SM (Metock; extended family members) Sri Lanka [2008] UKAIT 00075

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 21 August 2008

Before:

Miss E Arfon-Jones, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Mather

Between

SM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

The ECJ did not consider the provisions of Article 3(2) of Directive 2004/38/EC, which deals with other family members, in Case C-127/08 Metock, which was concerned with a spouse. Metock has no direct relevance to the interpretation of Article 3(2). It has not overruled KG and AK (Sri Lanka) v SSHD [2008] EWCA Civ 13, which remains good law on the meaning of that Article and its relationship with regulation 8 of the Immigration (European Economic Area) Regulations 2006. Nor does Metock overrule the whole of Case C-109/01 Akrich [2003] ECR I-960; the court having only concluded (at paragraph 58) that paragraphs 50 and 51 of Akrich needed to be reconsidered.

Representation

For the Appellant: Mr R Scannell, Counsel, instructed by Tamil Welfare Association

For the Respondent: Mr A Sharland, Counsel, instructed by Treasury Solicitor

DETERMINATION AND REASONS

1. The appellant, born 28 September 1978, is a citizen of Sri Lanka.

2. On 8 June 2006 the respondent refused to issue the appellant with a residence card as confirmation of his right of residence under the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The appellant had claimed

that right as an extended family member of Mrs Panchalingam, an EEA national exercising treaty rights in the United Kingdom (the sponsor).

3. The appellant, who had arrived in the UK in March 2001, had not appealed against the refusal to grant him asylum in 2001.

4. The basis on which the appellant had sought the issue of the residence card was that the sponsor, a German national, had first come to the United Kingdom in 1997 as a worker. She had been granted a residence permit as an EEA national exercising treaty rights. The appellant had claimed to be a dependant relative of the sponsor, a second cousin to whom he referred as "aunt".

5. The respondent had sought evidence from the appellant's representatives of his residence with the sponsor as part of her household prior to entering the United Kingdom. Some documents had been sent from Sri Lanka but they gave no indication of the dates when the appellant claimed to have lived with the sponsor. The sponsor entered the United Kingdom 4 years before the appellant, in 1997.

6. The appeal came before Immigration Judge Greasley sitting at Hatton Cross on 17 July 2006. At that hearing evidence was given by both the appellant and the sponsor.

7. The appellant gave evidence that his mother had died of cancer in 1998 and that the sponsor was his aunt. He claimed that after the deaths of his mother and grandmother, he had remained with his father and his sister who had looked after him. Whilst living in Sri Lanka the appellant claimed that he and his father and sister were supported by the sponsor from the United Kingdom, funds being sent to them regularly on a monthly basis.

8. The appellant further claimed that he had lived with the sponsor's sister, Mrs Kiritharakopalan, in the United Kingdom between 2001 and 2006. That had been at the request of the sponsor who had supported him to the extent of providing him with £50 per week. He had remained with Mrs Kiritharakopalan until he moved in with the sponsor, where he had remained.

9. The sponsor, who also gave evidence before Immigration Judge Greasley, confirmed the relationship, which was not challenged. She confirmed that she had supported the appellant both in Sri Lanka and since his arrival in the United Kingdom.

10. It is accepted that the appellant has never lived in Germany. It was acknowledged that the appellant was unable to benefit from Regulation 8(2) of the Regulations nor was he able to satisfy the criteria set out in any of the Immigration Rules. However, it was submitted on his behalf that his appeal should be granted pursuant to Article 3 of Directive 2004/38/EC ("the Directive") because the

appellant asserts that the Regulations have not properly transposed the terms of the Directive into UK law.

11. Despite the arguments submitted on behalf of the respondent by the Home Office Presenting Officer, that there was no reliable evidence relating to a household having been created in Sri Lanka and that there was a paucity of evidence relating to dependency in Sri Lanka, the Immigration Judge allowed the appeal "to the extent that it is remitted to the Secretary of State".

12. The Immigration Judge, at paragraphs 27-30 of the determination, said:

> "27. I accept that the appellant has provided proof of dependency in Sri Lanka, in the form of a letter from a village headman, and a GP, but also there is documentary evidence from a store in Sri Lanka which claims that regular financial payments were regularly sent from the sponsor to the appellant whilst living in his native country. The authenticity or genuineness of those documents was not challenged at the appeal hearing.
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> 28. I accept that the appellant has been financially dependant upon the sponsor, and I find the appellant is still financially dependant on the sponsor, who it would appear has now undertaken financial support for the appellant, since the death of his mother in 1999.
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> 29. I therefore accept that the appellant is dependant upon an EEA national and that he has never lived with the EEA national in Germany. I find the appellant has been dependant upon the sponsor since his arrival in the United Kingdom, and that that dependency is continuing until the present day.
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> 30. In all the circumstances, I therefore find that the decision to refuse the application pursuant to the Immigration (EEA) Regulations 2006, is not in accordance with the law."

13. The respondent submitted grounds for reconsideration dated 3 August 2006 arguing that the determination was fundamentally flawed because of an incorrect interpretation of the Directive, and in particular at paragraph 2(a) thereof in respect of the phrase "in the country from which they have come".

14. Senior Immigration Judge Drabu ordered reconsideration on 10 August 2006, satisfied that the grounds for review raised arguable issues of law which, if established, could alter the outcome of the appeal.

15. Thus the matter came before us.

16. This reconsideration first came before us some time ago. The hearing was adjourned for a variety of reasons and there were abortive hearings thereafter. The matter came before us for final disposal on 21 August 2008. We treated that hearing as a de novo hearing, not least because of the volume of recent jurisprudence.

17. At the outset of the hearing Mr Sharland made an application to re-open the issue of dependency. We considered that as that issue had not either been raised in the grounds which had contended that the Tribunal had made an error of law, or had been argued at any of the earlier reconsideration hearings, it was too late to challenge a factual issue for the first time. The grounds were therefore limited to those raised in the application for reconsideration. It follows that Mr Sharland did not pursue paragraphs 16 and 18 inclusive of his skeleton argument.

18. So as to identify with clarity the issues it would be helpful in our view to set out the relevant legal provisions at this stage.

19. Regulation 8 of the Regulations provides:

> "8. **Extended family member**
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> (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –
>
> (a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
>
> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household."

20. Regulation 2 defines "EEA State" thus:

> "(a) a member State, other than the United Kingdom;
> (b) Norway, Iceland or Liechtenstein; or
> (c) Switzerland;"

21. Regulation 12(2) of the Regulations provides:

> "12. …
>
> (2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—
> (a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and
(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit."

22. Article 2 of the Directive provides that:

"For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."

23. Article 3 provides:

"Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

24. The phrase "in the country from which they have come" in Article 3(2)(a) is at the heart of this appeal. The issue for determination by us is whether that phrase is to be interpreted in such a way as to limit the Directive's application to those who have come from other member states.

25. It is the appellant's submission that he is entitled to residence in the United Kingdom by virtue of Article 3(2) of the Directive.

26. Since the earlier hearings in this matter, the Tribunal has been much assisted by the Court of Appeal judgements in KG and AK (Sri Lanka) v SSHD [2008] EWCA Civ 13.

27. Mr Sharland urged us to accept that KG and AK was decided on similar facts and was very much on point and therefore determinative of the appellant's claim. He drew our attention to Buxton LJ's leading judgement and urged us to treat KG and AK as binding on us. Buxton LJ's detailed analysis of Article 3 is set out in his judgement. Mr Sharland urged us to find that Buxton LJ had expressed with clarity the distinction between family members and "other family members". As in KG and AK the appellant has never been in Germany or indeed ever resided in an EEA country, other than the UK.

28. Mr Sharland argued that the Court of Appeal judgement is relevant in contrast to the recent European Court of Justice Case C-127/08 Metock and Others. He submitted that Metock was of limited relevance as it did not address the issue of "other family members". He also argued that there was no basis on which the applicability of Metock could be broadened to other family members. It dealt only with spouses. He said it was important not to confuse the issue of freedom of movement with that of family reunion, and urged us to reject any argument which supported displacing the Court of Appeal's judgement in KG and AK with the recent ECJ judgement in Metock.

29. Unsurprisingly, Mr Scannell addressed us on the basis that Metock was on point and binding on us. He argued that the interpretation of the phrase "in the country from where they have come" is now as unequivocally stated in Metock. He referred us to paragraph 82 of KG and AK where Buxton LJ indicated that in some circumstances he might have considered it appropriate to refer the issue to the ECJ for a definitive ruling. He said in paragraph 82 of the judgement:

"82. If it were necessary for the resolution of these cases to decide the issue as to the application of article 3(2)(a) to Union citizens who move other than between

> member states, referred to in §68 above, then subject to further argument I would be inclined to think that a reference to the ECJ might be necessary on that point. In the event, the issue does not affect the outcome of these appeals, and therefore a reference could not be justified. And, further, as demonstrated in §§ 72–80 above the appeals must fail on the facts whatever view was taken of the central issue of construction. That is another reason for a reference to be out of the question."

30. Mr Scannell argued that Metock was binding on us and that, following it, the appellant was entitled to have his appeal allowed. In the alternative, Mr Scannell urged us to consider making a reference to the ECJ on the construction point.

31. Praying in aid the fact that it was the Grand Chamber of the ECJ which had pronounced in Metock, Mr Scannell sought very hard to persuade us that the case applied to other family members. He referred us to Article 10 of the Directive which confers the right of residence on family members of a Union citizen who are not themselves nationals of a member state. He relied in particular on paragraph 2(e) and (f) of Article 10. For the issue of residence cards the presentation of certain documents such as passport and documentary evidence of family relationship etc is required. Paragraphs 2(e) and (f) of Article 10 provide:

> "(e) In cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependents or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
>
> (f) In cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen."

32. Mr Scannell submitted that those provisions applied equally to extended family members as to core family members. *Mutatis mutandis*, Article 2(2) applies to Article 3(2).

33. He reminded us that lawful residence in the EEA was not a requirement and that Article 10, which provided for the issue of residence cards, does not require the presentation of evidence of prior residence in the EEA.

34. Mr Scannell also prayed in aid the fact that Case C-109/01 Akrich [2003] ECR I-9607 had been expressly overturned by the Grand Chamber of the ECJ. He reminded us that the purpose of the Directive was to "strengthen the right of free movement and residence of all Union citizens". What was important was to have in place a framework which did not discourage Union citizens from moving to or residing in other member states regardless of whether or not the family was already lawfully resident in the territory of another member state (paragraph 64 of Metock).

35. Mr Scannell also relied on the fact that Article 3(2) included not only dependant family members but also civil partners.

36. He placed great reliance on paragraph 84 of Metock which says:

> "84. Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness."

37. He reminded us that paragraph 90 of Metock went on to say:

> "90. It must therefore be held that nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union citizen in the host Member state, whether he has become established there before or after founding a family."

38. He said that a liberal construction was required by Metock and the ECJ had ignored the limitations which may be inherent in the phrase "accompanies or joins". It was clearly not necessary for there to be pre-existing cohabitation within the EEA.

39. Another argument in favour of a liberal interpretation was the very fact that bad faith was considered an irrelevant consideration. Notwithstanding the fact that there may be a case for recognising abuse of rights or fraud, such as marriages of convenience, nevertheless good faith was not a necessary requirement in order to benefit under this Directive.

40. Mr Scannell analysed in detail Buxton LJ's judgement in KG and AK. In a superficially seductive analysis, he submitted that nearly all of Buxton LJ's reasoning had been undermined and overruled by the reasoning in Metock. He urged us to accept his conclusion that the Court of Appeal judgement was now untenable in the light of Metock and either to allow the appeal following the reasoning in Metock which he reminded us he considered to be binding upon us, or to make a reference to the ECJ on point.

41. In reply Mr Sharland asked us to reject Mr Scannell's arguments that Metock was binding on the Tribunal on this point. Metock did not deal with the application of Article 3(2)(a); KG and AK did. Therefore there was no clash between the two cases. It was the Court of Appeal case of KG and AK which was on point and therefore binding on us. Whilst the European Court of Justice is a higher authority than the Court of Appeal, Metock was not on all fours with the appeal before us, and was, at best, merely persuasive.

42. With regard to Mr Scannell's submission that we might consider making a reference to the ECJ, Mr Sharland reminded us that Buxton LJ had been far from resolute in his opinion. He had merely formed a preliminary view in which he had used words such as "inclined" and "might be necessary". Paragraph 82 was not a

definitive and unequivocal endorsement of the need to make a reference in the situation in which the Tribunal finds itself in this appeal.

43. He said paragraph 4 of Metock set out some of the recitals to the preamble to the Directive. It only referred to recitals 1, 5, 11, 14 and 31. It omitted recitals to 6, 7, 8, 9 and 10. It is recital 6 which refers to Article 3(2)(a). Metock had not considered Article 3(2)(a).

44. The appellant in this appeal is unable to benefit from the reasoning in Metock as he is not a family member. It is clear that "other family members" is a term of art and constitutes a different category of beneficiaries from those in the core family member group referred to in Article 2 and considered in Metock. Had it been intended to include in those beneficiaries, "other family members", the Directive would have provided unequivocally for that.

45. Mr Sharland invited us to observe the contrast in the preamble between family members who have automatic rights, and other family members, who are to be examined on the basis of national legislation. The applicability of national legislation was a crucial consideration.

46. Mr Scannell had argued that Metock applied to "other family members" but Mr Sharland invited us to take note of the fact that the ECJ had not said so specifically and argued that if the ECJ had intended their reasoning to be of wider applicability, there is no doubt that they would have made that plain.

47. Mr Sharland referred to the ECJ's response to the submissions made by a number of member states that a liberal interpretation would increase the number of beneficiaries able to enjoy a right of residence within the Community.

48. At paragraph 73 the ECJ said:

> "73. On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national."

49. It was Mr Sharland's contention that paragraph 73 explicitly excluded other family members, and that if we were to be satisfied that Metock was of limited applicability, and excluded other family members, then Mr Scannell's arguments failed.

50. Mr Scannell's argument about Akrich was not persuasive in that Akrich dealt with the rights of a spouse whereas this appeal related to the rights of an "other family member". Paragraph 58 of Metock was deliberately narrow and applied only to spouses. It had considered only paragraphs 50 and 51 of Akrich and cannot

support Mr Scannell's wider interpretation that the whole of Akrich has been overruled.

51. Mr Sharland invited us to conclude that the underlying rationale of Metock was set out in paragraph 70:

> "70. …. Directive 2004/38 confers on all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State. "

52. It was Mr Sharland's submission that the paragraph set out the limits of the ECJ judgement.

53. In a nutshell Mr Sharland submitted that KG and AK was still good in relation to Article 3(2) namely "other family members".

Conclusion

54. Despite the complexity of the regulations themselves and the jurisprudence, both domestic and European, the issue is indeed a simple one. Essentially the issue for us to decide is whether the phrase "in the country from which they have come" in Article 3(2) is limited to EEA states. There is no dispute that the appellant is not entitled to a residence card under the Regulations because he cannot fulfil the criteria in paragraph 8(2)(b) or (c) of the 2006 Regulations.

55. The issue is whether or not the appellant can benefit under Article 3(2) of the Citizens' Directive.

56. We were assisted by the lead judgement given by Buxton LJ in KG and AK. We accept Mr Sharland's argument that the Court of Appeal's decision is precisely on point. Buxton LJ said:

> "64. If therefore we turn to the construction of article 3(2)(a), the general issue common to both appeals which we identified in §2 above is whether the provision that OFM [other family members] have to be dependants or members of the household of the Union citizen "in the country from which they have come" means, as Regulation 8(2)(a) provides, that "the country" has to be the EEA state in which the Union citizen also resides.
>
> 65. The basic point can be put quite shortly. No family members have rights of residence unless the Union citizen exercises his own right to move to or reside in a member state of which he is not a national. Article 3.1 of Directive 2004/38 provides that article 2 family members obtain the benefit of the Directive if they accompany or join such Union citizens. Although not specifically so stated, it is hardly likely that an OFM will not be also so required to be accompanying or

joining his relevant Union citizen. The tight relationship between the exercise of rights by the Union citizen and the requirement that the OFMs accompanying or joining him should have been his dependants or members of his household in the country from which they have come very strongly suggests that that relationship should have existed in the country from which the *Union citizen* has come, and thus have existed immediately before the Union citizen was accompanied or joined by the OFM. It seems wholly unlikely that when article 10(2) of Regulation 1612/68 and article 3(2)(a) of Directive 2004/38 introduce the requirement of dependence on and membership of the household of the Union citizen in the country from which the OFM has come, they can have had in mind anything other than dependence on the Union citizen in the country movement from which by the Union citizen is the whole basis of his rights and, thus of the rights of the OFM.

66. That consideration is reinforced not only by the requirement that the OFM must be accompanying or joining the Union citizen, but also by the justification for ancillary rights of movement in terms of not deterring the Union citizen from exercising the primary right (see §60 above). The analysis of the ECJ in *Akrich* addressed actual but unlawful presence of the family member in the original member state. But the argument that "the country" in article 3(2)(a) means any country at all, whether or not the Union citizen is there at the time of movement, assumes that the OFM rules will extend to cases where the OFM is not present in the original member state at all, even unlawfully. It is hard to see how the Union citizen will be deterred from exercising his right to move from one member state to another by the prospect of not being able to take with him an OFM who was once, in another state, but is not now, a member of his household.

67. So far so good. But the argument goes no further than to establish that in order to exercise an OFM's ancillary rights the dependence or membership of household must be in the same country as that from which the Union citizen is moving. Regulation 8(2)(a) however requires the OFM to have been a dependant or a member of the household of the Union citizen in *the EEA state* in which the Union citizen resides.

68. In most cases, including those addressed in these appeals, the country relevant to the rights of the Union citizen will indeed be a member state, because his rights will be based on movement, which the jurisprudence indicates will normally be movement within the Community. That however leaves the so far unresolved position of the Union citizen who wishes to enter a member state other than his own, being a person who has never lived in his own member state, or has lived in a third country for a substantial period of time: see §§ 29-31 above. The most that can be said about the impact of such cases is that, provided Community law sees the need to accommodate them under the freedoms of movement of Union citizen, they would undermine the position of Regulation 8(2)(a) in interpreting article 3(2)(a) of Directive 2004/38 as requiring "the country from which they have come" as necessarily being an EEA state."

57. We have been persuaded by Mr Sharland that the facts in KG and AK and the appeal before us are similar. The appellant did not reside with the sponsor, a second cousin, in an EEA state prior to his application for residence.

58. We rejected Mr Sharland's argument that the issue of dependency can be re-opened and therefore have not considered the factual issues relating to dependency.

59. We have dealt with Mr Scannell's submission that KG and AK is no longer good law since the decision of the Grand Chamber of the ECJ in Metock.

60. The issue in Metock concerned the rights of a spouse. It is clear from a careful reading of the judgement that it related specifically to the position with regard to spouses. It follows that Article 2(2) and 3(1) of the Directive were at the heart of that appeal and not Article 3(2), which is central to the appeal before us. We are satisfied that the rights conferred on "core" family members in Article 2(2) of the Directive and those conferred on "other family members" in Article 3(2) are wholly different in scope. Whilst we acknowledge the rationale that Union citizens must not be discouraged from moving freely within the Community and that it may be necessary for them to be able to have their core family members with them, it cannot be argued that extended or other family members are in the same category. The directive and indeed the reasoning in Metock make it clear in our view that there is the world of difference between a core "family member" and "other family members". In our view paragraph 73 of Metock encapsulates this reasoning:

> "73. On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national."

61. That underlines, with unequivocal clarity, that Metock was considering the rights of family members as defined in Article 2(2) rather than "other family members" such as the appellant in this case. The phrase "in the country from which they have come" does not apply to spouses as it does not appear in Article 2 and therefore was not considered in Metock.

62. Accordingly the Tribunal considers itself bound by the Court of Appeal's decision in KG and AK; as Metock determines the situation with regard to a spouse rather than "other family members" we do not consider ourselves bound by the ECJ judgement.

63. With regard to Mr Scannell's argument that we should consider making a reference to the ECJ, we do not consider that Buxton LJ's observations at paragraph 82 of KG and AK oblige us to do so. There is no ambiguity in the situation here. With

regard to "other family members" of whom the appellant is one, there is no lack of clarity which would benefit from a reference to the ECJ.

64. For the above reasons we are of the view that the Immigration Judge's decision was materially flawed in law and that the appellant is not entitled to a residence card.

Decision

65. Accordingly, as there was a material error of law in the determination, the following decision is substituted.

66. The appeal is dismissed.

E ARFON-JONES DL
DEPUTY PRESIDENT
Date: