinguished. R(U) 9/61 followed.

R(S) 1/89 vi The Commissioner decided that in considering whether a person had been entitled to sickness benefit for 168 days (in order to become entitled to United Kingdom invalidity benefit) the adjudication officer must take account of periods of entitlement to Austrian sickness benefit or invalidity pension and not only periods of payment. This was in accordance with Article 23(1) of the Agreement between the United Kingdom and Austria. Article 23(1) states that periods of entitlement to sickness benefit or invalidity pension under the legislation of the other country shall be treated as periods of entitlement under the legislation of the country considering entitlement to benefit. See also 19.2.2 *vi below*.

3 Retirement pension

R(P) 8/61 i A man who was resident in New Zealand was in receipt of superannuation benefit under the legislation of that country. It was paid to him until 11th November 1960, on which date he left New Zealand to travel to England. He was then over pensionable age. He arrived in this country in the middle of January 1961. Under the National Insurance (New Zealand) Order 1956 he was entitled to receive retirement pension from the United Kingdom while in, or resident in the United Kingdom, but it was held that it was not payable to him for the period of the voyage from New Zealand to England. It could not be said that while travelling, albeit in a British ship, on the high seas he was 'in the United Kingdom'. See now the Family Allowances and National Insurance (New Zealand) Order 1970 as modified by the Social Security (Reciprocal Agreements) Order 1976. See also R(S) 7/81.

R(P) 3/96 ii. Although the claimant was not entitled to retirement pension based on his UK contribution record, he was awarded retirement pension by taking into account contributions paid in New Zealand under Articles 9(3) and 9(6) of the Social Security (New Zealand) Order 1983.

The claimant left Great Britain to go to Spain on 29.4.92. The claimant's award of retirement pension was again reviewed and it was decided that the pension was no longer payable. The claimant again appealed. The tribunal decided that retirement pension should continue to be paid.

The Commissioner decided that the claimant's entitlement to retirement pension ceased from and including 30.4.92 and could not be helped by EC regulations quoting paragraph 7, section L, Annex VI of regulation (EEC) 1408/71, which holds that—

“The Regulation does not apply to those provisions of UK legislation which are intended to bring into force any Social Security agreement concluded between the UK and a third state.”.

See also 19.2.10.vi, 19.3.6.i, 17.6.4.xvi *below*

4 Injury benefit

i While supervising a skiing party in Switzerland a school mistress who was in charge of a party of girls she had brought out from England injured her ankle. It was accepted that, in view of the National Insurance and Industrial Injuries (Switzerland) Order 1954, the sole question for decision was whether the claimant had met with an industrial accident. It was held that she had done so. See 8.2.6 x. See now the Family Allowances, National Insurance and Industrial Injuries (Switzerland) Order 1969 as modified by the Social Security (Reciprocal Agreements) Order 1976. R(I) 39/56

5 Non-contributory invalidity pension

i On a claim for non-contributory invalidity pension by the wife of a serving member of the armed forces who resided with her husband in Germany, it was held in rejecting the claim that the claimant was not assisted by the Convention between the Federal Republic of Germany and the United Kingdom which does not apply to non-contributory benefits based on residence or presence in Great Britain. The claimant could not rely on any principle of extra territoriality whereby members of the forces and their families in quarters abroad should be treated as being on British soil. R(P) 8/61 and R(I) 44/61 referred to. See also 2.10.1 ii and 19.2.3 i. R(S) 7/81

ii. The claimant was born on 26.4.74. She left Great Britain for Germany with her parents in 1977 and did not return to Great Britain until 1.7.88. A claim for severe disablement allowance was made on 21.11.90. The claimant was not entitled to severe disablement allowance from 26.9.90 because she did not satisfy the 10 years residence condition at regulation 3(1)(c)(ii) of the Social Security (Severe Disablement Allowance) Regulations 1984. It was contended that the claimant would have been helped by the Family Allowances, National Insurance and Industrial Injuries (Germany) Order 1961 in that her residence in Germany should be treated as a period of residence in the United Kingdom, and that the residence requirement at regulation 3(1)(c)(ii) was *ultra vires*. R(P) 1/97

In addition to holding that the claimant could not rely on the Family Allowances, National Insurance and Industrial Injuries (Germany) Order 1961, to count her period of residence in Germany as a period of residence in the United Kingdom; The Commissioner decided that—

- a. regulation 3(1)(c)(ii) of the Social Security (Severe Disablement Allowance) Regulations 1984 was not *ultra vires* and was not resident in Great Britain for an aggregate of 10 years since her birth; and
- b. the claimant satisfied the residence and presence requirements for an award of severe disablement allowance from 6.4.92 onwards [Social Security (Severe Disablement Allowance) Regulations 1984, regulation 3 as amended by S.I. 1992 No. 704].

See also 2.10.1.iii, *above*, 19.2.3.iii *below*

16.4.6-7

6 Child benefit

- R(F) 2/92 i “Paragraph 13 of the Schedule to the Canada Order 1959 enables a person to overcome the residence and presence conditions contained in section 13 of the Child Benefit Act 1975 when migrating from Canada to the UK. It does not enable benefit to be paid during any period of absence in Canada”.

7 Invalidity benefit

- R(S) 1/93 i The claimant, who had been absent from GB in Malta for over 7 years, maintained a home in GB and stated that he intended to return to live in GB when his health permitted. He was only regarded as being a temporary resident in Malta by the Maltese authorities. It was decided that he was not temporarily absent from GB (section 82(5)(a) of the Social Security Act 1975) but the claimant argued that he was only in Malta temporarily and therefore that he was helped by Article 9A of the Agreement with Malta. The Commissioner decided that
- a. whether a person is resident in a country or only there temporarily is a question of fact and degree,
 - b. not being temporarily absent from GB and being temporarily in another country are 2 entirely separate states which can co-exist,
- and c. by November 1989 (when his absence had lasted over 7 years) the claimant had become permanently resident in Malta. The fact that he had not acquired a legal right to permanent residence in that country was not conclusive.

The decisions listed below are not included in chapter 16

Decisions which for divers reasons no longer have any relevance.

CSG 2/48	R(P) 5/52
CSU 14/48	R(G) 2/55
CI 36/49	R(I) 45/57
CG 206/49	R(I) 1/60
R(P) 2/52	R(F) 2/60
R(G) 4/52	R(G) 2/60

