University College London v Newman

COURT OF APPEAL (CIVIL DIVISION)

19 December 1985

J Beale for the Appellant; P Leaver for the Respondents

Bindman and Partners; Coward Chance

CROOM-JOHNSON LJ

This is an appeal from a judgment of His Honour Judge McDonell given at Westminster County Court on 7th November 1984.

The Defendant is a citizen of New Zealand, where he was born. On 3rd October 1983 he enrolled at University College London ("UCL") for a course for BSc (Econ). UCL are suing him for £2,420 for unpaid fees. That sum is the difference between the fees which have been paid and those which UCL say he ought to pay. It was common ground that the relationship between UCL and its students is contractual. Therefore it was necessary to find when the contract was made and what were its terms express or implied. This meant considering documents spread over nearly a year. It is necessary to have some background knowledge.

For many years students have been free to come to this country from abroad to go to our schools and colleges, subject to our immigration laws and subject to their obtaining places. They have also qualified for local authority grants to help pay their fees. Since at least the Education Act 1962 and regulations made under it, it has been a condition of eligibility for a grant that the student should be "ordinarily resident" (as defined) within the area of the relevant local authority. Even an overseas student who was only "ordinarily resident" for the necessary period of time because he was receiving the education for which he needed the grant was so entitled: see R v Barnet LBC Ex parte Shah, [1983] 2 AC 309, [1983] 1 All ER 226. In 1979 the Secretary of State recommended to local authorities that they should charge increased fees to overseas students. Where that was done it caused disputes over student's contracts and also gave rise to questions of discrimination under the Race Relations Act 1976.

Therefore at some time before the matters with which the present case is concerned, the Government let it be known that changes were to be made in the regulations so that overseas students would be obliged to pay the full amount, or nearly the full amount, of their tuition fees, instead of the much lower rate payable by UK students (whose education was being subsidised).

On 13th May there came into force the Education (Fees and Awards) Act 1983. By section 1 it empowered the Secretary of State to "make regulations requiring or authorising the charging of fees which are higher in the case of students not having any connection with the United

Kingdom or any part of it as may be specified in the regulations than in the case of students having such a connection."

In the exercise of the powers conferred by that Act, the Secretary of State made the Education (Fees and Awards) Regulations 1983. So far as they apply to this case they provided:

"Relevant connection with the United Kingdom and Islands

6. For the purposes of this Part a student has a relevant connection with the United Kingdom and Islands if:

(a) he has been ordinarily resident therein throughout the 3 year period preceding 1st September, 1st January or 1st April closest to the beginning of the first term of the student's course, and

(b) he has not been resident therein, during any part of the 3 year period, wholly or mainly for the purpose of receiving full-time education.

"Charging of higher relevant fees

7. -- (1) Subject to Schedule 2, it shall be lawful to charge higher relevant fees in the case of students who have not a relevant connection with the United Kingdom and Islands than in the case of students having such a connection:"

Schedule 2 made allowance for membership of the European Community. The relevant paragraphs are 1 and 2:

"SCHEDULE 2

FEES --EXCEPTED STUDENTS

1. It shall not be lawful in pursuance of Regulation 7 to charge higher fees in the case of a student who is an excepted student within the meaning of this Schedule.

2. -- (1) A person who –

(a) is a national of a member state of the European Community;

(b) is the son or daughter of such a national, or

(c) began his course before 1st January 1984, shall be an excepted student if he satisfies the conditions mentioned in sub-paragraph (2).

(2) The conditions referred to in sub-paragraph (1) are that –

(a) he has been ordinarily resident in the European Community throughout the 3 year period referred to in Regulation 6(a) and

(b) he has not been resident therein, during any part of that 3 year period, wholly or mainly for the purpose of receiving full-time education."

The Interpretation Regulation, regulation 2, said: "'European Community' means the area comprised by the member states of the European Community (including the United Kingdom) as constituted from time to time."

These regulations were made on 6th July 1983, laid before Parliament on 18th July 1983, and came into force on 21st July 1983 just before the beginning of the academic year 1983/84. The County Court judge found that UCL did not obtain a copy until sometime in October, and that the defendant never received them or knew anything about them.

Most students seeking places at universities apply to the Universities Central Council for Admissions ("UCCA"), stating their choices of university and the subject they wish to study. UCCA then tries to place them.

In December 1982 Mr Newman completed an application form to UCCA seeking a place at one of five institutions for higher education. UCL was on his list. Part 1 of the form required him to state his "residential category" according to Appendix III of the 1983 UCCA handbook. Appendix III, under the heading "Definitions", stated:

"1. For UCCA purposes you are 'ordinarily resident' in the UK or EC [European Community] if you live there for all ordinary living purposes and not only for a specific or limited purpose such as studying . . ."

On the opposite page it set out some alternatives. One was:

"If your place of ordinary residence is in the UK and will have been for the whole of the three years immediately preceding 1 September in the year in which your course starts and you are now living in the UK your residential category is B".

Another alternative was:

"If your place of ordinary residence is in the EC and will have been for the whole of the three years immediately preceding 1 September in the year in which your course starts and you do not qualify for B . . . your residential category is F."

Mr Newman said his residential category was B, and that he had started living in the UK on 3rd November 1978. On that form Mr Newman gave an account of his extensive travels since leaving New Zealand in 1977. It is accepted by counsel for Mr Newman that UCL had received the completed UCCA application form by April 1983. Soon after, he received from UCCA a notification of the offer of a place at UCL. Attached to it was a form of acceptance for him to sign and return. He did not do so till 5th September. On 27th April he had an interview at UCL. On 5th May he was sent a letter by the tutor saying:

"I am glad to inform you that we are prepared to make you a conditional offer of admission."

The condition was subject to his supplying satisfactory confirmation, in the form of educational certificates, of his eligibility.

The letter continued:

"I am, however, rather concerned to know how you propose to support yourself during your University course, and before you are admitted to this college I shall want your assurance that you will have at your disposal adequate finances, both for college fees and for maintenance, to see you through the whole of your course here. Fees for the sessions 1982/83 amount to £480 for students from the United Kingdom and from countries in the European Economic Community or £2,700 for students coming from other overseas countries. There can be no guarantee that these fees will not be raised for the 1983/84 and ensuing session."

About 2nd June Mr Newman replied saying "I have gratefully accepted your offer though I still have to finalise my financial arrangements."

On 22nd June ILEA wrote to Mr Newman saying he was eligible for an award from ILEA for his "approved fees", which would be paid direct to his college if he was accepted for his course. "Approved fees" meant at the lower rate for UK students. ILEA in due course paid the fees at the lower rate.

In July Mr Newman gave details of his previous educational certificates, but the originals were required. These had to come from New Zealand, and did not arrive until 11th November.

On 1st September 1983 the course tutor notified Mr Newman that he might register with them on 3rd October and sent him their Departmental Booklet. In that booklet was this passage:

"From the start of the session 1980-1 the Government has announced that full-time overseas students . . . will have to meet the full cost of their courses. The minimum laid down for universities for the session 1983-84 will be £2,700 for an Arts Course."

On 5th September Mr Newman signed and sent to UCCA the form of acceptance of the offer of a place, which he had received in April. By 3rd October the conditions on which the offer of a place was made in the letter of 5th May had not been met. So far as UCL were concerned, they had been told that Mr Newman qualified for the lower fees payable by a UK student. But Mr Newman had been told to present himself on 3rd October and he did so. He filled in a registration form, stating he was a citizen of New Zealand. It appears he was regarded in the registry as an overseas student, although he was not told so.

Mr Newman then began his course.

There was now some uncertainty about Mr Newman's position. On 17th October he was sent a document called "Fees Status Questionnaire." It began:

"In order to pay fees at the home rate students must be nationals of the United Kingdom . . . or European Economic Community . . . and have been ordinarily resident for the three years immediately preceding the date their courses are due to begin . . . In your case the college has not been able to establish that you qualify as a home student and has therefore assessed you initially as overseas for fees purposes."

That document clearly reflects UCL's thinking at this time that entitlement to pay the lower fees depended both on nationality and "ordinary residence."

Mr Newman returned the questionnaire. He also completed a course form, on 11th October, which in effect completed his registration. The registry again classified him as an overseas student. On 24th October he was invoiced for the extra £2,420.00, which he has not paid. Eventually, on 15th February 1984 he was suspended for non-payment of fees.

To complete the contractual history, on 25th November a certificate of eligibility was issued because Mr Newman's certificates had arrived and were sufficient.

Also on 25th November he was sent a letter by the Senior Administrative Assistant in the Registry saying:

"Having studied information you provided on the UCCA form in respect of your travels round the world since leaving New Zealand in November 1977 I am still in doubt as to whether you have been residing continuously in the UK/EEC for the three years immediately preceding the start of your course. Such residence is, of course, a pre-condition of home status."

He was asked to bring his passport in, which he did in January. What it showed will be discussed later; but UCL remained of the view that Mr Newman was properly classed as an overseas student.

Since UCL's claim is in contract, they must establish when the contract was concluded and what fees could be charged under it. The judge decided that the contract came into being when enrolment took place on 3rd October, subject to the condition (which was later satisfied) that his certificates of education were in order. Both parties contended that the fees to be paid depended on Mr Newman's status under the 1983 regulations, but applied the facts to them in different ways. The judge held that he could not imply into the contract a term that the regulations determined the fees at all, since neither party had any knowledge of them at the relevant time. Instead, he held that it was an implied term of the contract that UCL's letter of 5th May had made it clear that Mr Newman's fees would be at the higher rate if he were not a student "from the United Kingdom or a country in the EC". He held that unless Mr Newman could show he was "ordinarily resident" in either the UK or an EC country for the three years preceding 1st September 1983, he would have to pay the higher rate. He supported this conclusion by reference to the UCCA handbook appendix III which had led Mr Newman to choose between B and F when he filled in his application form to UCCA in December 1982.

Before this court, the parties have made some subsidiary submissions about the information of the contract. These can be dealt with shortly. UCL suggested that the offer of a place, made on 5th May, was not accepted until 25th November, when, after the certificate of eligibility was issued, Mr Newman accepted it by conduct. They suggested that they were entitled to allocate to him what they considered to be the appropriate fee status, that is to say as an overseas student, to which they had classified him. It is true that if his certificates had then been insufficient, his enrolment could have been cancelled. But in my view his fee status did not depend on UCL's decision, but on what it really was.

On the other hand, it was submitted for Mr Newman that the contract was made on 5th September, when he purported to accept UCL's offer of a place sent to him in April. That cannot be right either, because that offer was clearly conditional.

The conclusion I have reached is that the contract was made when Mr Newman enrolled on 3rd October, subject to his certificates proving his eligibility. The contention of both parties to the judge that Mr Newman's fee status was to be determined by the 1983 Regulations was correct. The reason is that from the time they came into force those regulations put on a statutory basis the amount which might be charged as fees to different classes of student. They covered many colleges, including UCL.

Regulations 4 and 5 described what tuition fees were covered by Part II of the regulations. Regulation 6 identified what students had "a relevant connection" with the United Kingdom and Islands. They must have been ordinarily resident therein throughout the appropriate 3-year period preceding the beginning of his course. Residence during any part of that period wholly or mainly for the purpose of receiving full-time education did not qualify. If a student qualified, he was what is loosely called a "UK student." Regulation 7 made it lawful to charge higher fees to other students, though there was no obligation to do so. Regulation 7 was "subject to Schedule 2". Schedule 2 described "excepted students" who had to be treated in the same way as UK students. If they fell within the definition they too must have been "ordinarily resident" throughout the necessary 3 years. If they qualified, it was not lawful to charge them more than UK students.

It may well be that the reason for making the upper limit of the fee for excepted students mandatory was to provide a defence under Race Relations Act 1976, section 41 to a charge of discrimination in favour of EC students. In their case, the ordinary residence had to be "in the European Community," which was defined in regulation 2 as the area comprised by the member states, including the United Kingdom. The ordinary residence therefore meant anywhere in the EC, and did not mean in a particular member state. There was however a safeguard which restricted the category of "excepted students" to nationals of member states and their children. As a transitional provision, an excepted student might be anyone who "began his course before 1st January 1984" without any requirement of being a national of a member state. It is this provision which Mr Newman says covers him.

The learned judge thought that Mr Newman had to be ordinarily resident for 3 years in "a country in the European Community." He did not look at the EC as a whole area. He fell into error therefore in implying into the contract a term which was inconsistent with the regulations, which had an overriding effect.

The question which has to be decided is whether Mr Newman qualified on the true interpretation of the regulations.

Mr Newman's movements, and his reasons for them, were established by his passport and his evidence. There is no need to recite them in detail. It is enough to say that after leaving New Zealand in November 1977 he travelled extensively, finally arriving in the EC area in August 1978.

Within that area he has been in five countries. The relevant 3-year period to satisfy Schedule 2 paragraph 2(2) is 1st September 1980 to 1st September 1983. Since September 1981 he was in the UK for most of the time, but the residence must be "throughout" the 3 years. Between September 1980 and September 1981 he was in the UK for 28 weeks, in France for 19 weeks

and in Spain for 4 weeks on holiday. If one disregards the Spanish trip, he had been living in the EC for the necessary 3 years.

But was he "ordinarily resident"? He has put down roots nowhere. He used France "as my base for travelling." He went from country to country, in short spells, returning again and again. His work record is spasmodic, and was described by the judge as "the token effort required to ensure that he receives social security payments." At one time he had an interest in a boat, which he sold. The judge summed up the evidence as follows:

"Since leaving New Zealand the Defendant has become a rather aimless drifter who has spent his time in what is inelegantly but descriptively called colloquially 'bumming' around Europe. He had never really settled anywhere until after his return to the United Kingdom in October 1981 and I am strongly of the opinion that he is content to live at the taxpayers' expense so long as he can do so. Just as it is possible for a person to be ordinarily resident in two countries at the same time --in re Norris (1888) 4 TLR 452 --I hold that it is possible for a person in the situation of the Defendant not to be ordinarily resident in any particular country for a time. I therefore hold that after the Defendant left France in August 1980 he did not become ordinarily resident in the United Kingdom before he left the following October and that he was not ordinarily resident in France between October 1980 and February 1981 since it cannot be said he was there 'for settled purposes as part of the regular order of his life for the time being' even of short duration. I would further hold that he did not become ordinarily resident in the United Kingdom until the lapse of some months after his return in October 1981 since he was not here for settled purposes as part of any regular order of life. Thereafter I think it can be said that he may well have become ordinarily resident here by a process of inertia. It therefore follows that in my judgment the Defendant was not ordinarily resident in the United Kingdom or the European Economic Community within the meaning of the term of his contract with the Plaintiffs which I have held is to be implied."

I have quoted that passage at length for several reasons. First, the general description of the defendant's activities is amply justified. Second, I agree that it is possible for someone to be ordinarily resident nowhere. People who spend their lives sailing about the world are such. So are the well-known class of tax-evaders who move on from country to country, always one move ahead of the tax man. But what the judge has done is to give effect to the notion, which was obviously current before the 1983 Regulations were read and appreciated, that residence in the EC meant residence in a member country of the EC. This was at the core of the term which he implied into the contract. He was concentrating on residence in the UK and France, and this explains his last sentence: "It therefore follows . . .".

Counsel for UCL urges that here is a finding of fact which should not be disturbed. But where it is based on a misdirection it is incumbent on this court to examine it afresh.

"Ordinary residence" has been judicially considered in a number of cases. In Levene v IRC [1927] 2 KB 38 the Commissioners of Inland Revenue had found as a fact that Mr Levene was ordinarily resident in the UK. That finding was binding unless it could be shown they had erred in law and applied the wrong test. Rowlatt J said, at p 45,

"those words . . . may be applied to persons who are wanderers in the United Kingdom whatever their mode of life may be. For these are resident in the United Kingdom, although not in any particular spot therein."

His judgment was upheld in the Court of Appeal and the House of Lords [1928] AC 217. Both Rowlatt J and the Court of Appeal said that they did not consider the word "ordinarily" added anything of significance to "resident".

Levene's case applied Reid v The Commissioners of Inland Revenue 10 Tax Cas 673. In that case Lord President Clyde at p 678 said that "reside" did not connote solely the element of time, duration or permanence of residence in a particular place. There were, he said, other equally relevant considerations.

"Take the case of a homeless tramp, who shelters tonight under a hedge, tomorrow in a greenwood and as the unwelcome occupant of a farm outhouse the night after. But will anyone say he does not live in the United Kingdom? and will anyone regard it as a misuse of language to say he resides in the United Kingdom?"

After comparing the tramp with the wealthy who may also be homeless wanderers in the United Kingdom, he added

"But surely it is true to say that they live in the United Kingdom, and reside there? The section of the Act of Parliament with which we are dealing speaks of persons 'residing' not at a particular locality, but in a region so extensive as the United Kingdom."

On the other hand, UCL relied on a number of passages in the leading speech of Lord Scarman in R v Barnet LBC ex parte Shah [1983] 2 AC 309, [1983] 1 All ER 226. That was the case in which overseas students established that they were "ordinarily resident" in various boroughs in the UK while they were receiving the education to pay for which they were claiming local authority grants. Lord Scarman in a number of passages said that "ordinarily resident" referred to a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes as part of the regular order of his life for the time being. He accepted the tax cases as authoritative guidance. He said, at p 344, that there must be a degree of settled purpose, and listed a number of such purposes. He ended by saying: "All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled". The Judge in the present case adopted Lord Scarman's test, and applied it to what he found (erroneously) to be the contract.

In the present case, the question which the Judge asked himself was "Has Mr Newman been shown to have been ordinarily resident in either England or France for the first of the three qualifying years?" Applying Lord Scarman's test, he answered it "no", and on the evidence his answer must have been right. Unfortunately, it was the wrong question. If he had asked himself "Has Mr Newman been shown to have been ordinarily resident in the EEC for the three qualifying years?" and had applied Lord Scarman's test, the answer would have had to be "yes". What the evidence did show was that Mr Newman was ordinarily resident, after his casual fashion, somewhere in the EC for the whole of the qualifying three years. Indeed, since 1978 he has hardly been outside the EC at all. Since his course began before 1 January 1984 he could take advantage of the transitional provision in Schedule 2 paragraph 2 which allowed such

people to be "excepted students" even though they were not nationals of member states of the EC.

He cannot do it again, because that transitional provision no longer applies. But at the time he could not lawfully be charged the higher fees, and the Judge came to the wrong conclusion.

This appeal must be allowed.

WATKINS LJ

I agree and have nothing to add.

SIR DAVID CAIRNS

I agree.

Appeal allowed with costs in Court of Appeal and below. Legal aid taxation of Appellant Defendant's costs.