IN THE UPPER TRIBUNAL **Case No.** CJSA/215/2016
ADMINISTRATIVE APPEALS CHAMBER

BEFORE UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is dismissed. The First-tier Tribunal sitting at Liverpool under reference SC068/14/03459 on 5 October 2015 did not make a material error of law. In the result, it correctly upheld the Secretary of State's decision dated 14 April 2014.

REASONS FOR DECISION

1. This case highlights two important issues:

> (a) the mechanisms of supporting people who are the victims of trafficking and the effect which those mechanisms do, or do not, have on social security entitlement; and
>
> (b) the effect (if any) of determinations of the DWP (or of a First-tier Tribunal on appeal from such determination) on whether a person has retained worker status or is a jobseeker, when it comes to questions of housing benefit entitlement.

2. The appellant is a national of an A8 state. He came to the UK on 2 November 2011. He has had the misfortune to have been exposed to trafficking on two occasions.

3. On 11 October 2013 the National Crime Agency ("NCA") wrote under reference NRM/13/1458 that the UK Human Trafficking Centre Competent Authority ("UKHTC") had concluded that there were reasonable grounds to believe he had been trafficked. I call this "Incident 1". I return below to the evidence about events up to that date. If the UKHTC thereafter reached a definitive decision, equivalent to the letter of 31 March 2014 in relation to Incident 2 below, it is not in evidence. On 11 November 2013, the appellant successfully claimed income-based Jobseeker's Allowance ("IBJSA") until 12 January 2014. On 23 January 2014 he began working for C Ltd but stopped on a date found by the tribunal (relying on the P45 at p50) as 31 January 2014 but the actual last day of which was (p34) 27 January 2014 (the difference is not such as to affect my conclusions at [19] below.) During that period he worked for 54.25 hours, earning £342.32 (or, for NI purposes, £341): see payslips at pp46-49. On 10 February 2014 (p102) he was interviewed by the Salvation Army's Anti-Trafficking Team, indicating that he had –it appears, following his work for C Ltd - been put to work by a named individual, collecting charity bags, but had not been paid for the last few days, that the manager was holding his passport and he wanted to leave. On 11 February 2014 he claimed IBJSA again. The claim was first closed because the appellant failed to provide information but it was subsequently re-opened and treated as having been made continuously from 11 February. On 14 February the NCA wrote under reference NRM/14/0242 indicating the UKHTC had concluded that there were reasonable grounds to believe he had

been trafficked (I call this "Incident 2") and on 31 March 2014 (under that reference) to say it had reached a definitive decision that he had been.

4. The decision under appeal was taken on 14 April 2014 and indicated that the appellant was awarded JSA as a jobseeker but could be required at any point to provide evidence that he had a genuine chance of being engaged.

5. The appellant was housed by the authorities in a safe house, with a view to his giving evidence at a criminal trial. An individual was subsequently convicted on trafficking and forced labour charges and jailed. The appellant was subsequently provided with other accommodation but, it appears, fell into arrears as a result of housing benefit not being in payment on the ground that, as a result of the Housing Benefit (Habitual Residence) (Amendment) Regulations 2014/539, from 1 April 2014, it could not be paid to jobseekers (as opposed to those with retained worker status).

6. His claim was then closed on 21 August 2014. The circumstances in which this occurred are disputed. The DWP says the appellant asked for his claim to be closed because he was no longer seeking employment. He now says (it does not appear to have been in evidence before the First-tier Tribunal) that was because he was told by the DWP he had no chance of establishing genuine prospects of work ("GPOW") in the absence of a specific job offer. The First-tier Tribunal accepted that the appellant had terminated the claim. There is some evidence (p63) that the DWP's position was as described, at any rate in a conversation with the appellant's representative, but the circumstances in which he terminated his claim are not the matter which is before me. The appellant was never required to undertake a GPOW interview. On 29 October 2014 he applied to the Home Office for discretionary Leave to Remain which in December 2014 he was given, until December 2015.

7. The appellant was represented throughout the First-tier Tribunal proceedings, which were adjourned several times to allow for consideration of new, wide-ranging submissions. On 5 October 2015 the First-tier Tribunal upheld the DWP's decision. The appellant appeals further, with permission given by a Judge of the First-tier Tribunal. Both parties have indicated that they do not seek an oral hearing of the appeal. As this decision goes somewhat beyond the matters canvassed in submissions, I circulated it as a draft first, to allow the parties the opportunity to comment if they wished. The appellant's representative has not replied. The respondent agreed with the proposed decision.

8. The parties had agreed that there were three issues before the First-tier Tribunal:

> (a) whether the DWP should have considered advising the appellant to seek discretionary leave when he made his successful JSA claim on 11 February 2014;
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> (b) whether the "linked period" rules - see regulation 48 of the Jobseeker's Allowance Regulations 1996/207 ("the JSA Regulations") - helped the appellant; and

(c) whether, rather than being a jobseeker, the appellant was entitled to be considered as a person who had retained "worker" status.

A. Duties in respect of discretionary leave

9. By regulation 85A (4) of the JSA Regulations:

> "A claimant is not a person from abroad if he is – …
> (h) a person who is granted leave or who is deemed to have been granted leave outside the rules made under Section 3(2) of the Immigration Act 1971 where that leave is –
> (i) discretionary leave to enter or remain in the United Kingdom…"

Similar provisions exist in the Housing Benefit Regulations 2006/213 ("the HB Regulations"): see reg. 10(3B)(h). Once granted, discretionary leave means a claimant can claim JSA and housing benefit without the conditions or restrictions which apply to other claimants from EU states.

10. The First-tier Tribunal held:-

> (a) the DWP [the tribunal's reference to "LA" was a slip] had properly exercised their functions when they awarded JSA to the appellant as a jobseeker;
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> (b) the First-tier Tribunal would have agreed that it would have been appropriate to consider other options to assist the appellant had he not received the award of JSA (but he had);
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> (c) regulation 4(1A) of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regulations")– which provides a degree of relief from the evidence to be supplied with claims – only applies to claims and did not assist the appellant because his claim had succeeded;
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> (d) regulation 19(5)(d) of the 1987 Regulations did not assist the appellant because the circumstances of the present claim did not fall within it; and
>
> (e) a claim on the basis of having discretionary leave to remain could not have succeeded because at the date of the DWP's decision the appellant did not have discretionary leave.

11. The challenge is expressed to be on the basis of inadequate findings of fact and inadequate reasons, although I am not sure that the description is a wholly accurate one. However, the appellant runs up against the inescapable fact that discretionary leave was not awarded until after the date of the DWP's decision. Submissions on behalf of the appellant have sought to place reliance on the Council of Europe's Convention on Action against Trafficking in Human Beings. However, the mechanisms giving effect to the UK's obligations under that Convention do not directly translate into rights under social security legislation, but go via the discretionary leave mechanism. To quote from the Secretary of State's submissions, which have not been challenged on this aspect:

> "Article 11 of Directive 2011/36 and Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings ("the Convention") impose obligations on the UK to ensure that victims of human trafficking are provided with safe accommodation and support for an appropriate period of time. The UK fulfils its obligations through a contract centrally funded by the Home Office and the Ministry of Justice under which persons identified as potential victims of human trafficking are provided with accommodation and support during a recovery and reflection period.
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> Persons who have been conclusively identified as a victim of human trafficking may then be granted discretionary leave to remain, to allow them to co-operate with any police investigation and subsequent prosecution. This period of leave can be extended if necessary. Victims of human trafficking who are not involved in a police investigation or prosecution may also be granted discretionary leave to remain dependent on their personal circumstances.
>
> Discretionary leave to remain provides access to mainstream welfare benefits such as JSA(IB) or ESA(IR) for the duration of the period for which leave has been granted…"

No reliance has been placed by the appellant's representative on Directive 2011/36/EU. She does however seek to rely in these proceedings on the duty of States under Article 12 of the Convention to provide assistance, including legal advice, in order to claim that the DWP ought to have advised the appellant sooner to seek discretionary leave. However, it is not the First-tier Tribunal's function to adjudicate on alleged shortcomings or maladministration by the DWP except insofar as they it bear on the matters the tribunal was required to decide. Even if the DWP were to have been at fault, it could have made no difference to the matter before the tribunal. The tribunal is not required to make findings on matters that are not legally relevant.

12. It is true that the tribunal's reasoning goes a little adrift. I respectfully cannot see that it was relevant for the tribunal to speculate as to what the DWP's duty might have been had JSA not been awarded. The situation did not arise. Any error of reasoning there may have been on this point could not have affected the outcome, was not material and so not an error of law.

B. The linking rules

13. The effect for IBJSA purposes of the linking rules in reg. 48 of the JSA Regulations is to ensure that on a qualifying second claim a claimant does not have to fulfil the waiting day requirement imposed by para 4 of schedule 1 to the Jobseekers Act 1995. The submission on behalf of the appellant is that in consequence of those rules he should not have been subject to the GPOW test. However, that would turn not on the linking rules but on the transitional provisions of the statutory instrument which introduced the GPOW test, the Immigration (European Economic Area)(Amendment) (No.2) Regulations 2013/3032. The transitional provisions are in schedule 3 and contain nothing which assists the

appellant. In this case moreover, no decision applying the GPOW test was in any event taken on the appellant's claim, so the point is academic.

C. Worker status

14. Put shortly, I do not think the tribunal, nor indeed the submissions to it, addressed this aspect correctly, but the failure to do so made no difference in these proceedings.

15. There was some evidence before the First-tier Tribunal about what had happened in the period from the appellant's arrival in November 2011 to October 2013, albeit it was neither extensive nor clear. The appellant had indicated (p35) that in the 12 months to 19 February 2014 he had supported himself through "earnings". At p57 a submission, written presumably on instructions, indicated (possibly with doubtful accuracy given the November 2013 JSA claim) that the appellant had worked for a named "charity" from January 2012 to January 2014 and that he had given details of this to the DWP previously. While his NI record (p66) showed "No Data" for the years 2010-11 to 2012-2013 inclusive, for 2013-14 it showed NI contributions (see [3] above) which plainly correlated to the work he had done for C Ltd in January 2014, but also a small amount of earnings from another employer, whose identity is not in evidence. There was also documentary evidence (p76) from a police officer in the relevant constabulary's Human Exploitation and Emerging Threats team. This explained how the appellant had been the victim of trafficking at the end of 2013 "when he was exploited by travellers" and in March 2014 [*sic* - the month appears wrong given the date of the appellant's interview by the Salvation Army and his subsequent continuous claim for JSA] when working as a charity bag collector. It dealt with each incident in turn. As to the first, it gave, it appears by way of background, how the appellant had first been made to work collecting charity bags of clothing (so I note he appears to have been engaged in such work on two separate occasions) but had been unhappy with this and was given £10 and told to make his way to a named railway station. There he was collected by travellers and put to work labouring, working 12 hours a day for £40 per day. Details were given of the conditions the appellant had to undergo, which it is not necessary to set out. Turning to the second incident, no further details of the working arrangements were given, but the police indicated that the gang master had been charged, that the appellant was to be a witness and that steps were to be put in place to secure the extra period of support for him to enable this to happen. However, there was evidence going to the terms of the second instance described by the police at p105, where the Salvation Army's representative set out what the appellant had told her about the pay and other terms of that work.

16. The tribunal accepted that the appellant had been trafficked. It does not appear to have appreciated that there were two separate instances of trafficking. At para 37 of its statement of reasons it recorded:

> "Notwithstanding it is submitted the appellant worked during the trafficked period there is (as would be expected in trafficked cases) no documentation available."

17. It found as fact that the appellant worked during the period 23-31 January 2014, working on average 10 hour per week earning £6.31 per hour. It found that he left voluntarily (but as it turned out that had no adverse consequence for his JSA claim).

18. The tribunal indicated that it "concurred with the…DWP that there was insufficient documentary evidence available to them to show that the appellant had worker or retained worker status."

19. In my view the tribunal's finding that the appellant worked 10 hours per week on average flies in the face of the objective evidence in the form of payslips and NI returns. Nor has the tribunal indicated what it made of that work, even as it found it to be – in particular, whether it was "genuine and effective" (the DWP had submitted at p5 that it was not). However, even on the higher amount of work disclosed by the payslips at pp46-49 I do not consider, having regard to the overall number of hours, low hourly rate and short duration that it could be said to be "genuine and effective" work.

20. Nor, while it noted it, did it attempt to engage with the evidence of the NI contributions record. The contributions must either have been paid, a little improbably, by the employer in Incident 2, or have been paid earlier in the year. However, the scale of the employment they disclose does not suggest that that work was genuine and effective either.

21. Of more concern is the fact that no attempt appears to have been made by anyone to establish whether the appellant had been a "worker" as the result of his activities prior to November 2013. To judge by the record of proceedings no evidence was led concerning this aspect and the tribunal put no questions about it. It is not the case that only lawful work is relevant to establishing whether a person has "worker" status: see JA v SSWP (ESA) [2012] UKUT 122 (AAC). Although all concerned appear to have appreciated that it was unlikely there would be documentary evidence in a trafficking case, the DWP appears to have submitted, and the tribunal accepted, that the absence of documentary evidence was fatal to the chance of establishing, and hence retaining, "worker" status. There is no rule that a claimant's evidence requires corroboration. He was recorded as having told the police about the terms of his work with the travellers, including hours and pay, though not for how long the work continued and this should have been explored and findings made. It would then have been necessary to establish whether he would have retained such worker status as he might as a result have acquired through his first JSA claim, the subsequent period of work with C Ltd and the apparently very short period of charity bag collecting which formed Incident 2.

22. What seems to have happened (pp 63 and 77-79) is that a focus developed within the DWP on the discretionary leave mechanism as a way, liable to be helpful to claimants, of bypassing the evidential difficulties there may be in relation to benefit claims in trafficking cases. I can understand that, but a trafficked person is not precluded from arguing their case on ordinary principles – including that they can demonstrate that they are a worker or have retained worker status.

23. However, does any of this matter to an appeal against a decision awarding JSA, albeit potentially subject to compliance with the GPOW test? In my view it does not. The appellant had had an award in his favour of JSA. Various other arguments were put forward in the First-tier Tribunal proceedings, none of which could result in his having any more than he had been awarded. If he had instead had retained worker status, he would still have been subject to the GPOW test following the amendments made by SI 2013/3032. The appeal to the First-tier Tribunal and that to the Upper Tribunal are in essence an attempt to appeal against a decision by the DWP where the appellant had effectively succeeded.

24. I have not overlooked that the driver behind much of this litigation has been a concern about the appellant's perceived ineligibility for housing benefit and his consequent rent arrears. I acknowledge that it may be unhelpful on a practical level for a claimant wishing to claim housing benefit if he has been adjudged to be a jobseeker rather than as having retained worker status, whether by the DWP or by a tribunal in proceedings between the DWP and the claimant. However, as a matter of law, the decision on the right to reside for the purposes of a JSA claim is not determinative for housing benefit purposes. The parties are not the same (DWP in one, local authority in the other). The statutory provisions applicable are (in the case of DWP benefits) section 17 of the Social Security Act 1998 and (in the case of housing benefit) para 11 of schedule 7 of the Child Support, Pensions and Social Security Act 2000. Neither has the effect of fixing a local authority with a decision already taken on the point by the DWP or prevents a claimant from arguing the point afresh. That, therefore, was the claimant's remedy if he wished to assert retained worker status based on trafficked work in order to support a housing benefit claim post 1 April 2014.

25. I observe that, prior to the amendments made by SI 2013/539, being in receipt of IBJSA automatically meant that a person was not a "person from abroad" for housing benefit purposes: see reg 10(3B)(k) of the HB Regulations as they then stood. At that time, determining that a claimant was in receipt of IBJSA was the end of the matter so far as a local authority's need to decide upon the Right to Reside was concerned. Following that set of amendments, the test is now – by reg 10(3B)(l) – whether a person is "in receipt of an income-based jobseeker's allowance and has a right to reside other than a right to reside falling within paragraph (3A)." Rights falling within paragraph (3A) - and so insufficient for housing benefit purposes - include where the person is "a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of [the Immigration (European Economic Area) Regulations 2006]. Whether a claimant has a right to reside other than as a jobseeker is, like most other decisions on housing benefit, a decision for the "relevant authority" i.e., in this context, the local authority: HB Regulations, reg 89. It may well wish to seek to explore the evidence on which the DWP decided what it did, but the DWP's view, or indeed that of a tribunal on appeal from the DWP, is not conclusive.

26. Essentially then, the underlying point was being pursued in the wrong forum in any event. Whether the appellant was a worker and retained worker status or was a jobseeker had no material effect on the substantive decision of either the DWP or the First-tier Tribunal. If the tribunal erred in its approach to worker status in a way

which would otherwise have amounted to an error of law, it was not a material error and so not an error of law at all. If I had held that it was an error of law, I should have exercised my discretion against setting the tribunal's decision aside, for the same reason.

27. Whether any of this is liable to assist the appellant in sorting out his rent arrears so long after the event I do not know. More generally though, it is to be hoped that the decision may assist by clarifying the legal position those who, for whatever reason, need to argue, in the context of housing benefit claims, that they have retained worker status rather than being jobseekers.

C.G. Ward
11 October 2016