[2017] AACR 34

(GE v Secretary of State for Work and Pensions (ESA)
[2017] UKUT 145 (AAC))

Judge Poynter **CE/657/2016**
28 March 2017

Residence and presence conditions – right to reside – residence for the initial 3 months and as a jobseeker counts towards the subsequent acquisition of a permanent right of residence under domestic UK law.

Residence and presence conditions – right to reside – whether a claimant satisfies the right to reside test is assessed down to the date of the decision not as at the date of claim.

The claimant, a Spanish national, moved to the United Kingdom (UK) on 14 April 2010. Thereafter, her residence fell into three distinct periods: (1) from 14 April 2010 to 30 April 2010 she made no claim for any social security benefit; (2) from 1 May 2010 to 19 March 2015 she was paid jobseeker's allowance (JSA) and also did some part time work and (3) from 20 March 2015 to 15 April 2015 she ceased to receive JSA and claimed employment and support allowance (ESA). Her claim for ESA was refused by the Secretary of State on the basis that she did not have a right to reside in the UK. The First-tier Tribunal (F-tT) rejected her appeal, holding that she had never been in effective and genuine work in the UK, and therefore could not establish retained worker status under regulation 6(2)(a) of the Immigration (European Economic Area) Regulations 2006, and that she had not been resident in the UK for five years at the date she claimed ESA. (It did not consider whether she had a permanent right of residence.) The claimant appealed to the Upper Tribunal and the two main issues before it were whether at the date of her claim the claimant was a former worker who had retained that status and whether she had acquired a right of permanent residence in the UK before the date of the Secretary of State's decision.

Held, allowing the appeal, that:

1. whether a claimant satisfied the right to reside test was assessed down to the date of the decision, so that if the claimant did not have a relevant right of residence at the date of claim but acquired one before the date of the decision, then the test was satisfied from the date the right was acquired (paragraphs 52 to 58);

2. although a right of residence as a jobseeker - in the European Union sense of someone who was seeking work but was neither a worker, nor a person who had retained worker status - did not count towards the continuous five-year period of legal residence required to attain a permanent right of residence under EU law, it did count as residence "in accordance with" the Immigration (European Economic Area) Regulations 2006 and could therefore, as a matter of domestic UK law only, give rise to a permanent right of residence under regulation 15(1)(a) (paragraphs 61 to 74);

3. as the words "in accordance with these Regulations" were to be given their natural meaning, even though the right of residence for an initial period of three months did not support an entitlement to benefit *during those three months*, it did count towards the subsequent acquisition of a permanent right of residence under regulation 15(1)(a) because it was "in accordance with" regulation 13 of the 2006 Regulations (paragraph 75).

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Sutton on 22 October 2015 under reference SC154/15/01456 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given immediately below. **The parties should note that those directions are addressed to them as well as to the First-tier Tribunal and specify time limits for compliance**.

DIRECTIONS

To the new tribunal

1. The appeal is to be re-considered by a judge of the First-tier Tribunal ("the new tribunal"). The judge who gave the decision dated 22 October 2015 that I have set aside is excluded from further involvement in the case.

2. The new tribunal must hold an oral hearing of the appeal and conduct a complete re-hearing of the case.

3. The new tribunal must first consider whether the claimant had a right of residence that counted for the purposes of ESA on any date between 20 March 2015 and 15 April 2015. In practice, that will involve considering whether the claimant retained worker status on the basis of involuntary unemployment during the currency of her award of jobseeker's allowance and subsequently retained that status on the basis that she was temporarily incapable of work.

4. If the new tribunal decides that the claimant did not retain worker status after her award of jobseeker's allowance came to an end, then it must consider whether the claimant acquired a permanent right of residence on 14 April 2015 under regulation 15(1)(a) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/2003) (the 2006 Regulations) on the basis that she had resided in the United Kingdom in accordance with the 2006 Regulations for a continuous period of five years.

5. In deciding that issue:

(a) the new tribunal must accept that, as a matter of law, the period from 14 April 2010 to 30 April 2010 counts towards the five-year period (see [67] – [76] below);

(b) unless the Secretary of State positively advances a case that any jobseeker's allowance received by the claimant between May 2010 and March 2015 was wrongly awarded, the new tribunal may accept that the claimant had a right of residence as (at least) a jobseeker during any period in which she was awarded jobseeker's allowance; and

(c) depending on the evidence, the new tribunal may accept that the claimant had a right of residence as a jobseeker during the period from 20 March 2015 and 14 April 2015. Although such a right does not count for the purposes of ESA, periods of residence as a jobseeker are – under domestic UK law – taken into account when calculating the five-year period (see [45] – [47] below).

To the Secretary of State

6. The Secretary of State must send a further response to the Sutton office of the First-tier Tribunal, so that it is *received* no later than one month from the date on which this decision is *sent* to the parties.

7. That response may address any outstanding issue in the appeal and must include a copy of the document referred to on page 55 of the papers as "P45 from last employer".

8. The Secretary of State's attention is drawn to the Direction 5(b) above. If he wishes to advance a positive case that any jobseeker's allowance received by the claimant between May 2010 and March 2015 was wrongly awarded, he must do so as part of the further response directed at 6 above.

To the claimant

9. You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the First-tier Tribunal. You have won your appeal because the written record of the hearing before the First-tier Tribunal has been partially misplaced. That does not necessarily mean that the First-tier Tribunal's decision was wrong.

10. Except as set out in Direction 5(a) above, the new tribunal will now re-decide all the issues in your case. You should attend the hearing that I have directed and be prepared, with the help of your representative, to make your case again.

11. One issue that the new tribunal will have to decide is whether any work you did between 14 April 2010, and 15 April 2015 was "effective and genuine" as that phrase is understood in EU law. If it was not, then you never qualified as a "worker" under EU law and therefore could not have retained that status when you ceased to work.

12. People who have been workers in the UK and have retained that status have more extensive rights than people who are mere jobseekers. It is therefore very important that the Tribunal should have all the evidence you are able to provide about the work you did during that period. Direction 13 below is intended to assist you by explaining the type of evidence that might support your case.

13. You (or your representative on your behalf) must send the following to the Sutton office of the First-tier Tribunal, so that they are *received* no later than one month from the date on which this decision is *sent* to the parties

(a) written details of every job you have had in the UK between 14 April 2010, and 15 April 2015. In particular, the Tribunal needs to know (for each of those jobs):

(i) the name and address of the employer;

(ii) the nature of your duties;

(iii) the number of days on which you worked each week and your hours of work for each day;

(iv) the hourly rate at which you were paid;

(v) the dates on which the job started; and

(vi) if the job has ended:

- when it ended; and

- why it ended.

(b) copies of all the documents you have proving that you were in work. These might include (but are not limited to):

(i) letters of appointment;

(ii) employment contracts;

(iii) payslips;

(iv) P45 Forms;

(v) P60 Forms;

(vi) bank statements showing earnings paid into the account.

REASONS FOR DECISION

Introduction

1. The claimant appeals to the Upper Tribunal with the permission of Upper Tribunal Judge Wright against the above decision of the First-tier Tribunal ("F-tT"). That decision confirmed a decision taken on behalf of the Secretary of State on 15 April 2015 that she was not entitled to employment and support allowance ("ESA") from 31 March 2015 because she did not have a right to reside in the United Kingdom and was therefore a person from abroad with an applicable amount of nil. The Secretary of State's representative does not support the appeal.

2. As I explain in more detail below, the appeal raised two issues. The first is whether, at the date of her claim, the claimant was a former worker who had retained that status. The second issue is whether she had, in any event, acquired a right of permanent residence in the UK before the date of the Secretary of State's decision.

3. I have set the First-tier Tribunal's decision aside because relevant parts of the record of proceedings appear to be missing (see [16] and [43] below). However, the issues that the new tribunal will need to consider are complex and I have therefore given directions for the re-hearing. These reasons are intended to assist the new tribunal and the parties by explaining those directions.

Background and procedural history

4. It is necessary to set out the factual background in some detail. I stress, however, that if anything I say below about the *facts* should prove at the re-hearing to be contentious, then the new tribunal is not bound by what I have said but must make its own findings of fact on the basis of the evidence available to it at that time. The new tribunal must, of course, follow the guidance and directions I have given about the law.

5. The claimant is a Spanish national (and therefore a citizen of the European Union). At the time of the Secretary of State's decision, she was 52 years old. Although she had previously spent time in the UK, the period of residence that is relevant to this appeal began on 14 April 2010. The time from that date to the date of the Secretary of State's decision on 15 April 2015 – five years and a day later – falls into three distinct periods:

(a) from 14 April 2010 to 30 April 2010 ("Period 1");

(b) from 1 May 2010 to 19 March 2015 ("Period 2"); and

(c) from 20 March 2015 to 15 April 2015 ("Period 3").

Period 1: From 14 April 2010 to 30 April 2010

6. The F-tT found that the claimant took up residence in the UK on 14 April 2010 because that was the day on which she took out a tenancy on a flat in Clapham. During the previous months, she had been travelling between Spain and the UK, gradually bringing her belongings with her. The F-tT accepted that she had lived in the UK from 14 April 2010 onwards.

7. In 2015, the claimant told the Department that she had come to the UK "to live and work here" and that she had intended to support herself in the UK through employment. However, the evidence also suggests that she wanted to study. She told the F-tT that she had had an interview for a Neuro-Linguistic Programming (NLP) course in November 2009 but there is no evidence that she ever took the course. She subsequently enrolled on a different course at an adult education college in September 2012.

8. Before the F-tT, the claimant asserted that she had a right of residence as a self-sufficient person during this period. She said that she had supported herself from her own resources and from payments made to her by her brother. She also said that she had had sickness insurance at the time. At the hearing she produced a document that she said was the relevant insurance policy. However, the F-tT refused to receive it in evidence because it was in Spanish. No copy of that document has been retained and I have therefore not seen it. The F-tT did not accept that the claimant had been self-sufficient.

9. Although neither the claimant nor her representative raised the point, it is also (just) possible that the claimant had a right to reside as a "jobseeker" during Period 1. This issue is also relevant to Period 3 and I discuss it in more detail at [45] – [47] below.

10. But neither of those possibilities is relevant to this appeal. Period 1 was many years before the claim that led to this dispute. It is only relevant to that claim if it fell to be taken into account as part of a possible five-year period of residence giving rise to a right of permanent residence. For the reasons I give in more detail below, and as a matter of domestic UK law only, it did. That is so irrespective of whether the claimant was self-sufficient or a jobseeker at the time.

Period 2: From 1 May 2010 to 19 March 2015

11. The Department's records show that the claimant was paid jobseeker's allowance ("JSA") from 1 May 2010 to either 18 or 19 March 2015. As the exact date is unclear, I have chosen the latter possibility (with the effect that Period 3 begins on 20 March). I do not consider that anything turns on the precise date and, in any event, the new tribunal will be free to make its own findings on the issue.

12. The evidence before the F-tT tended to show that the claimant was working for at least for some of that period. However, the extent of that work was unclear. In particular, the appeal papers record that the DWP were shown a "P45 from [the claimant's] last employer" but they do not include a copy of that document. Neither is there any other statement about what information it included.

13. Some – very few – of the claimant's bank statements have been produced. These record that the following payments, totalling £823.97 and described as "Wages" were credited to her account during the first three months of 2011:

Date credited	Amount (£)
31 January 2011	252.00
2 March 2011	270.01
31 March 2011	301.96

14. On the assumption that the claimant declared the work she was doing,[1] it is to be inferred from her continuous entitlement to JSA during this period that:

(a) She did not at any time work more than 16 hours a week on average.

Had she done so, she would have been excluded from entitlement under the remunerative work rule in section 1(2)(e) of the Jobseekers Act 1995 and regulations 51–53 of the Jobseeker's Allowance Regulations 1996 (SI 1996/207);

and that:

(b) Her earnings did not at any time exceed the level of her JSA personal allowance plus the £5 earnings disregard to which she would have been entitled as a single person with no dependants.

Were it otherwise, she would have been excluded from entitlement for the week in question on the basis that her income exceeded her applicable amount.

15. The claimant's national insurance records do not show her as paying any Class 1 or Class 2 national insurance contributions during the period. That is consistent with the claimant not having done any work; or with her having worked but not earned enough in any individual employment to have paid national insurance; or, unfortunately, with the record being incorrect, as it sometimes is. The manuscript notes in the margin suggest that the claimant did not pay any national insurance contributions in the employment that generated the earnings set out at [13] above.

16. I anticipate that the claimant would have been asked at the hearing to elaborate on the evidence of her bank statements. However, I only have three pages of the record of proceedings. The hearing was listed for 60 minutes and what I do have of the record of proceedings appears to end at a very early stage. It does not record either that the claimant was asked about the work that led to the payments into her account, or about what (if any) other work the claimant may have done. The appeal was heard by an experienced District Tribunal Judge and it is improbable that those questions were not asked. In my judgment, it is

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1 The F-tT noted that the Department was "apparently not aware" of the claimant's work. However, that does not seem to me to be consistent with the written explanation of the decision under appeal that was sent to the claimant on 28 or 29 April 2015 in which it is stated that "[the Department's] records show that you have worked part time in the UK since returning [in 2010]". For all but the 16 days of Period 1 since her return to the UK, the claimant had been receiving JSA.

more probable that part – and I suspect quite a large part – of the record of proceedings has been lost.

17. Those issues were important because it is relevant to the claimant's potential entitlement to ESA during Period 3, whether – immediately before the illness that led to her having to claim ESA began – she was a worker, a former worker who retained that status or as a jobseeker.

Period 3: from 20 March 2015 to 15 April 2015

18. Although the Secretary of State ceased to pay the claimant JSA from 20 March 2015, she did not claim ESA until 31 March 2015. The claimant says that she was told she had to claim ESA when she phoned the Jobcentre in response to a letter she received on 23 March 2015. It appears that once she had done so, no further JSA was paid with the effect that the disentitlement took effect from the date on which she had last signed on.

19. The claimant raised issues before the F-tT about her entitlement to JSA during the period from 20–30 March 2015 and as to whether the decision awarding her JSA was ever actually superseded so as to bring that award to an end. However, I judge that those issues were not relevant to what the F-tT had to decide on an appeal about the refusal of the subsequent ESA claim.

20. That is so because there can be no doubt that the claimant did cease to be entitled to JSA when she claimed ESA. Under section 1(2)(f) of the Jobseekers Act 1995, it is a condition of entitlement to JSA that a claimant should not have limited capability for work. In the circumstances of this case, the claimant would have been treated as having limited capability for work – and would therefore no longer have been entitled to JSA – as soon as she claimed ESA (see regulation 30 of the Employment and Support Allowance Regulations 2008 (SI 2008/974)).

21. The main issue for Period 3 is whether the claimant continued to retain worker status on the basis that she was temporarily incapable of work (see [41]–[42] below). However, if she did not, then it is possible that she may have continued to be a jobseeker even though she was no longer claiming JSA (see [45]–[47] below). As explained below, that is potentially relevant to whether she acquired a permanent right of residence on 14 April 2015.

The law

22. Rights of residence can arise under EU law (and the domestic legislation implementing it) either as a result of the circumstances or activities of the EU national herself or (in some circumstances) as a result of a person's relationship with another EU national.

23. On the facts of this case, any rights the claimant may have fall into the first category. I will therefore not quote the law relating to, for example, the rights of family members, and the "derivative rights" specified in regulation 15A of the 2006 Regulations.

The ESA Regulations

24. Under regulation 69(1) of the Employment and Support Allowance Regulations 2008 ("the ESA Regulations") :

"**Special cases**

> **69.**–(1) In the case of a claimant to whom any paragraph in column (1) of Schedule 5 applies (amounts in special cases), the amount in respect of the claimant is to be the amount in the corresponding paragraph in column (2) of that Schedule."

Paragraph 11 of Schedule 5 reads:

> **Person from abroad**
>
> | | | | |
> |---|---|---|---|
> | 11. | Person from abroad | 11. | Nil |

A person with an applicable amount of nil is not entitled to income-related ESA.

25. "Person from abroad" is defined by regulation 70 of the ESA Regulations. So far as relevant to this appeal, that regulation is in the following terms:

> "**Special cases: supplemental** – **persons from abroad**
>
> **70.–(**1) 'Person from abroad' means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) A claimant must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the claimant has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).
>
> (3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following –
>
> (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006;
>
> (b) regulation 14 of those Regulations, but only in a case where the right exists under that regulation because the claimant is –
>
> (i) a jobseeker for the purpose of the definition of 'qualified person' in regulation 6(1) of those Regulations; or
>
> (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;
>
> (bb) …
>
> (c) Article 6 of Council Directive No. 2004/38/EC;
>
> (d) Article 45 of the treaty on the Functioning of the European Union (in a case where the claimant is a person seeking work in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland); or
>
> (e) …
>
> (4) A claimant is not a person from abroad if the claimant is –
>
> (za) a qualified person for the purposes of regulation 6 of the Immigration (European Economic Area) Regulations 2006 as a worker or a self-employed person;
>
> (zb)-(j) …"

The Directive

26. Since 30 April 2004, the rights of EU citizens to reside in Member States of which they are not nationals has been regulated as a matter of EU law by Directive 2004/38/EC of the European Parliament and of the Council ("the Directive"). The following provisions of the Directive are relevant to this appeal.

27. Recital (29) states:

> "(29) This Directive should not affect more favourable national provisions."

28. So far as is relevant, Article 6 provides

> **"Right of residence for up to three months**
>
> 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
>
> 2. …"

and Article 7 provides:

> "**Right of residence for more than three months**
>
> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
>
> – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
>
> (d) …
>
> 2. …
>
> 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. …"

29. The retention of those rights of residence is governed by Article 14(1) and (2) which states:

"**Retention of the right of residence**

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in [Article] 7, … as long as they meet the conditions set out therein."

30. Article 14(1) is supplemented by Article 24(2). Article 24 states:

"**Equal treatment**

"1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. …

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence …"

Employment and support allowance is "social assistance", see the decision of the Court of Appeal in *Alhashem v Secretary of State for Work and Pensions* [2016] EWCA Civ 395; [2016] AACR 48.

31. The right of permanent residence is provided for in Articles 16 to 18. However, Articles 17 and 18 are not relevant in this case. The relevant parts of Article 16 are as follows:

"**General rule for Union citizens and their family members**

> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. …
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

As they relate to this case, the "conditions provided for in Chapter III" are those set out in Article 7, quoted at [28] above.

32. Article 37 states:

> "**More favourable national provisions**
>
> The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive."

The 2006 Regulations

33. Before 1 February 2017, the Directive was implemented in the UK by the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

34. Until 1 April 2014, regulation 6 of the 2006 Regulations provided:

> "**'Qualified person'**
>
> **6.–**(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as –
>
> (a) a jobseeker;
>
> (b) a worker;
>
> (c) a self-employed person;
>
> (d) a self-sufficient person; or
>
> (e) a student.
>
> (2) … a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if –
>
> (a) he is temporarily unable to work as the result of an illness or accident;
>
> (b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and –
>
> (i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) …

(4) For the purpose of paragraph (1)(a), 'jobseeker' means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged."

35. From 1 April 2014, regulation 6(1) remained unchanged. However, the subsequent paragraphs of that regulation were amended with effect from that date, and then again with effect from 1 July 2014 and 10 November 2014. They now read as follows:

"(2) … a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if –

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he –

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

(3) …

(4) For the purpose of paragraph (1)(a), a 'jobseeker' is a person who satisfies conditions A, B, and, where relevant, C.

(5) Condition A is that the person –

(a) entered the United Kingdom in order to seek employment; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba)).

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(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.

(8) In paragraph (7), 'the relevant period' means –

(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;

(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(9) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B –

(a) in the case of a person to whom paragraph (2)(b) or (ba) applied, for at least six months; or

(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(10) Condition C is that the person has had a period of absence from the United Kingdom.

(11) Where condition C applies –

(a) paragraph (7) does not apply; and

(b) condition B has effect as if 'compelling' were inserted before 'evidence'."

36. Regulation 13 is in the following terms:

"**Initial right of residence**

13.–(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

(2) …

(3) An EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom will cease to have a right to reside under this regulation.

(4) …"

37. Again, so far as is relevant, regulation 14 states:

"**Extended right of residence**

14.–(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(2)–(3) …

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

(5) …"

38. And regulation 15 states:

"**Permanent right of residence**

15.–(1) The following persons shall acquire the right to reside in the United Kingdom permanently –

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b)–(f) …

(1A) …

(2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) …"

Analysis

Rights of residence during Periods 2 and 3

39. Ignoring the rights of family members (see [22] above) and – for the moment – the permanent right of residence, an EU citizen who does not have a current contract of employment may claim JSA either as a former worker who has retained that status, or as a jobseeker.

40. However, the same is not true of ESA. Although a right of residence as a person who has retained worker status counts for the purposes of ESA, a right of residence as a jobseeker does not: it is excluded by regulation 70(2) and (3)(b) and (d) of the ESA Regulations.

41. A former worker, who has not already lost worker status, retains it while she satisfies any of the sub-paragraphs of regulation 6(2). The basis on which worker status is retained does not have to remain constant over time. A worker may lose her job but retain worker status on the basis that she is in duly recorded involuntary unemployment under regulation

6(2)(b) or (ba). She may then become temporarily unable to work as the result of an illness or accident. If so, she continues to retain worker status under regulation 6(2)(a). When she recovers and is able to seek work again, regulation 6(2)(b) or (ba) will apply once more. If she then decides to improve her job prospects by temporarily ceasing to look for work and embarking on vocational training instead, regulation 6(2)(c) will apply. And so on: see CIS/4304/2007 at paragraph 34 and *Secretary of State for Work and Pensions v IR* [2009] UKUT 11 (AAC) at [23].

42. Therefore, the basis on which the claimant received JSA during Period 2 was of potential relevance to whether she was entitled to ESA from the beginning of Period 3. If she retained worker status at the end of that period, it seems probable that she continued to retain that status when she claimed ESA.

43. The F-tT found that the claimant had never been in effective and genuine work in the UK. The fact that some of the record of proceedings is missing (see [16] above) means that, through no fault of the judge, I cannot be sure of the evidential basis for that conclusion, which means that the F-tT's decision is vitiated by an error of law – see *MK v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 293 (AAC) – and I have therefore set it aside.

44. I should add that if, contrary to what I have judged to be probable, the three pages I have of the record of proceedings are all that ever existed, then that would indicate that the F-tT did not ask the type of question referred to in [16] above. In those circumstances, I would have held that omitting to ask those questions amounted to a failure to exercise the F-tT's inquisitorial jurisdiction and I would have set the decision aside on that basis.

45. In addition it is possible that the claimant had a right of residence as a jobseeker during Period 3. Such a right would not count for the purposes of her claim for ESA but it would mean that she continued to reside in the UK in accordance with the 2006 Regulations: see [67]–[75] below.

46. Although it is necessary for a person's involuntary unemployment to be "duly recorded" and for her to have "registered as a jobseeker with the relevant employment office" in order to retain worker status under regulation 6(2)(b) or (ba), it is not necessary to be registered as a jobseeker, or to claim JSA, to have a right of residence as a jobseeker (see regulation 6(4)). It is necessary for a jobseeker to provide evidence that she is seeking employment and has a genuine chance of being engaged and it will often be easier for those who have claimed JSA, and whose jobsearch has been supervised by the Jobcentre, to provide that evidence. However, that does not rule out the possibility that other evidence will suffice.

47. The claimant's representative submitted to the F-tT that the claimant continued to be a jobseeker (in the EU sense of that word) during Period 3, when she was claiming ESA. If the new tribunal concludes that the claimant did not retain worker status on the basis of temporary incapacity for work during that period, it will have to investigate whether that submission is correct. Although it will be a matter for the new tribunal, it seems to me that the claimant will have to provide more evidence of her jobsearch during that period than is currently available if the submission is to succeed.

Permanent right of residence

Introduction

48. The rights of residence conferred by Articles 6 and 7 of the Directive, and implemented by regulations 13 and 14 of the 2006 Regulations, depend on a claimant's circumstances and activities during the period for which she is claiming. In contrast, the right of permanent residence based on five years' legal residence conferred by Article 16, and implemented by regulation 15, usually depends upon her circumstances and activities in the past.

49. However, in this case, the present and the past overlap slightly. The period that is in dispute is Period 3. The claimant's circumstances and activities during Period 3 are, of course, relevant to whether she has a right of residence as a qualified person during that period. But in addition, they may *also* be relevant to whether she had acquired a permanent right of residence by the end of the period. If the claimant had *any* right of residence during Period 3 – whether or not that right counted for the purposes of ESA – then the five-year period continued to accrue.

50. On the facts found by the F-tT, the claimant had not been resident in the UK for five years when she claimed ESA on 31 March 2015. However, she had been so resident by 14 April 2015, the day before the Secretary of State made his decision on 15 April.

51. It is therefore possible that, although the claimant did not have a permanent right of residence at the date of her claim, she may have acquired one before that claim was decided.

Down to the date of the decision

52. The Secretary of State's representative's submission denies that possibility. She says:

> "1. The UT Judge asks whether the F-tT erred in law for not considering whether the appellant had a permanent right to reside by 15 April 2015 (or 14 April 2015), even if her claim for ESA was made on an earlier date.
>
> 2. It is well founded that before right to reside when the decision was purely considering habitual residency the test was applied down to the date of the decision.
>
> 3. However, it is submitted that when considering a right to reside decision it is a decision made at the date of claim. It follows that, if someone had a right to reside and consideration was purely from when that residence became habitual that would be made down to the date of the decision.
>
> 4. So it is submitted that the tribunal did not err in law in not investigating and determining whether the appellant had acquired a permanent right of residence by 15 April 2015 under domestic law based on her time in the UK as a jobseeker."

53. However, I reject that submission.

54. I accept it will sometimes be possible to say that if a claimant does not have a particular right of residence at the date of claim she probably will not have it at the date of

decision either. For example, it is extremely unlikely that a claimant who does not retain worker status when she claims ESA will somehow retain it ten days later when the claim is decided.

55. However, that does not change the general principle that decision-makers can and must take into account changes in a claimant's circumstances between the date of claim and the date of the decision.

56. That principle is axiomatic and it is therefore difficult to cite direct legislative authority for it. However it is implicit in section 12(8)(b) of the Social Security Act 1998, which prevents the F-tT from considering circumstances that did not obtain at the date of the decision under appeal. It is also inherent in regulation 3(9)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) – and the equivalent provisions of the other sets of Decisions and Appeals Regulations – which prevents the Secretary of State from revising a decision under the "any grounds" power conferred by regulation 3(1) on the basis of a "relevant change of circumstances which occurred since the decision had effect". It follows that a relevant change of circumstances which occurred before the decision had effect *can* be taken into account on an "any grounds" revision. That, in turn, only makes sense if the original decision maker could also have taken that change into account.

57. The ability to take into account a change in circumstances that occurs between the date of a claim and the date that claim is decided cuts both ways. The claimant who has not retained worker status in the example in [54] above may have married another EU national who does retain that status during the period between claim and decision. If so, he may have acquired a right of residence as a family member from the date of the wedding. Equally, an ESA claimant with a right of residence may get better during that period and return to work, thereby losing entitlement to benefit.

58. There is no reason in law why the first of those changes of circumstances should be treated differently from the second. In all claims for benefit, whether the claimant satisfies the conditions of entitlement falls to be assessed on a daily, or sometimes weekly, basis from the earliest date covered by the claim until the date on which the claim is decided. If a claimant does not satisfy those conditions when she first claims but does satisfy them from some later date (before the date of decision) then the correct decision is to award benefit from the date on which the conditions were first satisfied. If she did satisfy the conditions at the start of the claim but ceased to do so before the claim is decided, the correct decision is to award benefit up to, but not after, the date of the change. All this is elementary and it applies in right to reside cases as it does in others.

EU Law – The decision in Ziolkowski and Szeja

59. However, the claimant can only have acquired a permanent right of residence at the end of 14 April 2015 if the *whole* of her previous period of residence in the UK counted towards the five-year period.

60. Under EU law, it did not.

61. In *Ziolkowski and Szeja v Land Berlin*, Joined Cases C-424/10 and C-425/10, EU:C:2011:866, the Grand Chamber of the Court of Justice of the European Union ruled that:

> "Article 16(1) of [the Directive] must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive."

62. In this case, the claimant did not satisfy the conditions in Article 7(1) of the Directive during Period 1 unless she was self-sufficient, which the F-tT decided was not the case.

63. Even if the F-tT was wrong about that, she did not satisfy those conditions at any time during Period 2 during which her sole right of residence was as a "jobseeker" (*ie,* as opposed to a worker or former worker who had retained that status), because jobseekers are not covered by Article 7. As it is not suggested that the claimant was in work when she first claimed jobseeker's allowance on 1 May 2010 – and ignoring the initial three months right of residence under Article 6 of the Directive – she can only have had a right of residence as a jobseeker at that time.

64. It follows that, under EU law, the "continuous period of five years" residence required by Article 16(1) did not begin until (at the earliest) the first day on which the claimant was in effective and genuine work.

65. If the F-tT was correct to conclude that the work done by the claimant was not effective and genuine, there was never such a day. But even if the F-tT's conclusion was wrong, that day cannot have been early enough for the five-year period to have ended before the Secretary of State made his decision on 15 April 2015.

66. Therefore, under EU law, the claimant had not acquired a permanent right of residence by that date.

Domestic UK Law

67. However, the position under domestic UK law is different. Article 37 of the Directive allows Member States to make laws "which would be more favourable to the persons covered by this Directive" than those in the Directive itself and this is a case in which the UK has done so. Regulation 15(1)(a) confers the permanent right of residence on any EEA national "who has resided in the United Kingdom <u>in accordance with these Regulations</u> for a continuous period of five years". In my judgment, the underlined words extend to those whose residence during the initial three months was in accordance with regulation 13 and those whose residence as a jobseeker was in accordance with regulation 14 and regulation 6(1)(a).

68. In reaching that conclusion, I have not overlooked the principle that – as I decided in CDLA/708/2007 – where UK domestic legislation is intended to implement EU law, it should be interpreted in accordance with EU law. That may sometimes involve interpreting it as having a more restricted meaning than the words used would normally convey.

69. In this case there can be no doubt that the 2006 Regulations were intended to implement the Directive: the Explanatory Note to the Regulations stated that that was the case and the UK Government published a Transposition Note "setting how the Government has transposed into UK law the main elements of [the] Directive".

70. However, the Directive that is implemented by the 2006 Regulations includes Article 37, which permits Member States to make more favourable provision. In my judgment, even if I would otherwise be required to interpret regulation 15(1) of the 2006 Regulations as strictly implementing the law as declared in *Ziolkowski and Szeja*, Article 37 allows me to apply the ordinary meaning of the words "in accordance with these Regulations" if the Regulations as a whole show that the United Kingdom intended to make provision for jobseekers that is more favourable than the provisions of the Directive.

71. In my judgment, such an intention does appear from the scheme of the 2006 Regulations.

72. The Directive does not govern the rights of jobseekers (*ie,* as distinct from those who retain worker status). Under EU law, the rights of jobseekers derive from what is now Article 45 of the Treaty on the Functioning of the European Union as interpreted by the European Court of Justice in *Antonissen*, Case C-292/89, EU:C:1991:80, [1991] ECR I-745. If the *sole* purpose of the 2006 Regulations had been to implement the Directive, there would have been no need to provide for the rights of jobseekers at all. The decision to make provision for jobseekers in the 2006 Regulations must therefore represent an intentional policy choice.

73. The same must also be true of the terms of the provision that has been made. The 2006 Regulations treat jobseekers as qualified persons, thereby giving them the same rights of residence as those who fall within the other categories of qualified person by satisfying Article 7 of the Directive. Such rights are clearly more extensive than those conferred by *Antonissen*.

74. I therefore do not consider I am required to give the words "in accordance with these Regulations" in regulation 15(1)(a) of the 2006 Regulations, anything other than their natural meaning. The effect is that the "continuous period of five years" specified in that regulation can include periods of residence as a jobseeker "in accordance with" regulations 6(1)(a) and 14.

75. I believe there is no previous authority at Upper Tribunal level for the conclusion I reach in the previous paragraph. However, that may be because it is uncontroversial. What, perhaps, has not previously been appreciated is that if, as I have held, the words "in accordance with these Regulations" are to be given their natural meaning, then even though the right of residence for an initial period of three months does not support an entitlement to benefit *during those three months*, it does count towards the subsequent acquisition of a permanent right of residence under regulation 15(1)(a) because it is "in accordance with" regulation 13 of the 2006 Regulations.

Application of UK domestic law to the facts of this appeal

76. On that basis, and as a matter of UK domestic law only, the claimant's residence in the UK during Period 1 counted towards the five-year period because it was within the initial three-month period. and, during that period, she did not cease to have a the initial right of residence under regulation 13(1) by becoming an unreasonable burden on the social assistance system of the United Kingdom within regulation 13(3). It is for this reason that it is irrelevant for the purposes of a claim made in 2015 whether the claimant was also self-sufficient during that period (see [10] above).

77. Additionally, and again as a matter of domestic UK law only, the claimant's residence in the UK during Period 2 also counted towards the five-year period if she had a right of residence as a jobseeker. It is not necessary for her to establish that she was a worker or a person who had retained worker status.

78. Finally, if the claimant had a right of residence during Period 3, either as a person who retained worker status, or as a jobseeker, then that period also counts towards the five-year period with the result that the claimant may have had a permanent right of residence by the date of the decision under appeal. That is the case even though a right of residence as a jobseeker would not have counted for the purpose of entitlement to ESA while the five-year period was continuing.