THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed.

The decision of the tribunal given at Glasgow on 16 September 2015 is set aside.

The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

REASONS FOR DECISION

General

1. This is an appeal against the decision of the FtT at Glasgow given on 16 September 2015 holding that the claimant did not have a permanent right to reside in the UK and was subject to the genuine prospect of work test ("GPOW). The FtT then went on to hold that the claimant did not have a genuine change of being engaged in employment. The Secretary of State's decision given on 19 May 2015 that the claimant was no longer entitled to jobseeker's allowance was therefore confirmed.

2. The claimant appealed on a number of grounds set out at page 68 including (i) that the judge had indicated he would not consider the period October 2012 to July 2013 in judging on the five year residency period, but then had done so in breach of procedural fairness, (ii) that applying the proportionality test the judge was wrong to hold it against the claimant that he did not have comprehensive health insurance, (iii) that the judge had misapplied the proper test for assessing the GPOW in that he had required compelling evidence whereas all that the claimant had to provide was evidence that they were continuing to seek employment.

3. The Secretary of State does not support the appeal for the reasons given in the submission on page 102.

First Ground of Appeal – procedural unfairness

4. Dealing with the grounds of appeal in turn. The first ground of appeal is that the judge "explicitly stated during the hearing that when considering breaks in continuity, the period October 2012 to July 2013 would not be considered as this was beyond the five year residency period of August 2006 to August 2011". However the Statement of Reasons discloses that he did consider that period. I have listened to the whole Record of Proceedings and did not immediately identify a comment in quite such explicit terms. I may have missed it. It would be helpful where a party seeks to rely on a statement in the recorded record of proceedings that the time of the statement is identified so that a judge can be clear as to what is being founded upon.

5. I do not accept this ground of appeal. If I am right in my listening that the judge did not give such an explicit undertaking then I refuse the appeal on that ground. If I am wrong, then the procedural unfairness can be rectified in this appeal in that the matter is open to me and I consider that period should be taken into account and so even if I allowed the appeal, the outcome would be the same. In any event the issue is academic in that I am allowing the appeal on other grounds so the issue can be argued at the rehearing.

Second Ground of Appeal – whether requirement for comprehensive health insurance proportionate in present case

6. This ground of appeal suggest that I the circumstances of the case where the claimant did not in fact call upon the NHS during periods when he was not working that it is not proportionate that he be required to have comprehensive medical insurance. Reference was made to C-413-99 *Baumbast*. I reject this argument. This is looking at the matter retrospectively where the claimant did not in fact require to use the NHS. During those periods he might have had to do so at any time if he fell ill or was injured so it is reasonable to require that he had insurance during those periods. Once cannot say it is disproportionate to require insurance just because retrospectively the claimant did not have to call on the services of the NHS. *Baumbast* was special on its facts where the claimant did in fact have insurance but it did not cover emergency cover.

Third Ground of Appeal – whether requirement for "compelling evidence" is compatible with EU law

7. The third ground of appeal essentially challenges the validity of the requirement that a worker or jobseeker after the "relevant period" has to provide "compelling evidence" to satisfy the GPOW test. Regulation 6(7) of The Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations") provides:

> "6(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged." [underline added]

8. Relying on C-106/77 *Amministration delle fianze dello Stato v Simmenthal* (1978) ECR 00629 it is argued that the UK cannot apply a provision that conflicts with EU law and if there is such a conflict then a UK tribunal should disregard the conflicting UK provision. The claimant quotes in part from paragraph 24:

> "[24] The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."

It is then argued under reference to C-292/89 *R v Immigration Appeal Tribunal ex p Antonissen* [1991] ECR I-745 that all that has to be proved is the claimant is continuing to seek employment and has a genuine chance of being engaged and this is then sufficient to enable the person to be allowed to remain in their capacity as a jobseeker for a longer

period. Thus there is no requirement in the EU test for this evidence to be compelling. Failure to prioritise EU law rights then constitutes a legal error. The paragraph which I assume the claimant is referring to in the CJEU judgement is:

> "[21] In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a member-State may stay there, a period of six months, such as that laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host member-State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host member-State."

9. The Secretary of State does not support the appeal arguing:

> "11. The gradated standard of proof in regulation 6 of the EEA Regulations and the requirement for compelling evidence at the six month point reflects the reality that an EEA jobseeker subject to the GPOW test will have been unsuccessful in obtaining work in the last six months and their chances of obtaining work beyond this point should be more rigorously tested in order to be able to continue to enjoy rights as a jobseeker. At this six month point it is no longer acceptable for jobseekers to continue to provide the evidence that they have been providing for the last six months. Jobseekers must instead should that their circumstances have changed in such a way that merits continuation of their jobseeker status.
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> 12. *Antonissen,* along with Article 14(4)(b), forms the basis of the GPOW test but together they do not prescribe the standard of proof to be met by a job seeker in order to demonstrate a genuine chance of engagement. It is for Member States to determine what will satisfy the test and constitute sufficient proof of a genuine prospect for work, provided they do not render the exercise of free movement rights excessive difficult. The requirement for compelling evidence is not prohibited by the Directive and has been properly set out in guidance for all decision makers."

Article 14(2)(b) of Directive 2004/38/EC so far as relevant provides:

> "… In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged."

Discussion – Third Ground of Appeal.

10. In my opinion it is unfortunate that the EEA Regulations uses the phrase "compelling evidence" because under both Scots and, and as I understand it, English law, the law only recognises two standards of proof; i.e. the civil standard of "on a balance of probabilities" and the criminal standard of "beyond reasonable doubt". Proceedings before a First-tier tribunal are civil proceedings so the standard of proof will be the civil standard of proof.

11. In *1st Indian Cavalry Club Limited v HM Commissioners for Customs and Excise* 1998 SC 126 Lord Johnston said:

> "The central starting point in this matter is to recognise that within the law of Scotland there are only two standards of proof to apply in civil and criminal proceedings, namely the balance of probabilities and beyond reasonable doubt respectively and there is no room for any suggestion that some form of intermediate standard between those two applies in certain circumstances. Whatever, therefore, may be the context of so called *quasi*-criminal or penal proceedings, the standard to be applied must be one of these two. I am not satisfied that certain *dicta* in the English cases presented to us would suggest that the law of England is any different. In so far as there are references to probabilities, I consider them to be dealing with the weight and quality of evidence which might be required in a certain context rather than defining the relevant standard of proof to be applied. The same can be said of certain observations in *Mullan v Anderson*. As to the evidence that might be required to reach a conclusion upon a standard of balance of probabilities in any particular case must depend upon the circumstances of that case and its subject matter, and I do not find it helpful to seek to define the matter any further."

It should be noted that while the civil standard of proof applies in reaching a decision on the balance of probabilities the court can have regard to the "weight and quality of evidence which might be required in a certain context" and that "a conclusion upon a standard of balance of probabilities in any particular case must depend upon the circumstances of that case and its subject matter."

12. Against that background I interpret "compelling evidence" to be no more than the requirement for evidence to establish on a balance of probabilities that the claimant is continuing to seek employment and that he has genuine chances of being engaged. I read "compelling" to mean no more than in the context of the circumstances that have arisen i.e. that the claimant has not been able to obtain employment during the relevant period that the onus is on the claimant and having regard to the circumstances of the case the judge considering the matter is entitled to decide the weight and quality of evidence required to establish that the claimant is continuing to seek employment and has genuine chances of being engaged.

13. I consider that interpretation concurs with the statement in *Antonissen* that "the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged", which reflects the wording in Article 14(4)(b) of the Directive. There is nothing in *Antonissen* or the Directive to suggest a higher or different standard of proof.

14. If the Secretary of State's submission is suggesting that "compelling evidence" means a higher standard of proof standard of proof may be set by a Member State then I reject that submission and hold that the Secretary of State is wrong. It does not accord with the common law that there are only two standards of proof and these are civil proceedings to

which the civil standard of proof should apply. If I am wrong and the intention of using "compelling evidence" was to apply a higher standard of proof after six months, then I consider that is contrary to EC law as set out in the Directive and *Antonissen*. I see no logical reason why different member states are entitled to provide for different standards of proof to prove that a person is "continuing to seek employment and that they have a genuine chance of being engaged." I consider that would be contrary to the provisions of free movement if it led to different standards in different member states. If that is the intention then applying the dicta in *Simmenthal* I should disregard it and apply the intended EU law, which I take to be the civil standard of proof.

Apply my decision of the meaning of "compelling evidence"

15. In the present circumstances I cannot be satisfied that the judge did not apply a higher standard of evidence in deciding whether or not the claimant passed the GOWP test. In the submissions to the tribunal he was referred by the decision maker to "The gradated standard of proof in Regulation 6"; he would have been faced with the words "compelling evidence" in the Regulations, which are repeated a number of times in submission to the tribunal. In the decision notice the tribunal judge says that the claimant "cannot demonstrate compelling evidence that he has a genuine chance of being engaged in employment". It therefore appears to me that the judge may well have applied a higher standard of proof than proof on a balance of probabilities.

16. I therefore remit the appeal to a differently constituted tribunal to rehear the appeal. The tribunal should interpret "compelling evidence" in the manner that I have set out in paragraph 12 above and apply the civil standard of proof. Having regard to the whole circumstances the tribunal may decide as to the weight and quality of the evidence that is required to establish that the claimant is seeking employment and has genuine prospects of getting it.

(Signed)
SIR CRISPIN AGNEW OF LOCHNAW Bt QC
Judge of the Upper Tribunal
Date: 20 May 2016