

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. CSJSA/492/2017**

**Before: Upper Tribunal Judge A I Poole QC**

1. The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal dated 19 July 2017 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside, as well as the decision of the Secretary of State for Work and Pensions dated 5 December 2016. I substitute a decision that the claimant was entitled to a Jobseeker's Allowance for a fixed period from 26 November 2016 to 11 January 2017. I remit the case to the Secretary of State for Work and Pensions to consider entitlement after 11 January 2017.

**REASONS FOR DECISION**

**Background**

2. This is a case about Jobseeker's Allowance ("**JSA**"). The appellant (the "**claimant**"), is an Estonian and EEA national who was residing in the United Kingdom. On 19 July 2017 the First-tier tribunal (the "**tribunal**") confirmed the decision of the Secretary of State for Work and Pensions ("**SSWP**") that the claimant was not entitled to JSA after 25 November 2016. It is common ground that the date of the relevant decision of the SSWP under appeal in this case is 5 December 2016. It is also relevant to note that the claimant has brought another appeal against a different decision by the SSWP about JSA, which has been decided separately in case reference CSJSA/565/2017. The two appeals have been linked, but concern different decisions on different grounds, and so I have decided them in separate determinations. In both cases I have allowed the appeals following concessions by the SSWP.

3. After grounds of appeal were received from the claimant in this appeal to the Upper Tribunal, permission to appeal was granted by a judge of the Upper Tribunal on 14 December 2017 on the basis that there was an arguable error of law in the tribunal's decision. In summary, the arguable error was that the tribunal failed to give adequate reasons because it had not explained what it made of the claimant's participation in a New Enterprise Allowance ("**NEA**") Scheme, including any consideration of what implications, if any, selection for a Scheme for Assisting Persons to Obtain Employment ("**SAPOE**") might have for whether an EEA national retains jobseeker's status.

4. By submission dated 1 February 2018, the SSWP accepts that there was an error of law due to the failure of the tribunal to consider the implications of the claimant's participation in the NEA scheme in relation to whether he had a genuine prospect of work and retained jobseeker's status. She submits that the claimant's participation in the NEA scheme commenced on 10 October 2016 and the normal 12 week mentoring stage would run to 1 January 2017. She argues the GPOW end date should have been reset from 25 November 2016 (the end of the 91 day period)

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to 11 January 2017. Because 25 November 2016 (the date from which the claimant was found disentitled to JSA) and 5 December 2016 (the date of the SSWP's decision) were within this period, the tribunal erred in failing to consider the implications of participation in the NEA scheme on the GPOW test. She submits that the decision of the tribunal involved the making of an error of law and that the decision should be set aside. She also argues that the Upper Tribunal should substitute its own decision. She submits that the claimant should be found entitled to JSA from 16 November 2016 up until 11 January 2017. For the period after that, she submits there should be a further interview of the claimant by the SSWP to consider evidence of GPOW after 11 January 2017. The claimant, in representations received by the Upper Tribunal on 3 June 2018, welcomes the SSWP's support of the appeal. He makes further submissions about whether there should have been an interview concerning GPOW in any event.

5. The claimant does not consent to a decision without reasons under Rule 40(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The SSWP has not requested an oral hearing. The claimant has requested an oral hearing but only if the appeal is not being granted in his favour. As I am determining the appeal in the claimant's favour, and I am satisfied that I can fairly determine the case without an oral hearing, I have not ordered an oral hearing. I allow the appeal for the reasons given below.

### **Governing law**

6. The entitlement to the claimant to JSA after 25 November 2016 turns on the issue of whether the claimant had a genuine prospect of work ("**GPOW**"). The GPOW test applied in the claimant's case arises under Regulation 6(7) of the Immigration (European Economic Area) Regulations 2006 (the "**2006 Regulations**"). Regulation 6(7) provides that a person may not retain the status of jobseeker for longer than the relevant period (ordinarily 91 days in the case of a jobseeker), unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.

7. There is a separate set of provisions underpinning the NEA scheme in which the claimant participated. Section 17A of the Jobseeker's Act 1995 (the "**1995 Act**") gives a power to make regulations relating to schemes to assist persons to obtain employment. The Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (the "**SAPOE Regulations**") are regulations made under Section 17A of the 1995 Act. Regulation 3 of the SAPOE Regulations prescribes a number of schemes within Section 17A. Regulation 3(5) provides:

"New Enterprise Allowance is a scheme designed to assist a claimant into self-employed earner's employment comprising guidance and support provided by a business mentor, access to a loan to help with start-up costs (subject to status) and a weekly allowance for a period of 26 weeks once the claimant starts trading".

If a claimant is selected for a NEA scheme and given the appropriate notice, they are required to participate in the scheme (Regulation 5).

8. Publicly available guidance about NEA on the gov.uk website contains the following paragraph:

*"What you'll get*

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You'll get a mentor who'll give you advice and support to help you set up your business and start to trade.

Once you've made a business plan that your mentor has approved, you:

may get a weekly allowance worth up to £1,274 over 26 weeks

can apply for a loan to help with start-up costs"

The NEA Scheme therefore appears to be structured with an initial mentoring period within which a business plan is approved, followed by the possibility of further help with start up of the business in the form of a weekly allowance and a loan.

9. The SSWP has internal operational guidance on the NEA scheme. Paragraphs 132 to 136 suggest that there is normally an 8 week mentoring period for preparation of the business plan. The absolute maximum period for working on a business plan is 12 weeks, and it is stated that the policy expectation is that the NEA programme (by which I understand the mentoring stage of the programme) will last 12 weeks unless there are truly exceptional circumstances.

10. As to the interrelationship of the NEA scheme and the GPOW test, I notice that the SAPOE Regulations do not provide that people participating in prescribed schemes are exempt from the GPOW test under the 2006 Regulations. There is, however, a provision in the SAPOE Regulations which on its face impacts on the general conditions for entitlement to jobseeker's allowance. Under Regulation 7(1) of the SAPOE Regulations it is provided that:

"(1) A claimant who is participating in the New Enterprise Allowance scheme described in regulation 3(5) is not required to meet the condition set out in section 1(2)(c) of the [1995] Act (conditions for entitlement to a jobseeker's allowance: actively seeking employment)".

This provision seems sensible, because having to seek employment might adversely impact on the time available to devote to developing a business plan and starting the business, and jeopardise the success of the NEA Scheme for the participant. However, Regulation 7(1) refers only to a claimant not being required to meet the condition in Section 1(2)(c) of the 1995 Act, and says nothing about exemption from provisions of the 2006 Regulations, including the GPOW test. Nor does Regulation 7(1) cover all aspects of the GPOW test contained in the 2006 Regulations. There are some similarities between the 'actively seeking employment' wording in Regulation 7(1) and the 'continuing to seek employment' wording in the GPOW test. But Regulation 7(1) does not mention the requirement found in the GPOW test that the claimant produces compelling evidence that there is a genuine chance of being engaged. Regulation 7(1) therefore neither expressly nor by necessary implication exempts claimants from satisfying the GPOW test in the 2006 Regulations. (I notice in passing that the 2006 Regulations have been re-enacted subsequently in Regulation 6(7) of the Immigration (European Economic Area) Regulations 2016 (the "**2016 Regulations**"); these came into force for present purposes on 1 February 2017. This was after the date of the decision under appeal, so the 2016 Regulations are not strictly relevant. The effect of Schedule 7 paragraph 1 of the 2016 Regulations, for decisions made after the coming into force of the 2016 Regulations, would be that any reference in legislation to provisions in the 2006 Regulations would be read as a reference to the corresponding provision in the 2016 Regulations). The short point is that the SAPOE Regulations contain no exemption from the GPOW test in the 2006 Regulations.

11. What I conclude from this legislative background is that EEA nationals on the NEA Scheme remain subject to the GPOW test. As a matter of law, they must be able to satisfy that test in order to continue to be treated as jobseekers after the relevant period. I notice that my interpretation is in keeping with the SSWPs internal guidance document, which states in a section headed “EEA Nationals and Genuine Prospects of Work”:

“Work coaches must not assume that a claimant taking part in NEA mentoring will meet GPOW criteria as each case is assessed on its own merits against set criteria”.

However, the fact that a claimant is participating in the NEA scheme is likely to have an evidential impact on the application of the GPOW test, in that it is likely to make it easier to satisfy the GPOW test. Participation in the NEA scheme is therefore relevant to application of the GPOW test.

### **Application to the present case**

12. I agree with the concession of the SSWP that participation in the NEA Scheme is a relevant consideration when considering the GPOW test under the 2006 Regulations. Given that the NEA Scheme is specifically to assist people into self-employment, participation is relevant to the test in the 2006 Regulations of whether a person is continuing to seek work and has a genuine chance of being engaged. The tribunal found that the claimant had been accepted for the NEA Scheme prior to the date of the SSWP’s decision (Findings in Fact paragraph 10 and Reasons paragraph 4), but did not go on to consider how that impacted on the GPOW test. It failed properly to take into account a material consideration, and its decision was therefore in error of law. I am satisfied that I should set aside the decision of the tribunal dated 19 July 2017, and the decision of the SSWP of 5 December 2016 that was under appeal before the tribunal.

13. I have taken account of the claimant’s position that he should not have been subject to a GPOW interview at all. I do not consider that is correct. As I have explained in the Governing Law section above, the GPOW requirement is a freestanding requirement under different Regulations, and the SAPOE Regulations contain no exemption from it. There is no legal provision put before me that prohibits the holding of GPOW interviews when a person has been accepted onto the NEA Scheme. It seems to me that the issue is really a practical one; while there is nothing to prevent the SSWP from holding GPOW interviews while a person is participating fully in the NEA Scheme, there may be little point in doing so. This is because it will be highly likely that the GPOW test will be met, at least while there is full and active participation by a claimant in the mentoring stage of the NEA Scheme. The SSWP may therefore consider it is not a good use of resources to arrange GPOW interviews while there is such active participation. But that does not mean it is unlawful for the SSWP to decide to hold a GPOW interview, and require a current participant in a NEA scheme to attend it. The appeal succeeds on different grounds to the claimant’s contention that he should not have been assessed under the GPOW test at all due to his participation in the NEA scheme, which I reject.

14. I am satisfied that I should substitute my own decision, on the basis of the SSWP’s concession. I therefore find that the claimant was entitled to JSA for a fixed period from 26 November 2016 to 11 January 2017, the end of the normal 12 week mentoring period. I remit the case to the SSWP to consider entitlement after 11

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January 2017, which will depend on whether the GPOW test continued to be met after that date.

**Signed on the original  
on 11 June 2018**

**A I Poole QC  
Judge of the Upper Tribunal**