Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF LEGAL GROUP)

# Neligan
# Digest of Commissioner's Decisions

## Volumes 1 and 2
## Supplement 70 – November 2009

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3. This package contains the following Commissioners' Decisions:

   R(DLA) 1/09 R(G) 1/09 R(H) 5/09 R(H) 6/09 R(H) 7/09 R(JSA) 1/09

4. The last two supplement packages issued were

   Supplement No. 68 [May 2009]

   Supplement No. 67 [February 2009]

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CHAPTER 15

# Attendance allowance, mobility allowance, invalid care allowance and disability living allowance

*(Invalid Care Allowance was changed to Carer's Allowance on 01/04/03).*

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**5 Entitlement because severely disabled person admitted to hospital and AA not payable**

i The claimant (the carer) was paid ICA because he was looking after his severely disabled mother and he met the conditions of entitlement in s. 70(1) of the SS Contributions and Benefits Act 1992. An AO decided that the mother had not been entitled to AA for certain periods because of her admissions to hospital. In consequence it was also decided that the carer was not entitled to ICA because he had received it during those periods when his mother was hospitalised. On appealing the AO's decision, the tribunal decided that the claimant's mother was not a "severely disabled person" within the meaning of s. 70(2) when she was not entitled to AA. The Commissioner held that s. 70(2) exclusively provides for the definition of "severely disabled person". Reg. 4(1) of the SS (ICA) Regs. 1976 deals with the meaning of s. 70(1)(a) and is not intended to involve any departure from the statutory definition at s. 70(2). Further, there is no conflict or inconsistency between reg. 4(2) and s. 70(2) with its statutory definition; and there is nothing in the regulatory powers of s. 70(8) to disapply the statutory definition.

R(G) 1/02

**6 Calculation of number of hours of education: meaning of "attends a course of education at" - meaning of "supervised study".**

i The claimant's entitlement to ICA was reviewed and withdrawn on the grounds that she was receiving full-time university education as laid down in s. 70(3) of the SS Contributions and Benefits Act 1992. The claimant appealed to the CA arguing that, in assessing whether education was "full-time" (twenty-one hours or more a week) under Reg. 5(1) of the SS (ICA) Regs. 1976, the phrase "attends a course of education at" should be construed as requiring the student's physical presence at the premises of an educational establishment. She further argues that the expression "supervised study" in reg. 5(2) did not include private study at home. The CA dismissed the appeal and held that. The expression "attends a course of education at a university" is to be construed in the sense of being enroled upon such a course and does not bear a locational connotation. Hours of study away from the premises of the university are therefore capable of coming within the period during which the student is attending a course of education. As regards reg. 5(2), the test of what is "supervised study" does not depend on the period of time for which the supervisor is present with the student. However, the study must be directed to the curriculum of the course of education involved and in addition there must be a degree of direction by and answerability to a supervisor. The fact that the work is "set" – in the sense that is work which the student is expected or required, by the curriculum or by a supervising member of staff, to do – will (save in exceptional cases) bring it squarely within the concept of "supervised study". It was also agreed that the ascertainment of hours of attendance is question of fact to be determined by the DM or tribunal. The approach of the Northern Ireland CA in *Bronwyn Wright-Turner v. Department for Social Development* was broadly correct and should be adopted.

R(G) 2/02

**7 Earnings**

i The claimant, relying on R(IS) 4/05, argued that in SS Benefit (Computation of Earnings) Regs. 1996, reg. 10(4) "amount paid by way of tax" includes tax which she is liable to pay. Rejecting this, the Upper Tribunal followed CG/1054/2005, holding that she could not reduce her earnings by the amount of any tax liability resulting from receipt of carer's allowance because no tax had in fact been paid.

R(G) 1/09

where a worker was obliged to cease work to care for a spouse who is temporarily seriously disabled. They both retained rights to residence.

xv The claimant, a Polish national, came to the UK in 2002, initially as a student and subsequently in employment. Following the birth of her child, she gave up work in 2005 and claimed IS. This was disallowed as she did not have a right to reside and the claim eventually reached the CA. The claimant argued that entitlement arose under Art. 12 or 18 of the Treaty because it was disproportionate to deny a right of residence to someone who is lawfully resident and substantially settled. The CA held that Art. 18 can be relied on to fill a lacuna in a Directive but that Council Directive 2004/38/EC gave an authoritative insight into the parameters of proportionality, providing for a right to permanent residence after 5 years lawful presence. Dismissing the appeal, it held that it was not disproportionate to exclude the claimant from IS when, at the time of claim she had been in GB for 3 years and was economically inactive.

R(IS) 5/09

xvi The claimant, a Turkish national, was granted temporary admission when she came to the UK as an asylum seeker. She was still an asylum seeker in 2006 when she claimed HB. The claim was refused because she did not have a right to reside, and was eventually appealed to the CA. The claimant argued that, as a national of a state which had ratified ECSMA, she was not excluded from entitlement to benefit under s. 115 of the Immigration and Asylum Act. Dismissing the appeal, the Court held that there is a clear distinction between lawful presence and a right to reside and although not excluded from benefit under the Immigration and Asylum Act, this did not give automatic entitlement. She did not have a right to reside because she did not satisfy the provisions in domestic legislation.

R(H) 7/09

## 4 Habitual residence - domestic

i The claimant was a British national. He had qualified in England in technical graphics in the Summer of 1981, when he was 20. In April 1981, before so qualifying, he had commenced employment in West Germany on an eight month engagement. He returned to England to take his qualifications examination but, subject to that, he remained employed in West Germany for a succession of fixed periods, totalling two years. His employers were three successive, though associated, employment agencies and the actual work was done for a single firm to whom each of his employers successively contracted his services. In Germany he first lived in an hotel and then a furnished flat. When his employment ended, he returned to England after drawing German UB for 2½ months. While working in Germany, he returned home only on three occasions, for nine days to take his examination, and for one holiday of two or three weeks each year. He left all his possessions in his parent's home, which he used as his address and in which he jointly shared a room with his brother and to which he returned when he came to England. His parents continually were on the look-out for employment for him in England. He originally intended only to be in Germany for the eight month period of his initial employment. On his return to England he claimed and was awarded West German UB for the three months ending 29 September 1983 under Art. 69 of EEC Reg. 1408/71. He claimed UK UB from 30 June 1983 to 25 April 1984, but from 4 August 1983 to 11 August 1983 he was in Spain looking for employment and his disqualification from benefit for that period was not disputed. It was contended that the claimant's West German contributions could not be counted towards the satisfaction of the contribution conditions for the UK benefit and accordingly he did not satisfy those conditions; that, once having availed himself under art. 69, he could not at least during the period before the Commissioner maintain a claim for the UK benefit (see *obiter dictum* in R(U) 4/84); and that, in any event, the period from 30 September 1983 to 2 October 1983 should be accounted as waiting days, because the claimant was precluded from drawing the UK benefit while drawing the German benefit. Therefore he should be regarded as disqualified from receiving the UK benefit during that period and the days in that period were not to be treated as days of unemployment. The Commissioner held that:

R(U) 7/85

1. subject to certain exceptions, Community law did not provide for the right of an unemployed worker to claim UB under the legislation of a Member State other than the State in which he became unemployed (art. 67(3)) (para. 5);

2. in this case the relevant exception was in art. 71(1)(a)(ii) and (b)(ii) and in relation to that Art. the question in issue was whether the claimant was "habitually residing" in the UK while working in Germany (see arts. 1(h) and 71(1)) (para. 6);

3. during that period the claimant was habitually residing in the UK for the purposes of those provisions (paras. 7 to 15);

4. the fact that the claimant was precluded from receiving the UK benefit down to 30 September 1983 by reason of his receipt of the German benefit did not amount to disqualification for receipt of the UK benefit, nor to disentitlement to it (paras. 18 to 20);

5. the claimant was entitled to UK UB from 30 September 1983 to 24 April 1984, but not from 30 June 1983 to 3 August 1983 or from 12 August 1983 to 29 September 1983 (paras. 1 and 16).

The Commissioner also ruled that the expression "stable employment" in the *Di Paolo* case [1977] ECR 315 should be interpreted as meaning permanent or steady employment (para. 13). R(U) 4/84 followed and *obiter dictum* explained and distinguished. CS 174/49 (KL), R(S) 2/65, R(U) 13/80 and R(S) 11/83 considered.

R(IS) 6/96

ii The claimant had a right of abode in the UK. She was born in Burma and lived there all her life until June 1992 when she first came to the UK, having separated from her husband. Her husband and children remained in Burma. She found long term work and rented accommodation. She was made redundant in May 1994 after which she claimed and was paid IS. In July 1994 she left the UK to visit her husband as he was thought to be terminally ill. She returned to the UK on 20 August 1994 and claimed IS. The AO decided she was not habitually resident in the UK and the tribunal upheld that decision. The Commissioner decided that the claimant had become habitually resident in the UK before she left on 20 July 1994 and that her temporary absence in Burma did not cause her to lose that habitual residence. He held that:

1. a person who is not resident in this country at all cannot be habitually resident. Residence is a more settled state than mere physical presence in a country. To be resident a person must be seen to be making a home. It need not be the only home or a permanent home but it must be a genuine home for the time being (para. 19).

2. it is a question of fact whether a person who has established **residence** in a country has also become **habitually** resident. This must be decided by reference to all the circumstances of the particular case (para. 20);

3. the most important factors for habitual residence are the length, continuity and general nature of **actual** residence rather than intention (para. 21);

4. an "appreciable period of time" together with a settled intention will be necessary for a person to be habitually resident. The relevant time is not in the future, but one which has largely or wholly elapsed (paras. 21 and 23);

5. the "appreciable period of time" depends on the facts of each individual case and should be a period which shows, according to good sense and judgment, a settled and viable pattern of living here as a resident (para. 28). The practicality of a person's arrangements for residence is a necessary part of determining whether it can be described as settled and habitual (para. 29);

6. established habitual residents of this country who have periods of temporary or occasional absence of long or short duration may still be habitually resident in this country during such absences.

iv The claimant was awarded MIG (and then SPC) from January 2003, but this was subsequently disallowed in April 2006 when it was found that she was subject to a sponsorship agreement, signed in November 2002. The claimant appealed and produced evidence, including a British passport and naturalisation certificate, showing that she had become a British citizen in 2004. Despite this, the tribunal upheld the disallowance. The Commissioner held that all British Citizens have a right of abode in the UK and a British citizen can never be regarded as a sponsored immigrant or barred for that reason from public funds.

R(PC) 2/07

**5 Sponsored immigrants**

i A 17 year old claimant had been granted leave to remain in the UK as a refugee. He was refused IS on the grounds that none of the circumstances in which a person in relevant education may be entitled to IS (reg. 13) applied to him. The claimant was not estranged from his parents in Somalia or any person acting in their place (reg. 13(2)(d) and his parents were not prohibited from entering GB (reg. 13(2)(e)(iii). The Commissioner held that:

R(IS) 9/94

1. a sponsor is not acting in the place of parents as his duties are not the same as those of a parent (para. 13);

2. when determining if a claimant has of necessity to live away from his parents due to physical or moral danger, that expression should be given a wide interpretation. The "physical or moral" danger need not emanate from the parents (para. 14);

3. most persons who are not British citizens are prohibited from entering the UK unless given leave to do so in accordance with the Immigration Act 1971. There does not have to be a specific prohibition of entry into GB (para. 17).

ii The claimant entered the UK as a visitor but was subsequently granted indefinite leave to remain when his nephew signed a sponsorship undertaking. In 1996 the claimant returned to the UK after a spell of several months abroad and was given leave to enter as a returning resident. He again left the country for a short time in 1997 and was again granted leave to enter on the same basis. His claim for IS was rejected on the ground that he was a sponsored immigrant who had not been present in the UK for five years and was accordingly a "person from abroad" with an applicable amount of nil. Following an unsuccessful appeal to the tribunal the claimant appealed to the Commissioner who decided that the sponsorship agreement was continuous and applied to the fresh leave to enter or remain granted on the claimant's return to the UK. The CA dismissing the claimant's appeal held that:

R(IS) 2/02

1. the undertaking should be construed in the light of the immigration scheme as a whole

2. the Commissioner was right to decide that the undertaking was a acontinuing one which applied to the further grant of leave on return to the UK

3. the use of the words "upon an undertaking" in reg 21(3)(i) of the IS (General) Regs 1987 should be construed so that the leave granted on return to the UK was on the basis of the undertaking

4. S 135(2) of the SS Contributions and Benefits Act 1992 permits an applicable amount of nil to be prescribed and use of that power cannot render a reg. *ultra vires*.

iii The claimant aged 71 came from Pakistan to live with her daughter and son in law who had signed a sponsorship undertaking to maintain her for 6 months. Her claim for IS was refused on the basis that she was a sponsored immigrant who had not been in the country for more than 5 years. Following an unsuccessful appeal the claimant was refused leave to appeal to the Commissioner. She then applied for judicial review of the Commissioner's refusal in the High Court on the ground that the undertaking was not on the official form [RON112 or SET(F)] and was not a valid undertaking on which entry clearance had been granted by immigration officials.

R(IS) 11/04

The Court held that decisions CIS/2474/99, CIS/47/02 and CIS/2816/02 were correctly decided. Whether an undertaking is for the purposes of the relevant legislation is a question of fact. The document was sufficiently formal and definite to constitute an undertaking, it contained an express undertaking that the claimant would be maintained without recourse to public funds and was drawn up by a solicitor and witnessed. There was evidence that the leave to enter was granted on the basis of the undertaking. The tribunal's finding that it was valid for more than 6 months was one they were entitled to reach.

v A claim for a Sure Start Maternity Grant was refused on grounds that the claimant was caring for the relevant child under a residence order rather than an adoption order as required in regulations. Subsequent appeals to the AT and Commissioner were dismissed. Allowing the appeal, the CA held that the significant legal differences between an adoption order and a residence order had no relevance to the purpose of a Maternity Grant, which was to provide help to low income mothers with the costs associated with a new baby. The claimant was in an analogous or sufficiently similar situation to an adoptive mother such as to count as a relevant ground for the purpose of Art. 14 of the Convention. Administrative convenience cannot in itself be sufficient justification for excluding those in relevantly similar situations. The exclusion of the claimant from entitlement to a Maternity Grant was discriminatory contrary to Art. 14. See also 29.16.1 ii

R(IS) 6/06

vi The claimant appealed to the Commissioner against a tribunal decision confirming removal of SDP when the claimant moved from a hostel into accommodation where her sister also lived. The claimant argued that she was not residing with her sister and also that the decision was in breach of various Arts. of the European Convention on Human Rights. In particular, the claimant argued that the provision excluding SDP to claimants who had a commercial agreement with a close relative was discriminatory, contrary to Art. 14, taken together with Art. 1 of Protocol 1. The Commissioner held that the tribunal had erred in assuming that if a kitchen and living room were shared, then the claimant was automatically "residing with" her sister; and remitted the appeal back to tribunal to consider that point. However, the Commissioner further held that the exclusion from entitlement to SDP of close relatives where there is a commercial arrangement was not in breach of Art. 14 as there was a rational justification for the rule.

R(IS) 12/06

vii The claimant was refused HB under reg. 7(1)(b) of the HB General Regs 87 because the person to whom she was liable to pay rent also resided in the dwelling and was a close relative. Appealing to the Commissioner, the claimant contended the reg. infringed various provisions of the European Convention on Human Rights, in particular that it was discriminatory contrary to Art. 14 taken together with Art. 8. Dismissing the appeal, the Commissioner held that where landlord and tenant are sharing the majority of the living accommodation, albeit that the claimant has exclusive use of her room, it is right to regard them as both residing in "the dwelling". The Commissioner also held that reg. 7(1)(b) was justified as a reasonable and proportionate anti-abuse measure, and not in breach of Art. 14.

R(H) 5/06

viii The claimant, then aged 62, claimed asylum in 2004 and was granted refugee status in 2006. She claimed SPC within 28 days of notification of the grant of refugee status, requesting the claim be backdated to the date of her asylum claim. Such backdating can be considered in IS claims under reg. 21ZB of the IS (General) Regs. 1987. However, the DM decided that there was no similar provision in SPC legislation, and thus the claim could not be backdated to the date asylum was first claimed. This decision was upheld by a tribunal and the claimant appealed to the Commissioner, arguing that SPC fell within the scope of Art. 1 Protocol 1 of the Human Rights Act (peaceful enjoyment of possessions), and that there was age discrimination contrary to Art. 14. The Commissioner held that, even if SPC fell within the scope of Art. 1 Protocol 1, there was no effective remedy which he could give the claimant. Although the Courts should, as far as possible, interpret legislation in such a way as to make it compatible with Convention rights, this cannot extend to adopting an interpretation which would contradict the clear meaning of an enactment.

R(PC) 1/08

DMs should further note that the House of Lords (in *RJM v. The Secretary of State for Work and Pensions* [2008] UKHL 63 of 22.10.08) has subsequently ruled that non-contributory benefits, including SPC, can come within the scope of Art. 1 Protocol 1 of the Human Rights Act.

ix The parents shared care of their two children equally, CHB being paid to the mother. The Secretary of State decided that the mother was the parent with care. The father, having lost his appeal to the tribunal, appealed to the Commissioner contending that the regs. operated in an unfair and discriminatory way and that there must be some room for discretion. It was held that the rule in reg. 8(2)(b)(i) of the Child Support (Maintenance Calculations and Special Cases) Regs. 2000 ws not irrational or *ultra*

R(CS) 1/09

*vires* (RCS) 14/98 followed). There was no breach of European Union Law as neither the child support scheme nor the CHB scheme was within the scope of council Directive 79/7/EEC. Even if the child support scheme came within Art. 8, there was no breach of Art. 14 in this case as the CHB arrangements between these parents were voluntary and any theoretical possibility of gender-based discrimination within the CHB scheme did not apply to them.

R(DLA) 1/09 x The claimant was in receipt of middle rate care component and lower rate mobility component. Some years after reaching age 65 she had a fall and subsequently applied for supersession of the existing DLA award for it to be increased to the higher rate of mobility component. The Secretary of State refused to supersede because the claimant was over 65 when her mobility needs increased, and an AT confirmed that decision. The claimant further appealed to the UT arguing there was age discrimination contrary to Art 14 of the Convention in conjunction with Art 8 and Art 1 Protocol 1. The Judge held that age is a status capable of being protected by Art 14, but that the Secretary of State had provided a rational explanation to justify the difference in treatment.

**5 Article 1 Deprivation of possessions**

R(P) 1/06 i In 1994 the claimant was awarded reduced rate Cat A RP on her own contributions. In 1999 her husband became 65 and claimed RP. Although the claimant was then entitled to elect to receive Cat B or increased Cat A pension based on her husband's contributions, no such claim was made until 25.10.01. Applying the prescribed time limit of three months for claiming RP of any category, the DM awarded her increased pension from 25.7.01. A tribunal dismissed the subsequent appeal. The claimant appealed to the Commissioner arguing that the three month time limit deprived her of a possession; and that not advising her of her right to claim an increased pension was discriminatory. The Commissioner held that Art. 1 of the First Protocol to the European Convention on Human Rights (peaceful enjoyment of possessions) does not apply where the claimant fails to satisfy the conditions of entitlement under domestic law. He also found that there was no evidence that the claimant was not informed of her entitlement as the result of any form of discrimination.

R(CS) 4/06 ii M was the non-resident parent of two children, and was living with a same-sex partner. Her liability for child-maintenance was assessed in accordance with the rules in force at the time, with the result that she was required to pay more than would be required of an absent parent in the same circumstances but living as a member of a heterosexual couple. On appeal, a tribunal found the statutory definition of "unmarried couple" in the Child Support (Maintenance Assessments and Special Cases) Regs. to include same-sex couples, relying on s. 6 of the Interpretation Act 1978. Subsequent appeals to the Child Support Commissioner and CA, by the Secretary of State, were dismissed. The CA held that the different level of respect accorded by the child support legislation to M's family life with her new same-sex partner (as against a heterosexual relationship) came within the ambit of Arts. 8 and 14 of, and Art. 1 of the First Protocol to, the Convention. However, the Court found the remedy was to invoke s. 3 of the 1998 Act (legislation must be read in a way compatible with Convention rights) to disapply the definition of "unmarried couple" in the Regs. The Secretary of State appealed to the HL, which allowed the appeal. It held that Art. I of the First Protocol was not engaged as the legislation governing the calculation of child support liabilities of non-resident parents to support their children was concerned with enforcing personal obligation, and not expropriating property. M's complaint did not fall within the ambit of Art. 8 in conjunction with Art. 14 because the child support assessment had only a tenuous link with respect for family life; and further, that established Strasbourg jurisprudence did not yet recognise that the Convention guarantee of respect for family life was applicable to same-sex relationships. Since the introduction of the Civil Partnership Act, regs. have been amended to recognise same-sex partnerships in the child support scheme.

R(PC) 1/08 iii The claimant, then aged 62, claimed asylum in 2004 and was granted refugee status in 2006. She claimed SPC within 28 days of notification of the grant of refugee status, requesting the claim be backdated to the date of her asylum claim. Such

backdating can be considered in IS claims under reg. 21ZB of the IS (General) Regs. 1987. However, the DM decided that there was no similar provision in SPC legislation, and thus the claim could not be backdated to the date asylum was first claimed. This decision was upheld by a tribunal and the claimant appealed to the Commissioner, arguing that SPC fell within the scope of Art. 1 Protocol 1 of the Human Rights Act (peaceful enjoyment of possessions), and that there was age discrimination contrary to Art. 14. The Commissioner held that, even if SPC fell within the scope of Art. 1 Protocol 1, there was no effective remedy which he could give the claimant. Although the Courts should, as far as possible, interpret legislation in such a way as to make it compatible with Convention rights, this cannot extend to adopting an interpretation which would contradict the clear meaning of an enactment.

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CHAPTER 23

# Jobseeker's allowance

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vi The Commissioner considered three appeals. The claimants were seasonal casual workers in a seaside resort with no continuing relationship with their employers; having to apply for a job at the beginning of each summer season in competition with others. They made claims to JSA in the out of season winter months. These claims were disallowed on the basis that the DM said they had established a cycle of work of a year by working for the same employer for more than one year in a row. When the hours worked during the summer season were averaged over the year they exceeded 16 per week. This meant they were held to be in remunerative work for the whole year and therefore not entitled to JSA. Considering R(JSA) 5/03, the tribunal found that the claimants had only a "hope" and not an "expectation" of being re-employed and could not therefore be in a cycle of work. The Secretary of State appealed. The Commissioner held that the tribunal did not err in law. A casual worker unable to get a job in winter months is not in remunerative work the whole year just because he has been able to get casual jobs in the summer of one or more previous years. Reg. 51(2) is subordinate to reg. 51(1) and there is no legal basis for proceeding backwards from the selection of an averaging period for calculating hours to distort the meaning of reg. 51(1) as if it contained a deeming provision making people count as engaged in work when they are not.

RS(JSA) 1/07

vii Claimant was a self-employed carpenter. He had a period of entitlement to JSA but then worked. Reclaimed JSA but his claim was disallowed on ground that he was in remunerative work as he had said that usual break between jobs or contracts was normally 12 weeks. Claim accepted from August 2007 when 12 weeks had elapsed since he last worked. Claimant appealed against disallowance of JSA but tribunal dismissed appeal. The nine issues accepted in CIS/166/94 are mainly relevant to the question of whether a person is "engaged in remunerative work or part-time employment" and not to whether a person is "employed". The Judge broke down the framework for making decisions on such cases into 4 questions to ensure relevant issues are not overlooked. These are whether the person is still employed; whether in a particular week the claimant is engaged in remunerative work or part time employment; whether the work is for more or less that 16 hours per week and whether earnings are to be taken into account. See also *23.10.2 i below.*

R(JSA) 1/09

**2 Right to reside**

i The claimant, a Dutch national with 3 dependant children, came to the UK in May 2004 and claimed IS in November 2004. The claim was disallowed because the claimant was not a "qualified person" and therefore did not have a right to reside. On appeal, the tribunal found that, although a single parent, the claimant had been looking for work since coming to the UK. However, they dismissed the appeal because the claimant was not a "worker" or self-sufficient. The Commissioner held that, until 30.4.06, a claimant of IS was not precluded from establishing a right to reside as a "workseeker", providing they could show they were actively seeking work that was genuine and effective. Employment for at least 16 hours per week, which is the minimum required of a JSA claimant with caring responsibilities, would generally be taken to be "effective". However, from 30.4.06, an EU citizen claiming a right to reside as a "workseeker" must claim JSA, with the consequent normal conditions to be available for and actively seeking work, but also to have a genuine chance of being engaged.

R(IS) 8/08

## Part 4: Young persons

*(at the time of going to print there was no recorded decision on this matter)*

# Part 10: Self-employed earners

## 1 Seasonal worker - "calculation of average earnings"

R(JSA) 1/03

i The claimant worked as a self-employed seasonal worker and had done so for several years. His working season lasted from early July to early November each year. In November 1999 the claimant made a claim to JSA. The DM decided that the claimant was gainfully employed throughout the year from July 1999. As a result, the claimant's earnings from self employment fell to be calculated under reg. 95(1)(a) of the JSA Regs. 1996. The earnings were therefore calculated by means of a weekly average over the whole year. The claimant appealed against this decision arguing that he should not have been treated as gainfully employed as there was some doubt as to whether he would be granted a license to trade the following year. The tribunal allowed the appeal, but only to the extent of reducing the amount of earnings to be taken into account. The claimant appealed to the Commissioner who held, following CIS/422/95 that in the case of a seasonal worker there is likely to be a cycle of work of one year, and that if the claimant was gainfully employed for on average less than 16 hours per week over the year he would not be excluded from JSA on the grounds of being in remunerative work (*see* 23.3.1ii), but his earnings would need to be calculated with reference to his average weekly earnings over the whole year in accordance with reg. 95 of the JSA Regs. The Commissioner also held that the tribunal did not err in law in concluding that that claimant was gainfully employed as a self-employed earner on the grounds that since the claimant had always been granted a licence in previous years it was likely that one would be granted again.

## 2 Self-employed earnings if claimant engaged in part-time or remunerative work

R(JSA) 1/09

i Claimant was a self-employed carpenter. He had a period of entitlement to JSA but then worked. Reclaimed JSA but his claim was disallowed on the ground that he was in remunerative work as he had said that usual break between jobs or contracts was normally 12 weeks. Claim accepted from August 2007 when 12 weeks had elapsed since he last worked. Claimant appealed against disallowance of JSA but tribunal dismissed appeal. Secretary of State relied on CIS/166/94 which held that earnings from self-employed are taken into account as long as claimant remained in gainful employment. Further appeal allowed and held that JSA regs, Sch. 6, para. 4 uses two distinct concepts "engaged in remunerative work or part-time employment" and being "employed" and that this is less confusing than term "gainfully employed" used in CIS/166/94. The nine issues accepted in CIS/166/94 are mainly relevant to the question of whether a person is "engaged in remunerative work or part-time employment" and not to whether a person is "employed". The question to be determined when a person who has been self-employed claims JSA is are they still "employed" and if yes are they carrying out activities connected with the self-employment in relevant week and by virtue of reg. 52 are they treated as engaged in work during periods of no activity that are normal incident of self-employment. The next question is whether the work is "remunerative" or merely "part-time" employment" looking at the number of hours calculated by taking the average over a prescribed period. If the hours are part-time then earnings may need to be considered by applying reg. 95(1) to determine the period over which earnings should be averaged. *See also 23.3.1 vii above.*

## Part 11: Participants in the self employment route

*(at the time of going to print there was no recorded decision on this matter)*

CHAPTER 32

# Housing Benefit & Council Tax Benefit

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HB and CTB from 1 April 2001. Details of the claimant's bank accounts submitted to the LA in support of the claim showed large irregular payments into the claimant's current account, as well as extensive use of overdraft facilities and credit cards. The claimant explained that the main payments were received from his girlfriend in Italy. She wrote a letter saying that she had provided him with £22,375 financial support between April 2001 and May 2002. The LA refused benefit on the ground that income from these payments, and the claimant's bank overdraft facilities and credit cards, had been used to discharge liability for rent. The claimant appealed on the ground that the monies were not a gift, and his girlfriend expected repayment. The appeal was disallowed. On appeal to the Commissioner, the LA argued that the claimant was not liable for the rent and in the alternative that the monies from the claimant's girlfriend fell to be treated as income despite their irregular nature. The Commissioner allowed the appeal and held that for the purpose of reg. 6(1)(c)(ii) of the HB (General) Regs. 1987 the "person" can include a limited company and the other conditions of reg. 6(1)(c) were met. The Commissioner also held that for the purpose of reg. 40(6) "voluntary payment" has the meaning of a payment made without obtaining anything in return. Having found as a matter of fact that the monies were paid by way of loan, and that, although a lender would normally obtain something in return for making a loan - the right to repayment, in these circumstances there was no intention to create legal relations, the payments were voluntary and reg. 40(6) applied. In addition, the Commissioner held that "income" should be given its natural and ordinary meaning, so that the loans incurred by drawing down on the bank overdraft facilities, being repayable on demand, did not amount to income.

**5 Rent to former partner for home previously shared - possible discrimination**

R(H) 6/05

i HB was refused because the claimant was paying rent to her ex-partner for a home they had formerly shared. The claimant appealed on grounds that it constituted discrimination under the Human Rights Act because partner referred only to heterosexual relations, so that a person who had been in a homosexual relationship and whose circumstances were otherwise the same, would have qualified for benefit. The appeal was refused by the tribunal and the Commissioner. The CA held that although the HB scheme as a whole is within the ambit of Art. 8 of the Human Rights Act, it was necessary to consider the particular provision that was alleged to be discriminatory. Since the purpose of reg. 7(1)(c)(i) of the HB (General) Regs. is to prevent abuse, it does not engage any Convention right.

**6 Payments by an owner**

R(H) 7/05

i This case was the subject of a CA decision in *Burton v New Forest District Council*. The claimant, who is severely disabled, was the sole proprietor of a property. By deed dated 17 January 1997, he transferred his beneficial interest in the property to the Nay Housing Care Trust, of which he and his mother were the trustees. The property was let to third parties. By further deed, dated 20 October 2001, the claimant retired (and was replaced) as a trustee. The claimant had by then himself moved into the property. On 4 April 2002, the legal estate was transferred by the claimant to the trustees of the Nay Trust. The transfer was registered at the Land Registry on 8 April 2002. On 2 November 2001, the claimant had applied for HB as a tenant of the Nay Trust. His claim was refused. A ground of refusal was that benefit was not payable in respect of "payments by an owner", pursuant to reg. 10(2) of the HB(General) Regs. 1987. An "owner" is defined in reg. 2(1) as "the person who ... is for the time being entitled to dispose of the fee simple". The claimant appealed. A tribunal allowed the appeal. It decided that, although owner of the legal title, the claimant had no beneficial interest in the property and was therefore not the "owner" within the meaning of reg. 10(2). The LA appealed to a Commissioner, who allowed the appeal, holding that the claimant was the "owner", as that word is defined in reg. 2(1). The claimant appealed to the CA. The CA dismissed the appeal and held that the claimant was the owner of the property within the meaning of reg. 2(1): s. 20(1) of the Land Registration Act 1925 makes it clear that the claimant was entitled to dispose of the fee simple up until the register at the Land Registry was rectified on 8.4.02 and it is not possible to construe "owner" in reg. 2(1) as meaning exclusively a beneficial owner.

R(H) 8/07

ii The appeal concerned a terraced house divided into three flats. The claimant owned the freehold of the house. One of the flats had been sold to his former partner on a 99 year lease. He then rented the flat from the former partner and claimed HB. Following R(H) 7/05 the Commissioner decided the claimant was the "owner" of the property. "Owner" is defined as the person who is entitled to dispose of the fee simple and the claimant was entitled to do so.

**7 Whether claimant and landlord reside in the dwelling**

R(H) 5/06

i The claimant was refused HB under reg. 7(1)(b) of the HB General Regs. 87 because the person to whom she was liable to pay rent also resided in the dwelling and was a close relative. Appealing to the Commissioner, the claimant contended the reg. infringed various provisions of the European Convention on Human Rights, in particular that it was discriminatory contrary to Art. 14 taken together with Art. 8. Dismissing the appeal, the Commissioner held that where landlord and tenant are sharing the majority of the living accommodation, albeit that the claimant has exclusive use of her room, it is right to regard them as both residing in "the dwelling". The Commissioner also held that reg. 7(1)(b) was justified as a reasonable and proportionate anti-abuse measure, and not in breach of Art. 14.

**8 Dwelling previously owned by claimant**

R(H) 6/07

i The appeal concerned the test in reg. 7(1)(h) of the HB (General) Regs. 1987 of whether the claimant could have continued to occupy the dwelling without relinquishing ownership. The claimant and her husband contended that they believed themselves to be under a compulsion to sell and that the proper approach to the test was subjective, not objective. The Commissioner held that the reg. contains both subjective and objective elements and that the test is one of practical possibility as applied to the particular circumstances of the claimant. However it was impossible to interpret the words "could not" as meaning "believe she could not" so apart from exceptional circumstances such as extreme stress the claimant's perceptions are not relevant to the application of the test.

R(H) 1/08

**9 Payment to tenant or landlord**

i Reg. 95(1) of the HB Regs. 2006 gives a LA a duty, not a discretion, to undertake an independent reconsideration of whether the exception applies and payment of HB is to be made to the landlord. A change of payee involves a revision or a supersession of an award (see R(H) 2/08) which carries appeal rights for both the claimant and the landlord. Accordingly, reg. 11(2)(a)(ii) of the HBCTB Decisions and Appeals Regs. 2001 permits the suspension of payment while enquiries are made. R(H) 2/08 also directs it is not possible to make duplicate payment of HB to both the claimant and the landlord.

**10 Whether two tenancies on different properties constitute a single dwelling**

R(H) 5/09

i The claimant, who had a large family, rented two adjacent flats. The LA refused to award either HB or CTB in respect of the second flat because separate flats could not constitute a single dwelling. In R(JSA) 9/03 it was held that a dwelling occupied as the home could apply to two dwellings, although this was a JSA(IB) authority it is permissible, for HB purposes, in appropriate circumstances to take a similar functional approach. In that context it was appropriate to take account of the reality of the claimant's living arrangements and as such a finding that the claimant's dwelling consisted of both flats was not perverse.

# Part 7: Capital and income - general

## 1 Expenses of self-employed earners

R(H) 5/07

i The claimant was in receipt of HB and CTB for a period of about a year. The LA decided that part of the benefit had been overpaid and the claimant appealed against this decision. The appeal concerned the expenses that were deductible from the claimant's self-employed earnings when calculating the net profit of the business in accordance with HB (General) Regs. 1987, reg 31 as "wholly and exclusively incurred....for the purpose of the business". The tribunal allowed the claimant's appeal and directed the LA to recalculate the claimant's entitlement, however the claimant appealed to the Commissioner stating that aspects of the tribunal's decision were wrong and that additional amounts of expenditure should have been held deductible. In particular the claimant stated that an apportioned amount of repayments for interest and capital on the loan for purchase of a replacement car should be deductible. The Commissioner allowed the appeal; and held that in determining whether any and if so what, part of the loan interest repayments for the car were expenses "wholly and exclusively incurred..." the principle of apportionment adopted in R(FC) 1/91 applied. The apportionment should be in accordance with the amount of business mileage as a percentage of the total mileage in the assessment period in which the interest was paid and this same principle of apportionment applied to the capital repayments as to the interest payments. The Commissioner substituted his own decision setting out the further deductions to be made.

## 2 Self-employed earners - calculation of income

R(H) 5/08

i The claimant was awarded CTB based on his income from self-employment and his wife's part-time earnings. His business was making a loss during the relevant period and he disagreed with the income figure used in the calculation arguing that the loss from his self-employment should be deducted from his wife's earnings. The tribunal upheld the council's decision so the claimant appealed to the Commissioner. Reg. 22(10) of the CTB (General) Regs. 1992 prevents offsetting of losses from a claimants self-employed business against any other employment in which he is engaged. The claimant argued this reg. did not apply because although his wife's earnings were to be treated as his under s136 of the SS Contributions and Benefits Act 1992, this did not require that he be treated as engaged in the employment undertaken by his wife and reg. 22(10) only applied where the claimant is engaged in two or more employments. The Commissioner dismissed the appeal and held that whilst reg. 22(10) did not in terms prevent offsetting against his wife's income, it did allow only for net profit to be taken into account when calculating self-employed income, in regs. 22(1) and (3) and made no provision for a loss to be treated as anything other than nil. This meant that there was no figure to offset against his wife's earnings.

R(H) 6/09

ii Claimant's wife was running a business with a partner, making regular drawings from the capital but the business was not making a profit. Claimant's CTB award was re-calculated to take account of his wife's drawings from the business initially as earned income but on revision as unearned income. AT confirmed this revised decision but claimant appealed. Appeal allowed and confirmed that when partnership is making profits any drawings taken by a partner are not taken into account as income as to do so would involve taking into account both claimant's share of profits and actual drawings from that share of profits. This view clarifies earlier decisions. Where the partnership is not in profit or where partner draws amounts in excess of his or her share of profit so that partner's capital account goes into, or further into, overdraft, it would be unfair to take such drawings into account since drawings from profits in future years might be restricted to decrease the overdraft on the capital account, but the partners full share would still be required by the legislation to be taken into account.

**3 Whether gross income means Incapacity Benefit actually received or the notional rate**

R(H) 2/09

i The claimant was in receipt of an occupational pension and IB reduced from the full rate to take into account the occupational pension in accordance with s. 30DD of the SS Contributions and Benefits Act 1992 (the 1992 Act). In dealing with his claim for CTB the LA had taken into account the amount of IB actually paid, but on 22 May 2007 reassessed his entitlement back to April 2004 using the standard rate of IB payable rather than the actual amount paid to the claimant following the s. 30DD reduction, relying on reg. 30(5) of the Council Tax Benefit Regs. which provides that "where payment of any benefit … is subject to any deduction by way of recovery the amount to be taken into account … shall be the gross amount payable". On appeal to the Commissioner it was held that reg. 30(5) did not apply on the facts of the case. The claimant's IB was not "subject to any deduction by way of recovery" but subject to a reduction by virtue of the operation to s. 30DD of the 1992 Act: no amount was being "recovered" from his benefit entitlement (para. 16). The correct approach was to assess the claimant's income based on (a) his gross occupational pension payments (see R(IB) 3/05), (b) the actuall rate of IB in payment after any reduction under s. 30DD and (c) any other relevant income. (See also R(IB) 3/05 2.1.1ii).