IN THE UPPER TRIBUNAL **Appeal No: CH/2389/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Bury on 4 May 2016 under reference SC268/14/00378 involved an error on a material point of law and is therefore set aside.

The Upper Tribunal remakes the decision of the First-tier Tribunal. The remade decision is to allow the appeal, set aside Bury Metropolitan Borough Council's decisions of 3 October 2014 and 22 October 2014, and replace them with a decision that the appellant was entitled to housing benefit from and including 10 August 2014.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007

Representation: The appellant was represented by Martin Williams of the Child Poverty Action Group at the final hearing.

Julie Smyth of counsel appeared at the final hearing for the Secretary of State for Work instructed by the Government Legal Service.

The local authority did not appear at any hearing.

REASONS FOR DECISION

Introduction

1. This is a right to reside appeal that has had a very long history in which many arguments have been made. However, for the purposes of this decision I need only concentrate on two arguments. The other arguments which the appellant has made in the past, including at an earlier hearing before me, have now been abandoned.

2. The first substantive argument I can clear out of the way very quickly, and I should do so immediately to concentrate on the other argument. By the first argument the appellant seeks to rely on the same 'contingent' right to reside argument I rejected as arising in *AM v Secretary of State for Work and Pensions and another* (JSA, IS and HB) [2019] UKUT 361 (AAC). As in *AM*, and for the same reasons I gave there, I do not consider the appellant can have a 'contingent' right to reside based on her having been, at the material time, the primary carer of her under school age child, even if that child may have had a right to reside as the 'family member' of the child's father on the basis that the father had a right to reside in the United Kingdom as a 'worker', but where the appellant was not a 'family member' of the father of her child.

3. The second substantive argument concerns the legality of the "genuine chance of being engaged [in employment]" test under and in respect of what was, at the time relevant to this appeal, regulation 6(2)(b)(ii) and (7) of the Immigration (European Economic Area) Regulations 2006 (the "2006 EEA Regs"). At that time that regulation 6 provided, so far as is material, as follows (I have highlighted in bold the most relevant parts of the regulation).

> "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) Subject to regulations 7A(4) and 7B(4), **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.....
(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...."

The arguments of the parties in summary

4. The argument made by CPAG on behalf of the appellant is that which appears in regulation 6(2)(b)(ii) above (i.e. the satisfaction of 'conditions A and B') and in regulation 6(7) is contrary to EU law and thus unlawful. All that is required for a person who had been employed to retain his or her 'worker' status is being in duly recorded involuntary employment and registration as a jobseeker at the relevant

employment office. This, so the argument proceeds, is **all** that EU law under Article 7(3)(b) of Directive 2004/38/EC requires and to go further than this is therefore to breach EU law. In particular it is said that the requirement for "compelling evidence" of having a "genuine chance of being engaged" in employment after a period of six months has no analogue in EU law and is invalid as a matter of EU law. The purpose of Article 7(3)(b) is to determine whether a person remains 'involuntarily unemployed' and is no part of determining that issue, as under EU law, that the person has a genuine chance of actually being engaged in employment. Properly understood, a test of being 'engaged in employment' is reserved under EU law for 'pure workseekers' (primarily those who have never worked in the Member State concerned and are there simply looking for work).

5. As an alternative, it is argued that if such a requirement is in accordance with EU law, it can only be determined by the relevant employment office in the Member State.

6. The relevant parts of Directive 2004/38/EC ("the Directive") provide as follows (again I have highlighted in bold the most relevant parts).

> "
>
> Article 1
> Subject
>
> This Directive lays down:
> (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
> (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
> (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.
>
> Article 2
> Definitions
>
> For the purposes of this Directive:
> 1) "Union citizen" means any person having the nationality of a Member State;....
>
> 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3
Beneficiaries
1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.....

Article 6
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. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7
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) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).
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 job-seeker 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. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

7. The Secretary of State's response to this argument is two-fold. First, she argues that the above argument is irrelevant because she says the appellant had in fact already lost her 'worker' status. She was thus a 'jobseeker' under regulation 6(1)(a) of the 2006 EEA Regs at the relevant date and the 'genuine chance of being engaged test' has been held to apply lawfully to such a category of person in *SSWP v MB and others* (JSA) [2016] UKUT 372 (AAC); [2017] AACR 6.

8. The Secretary of State's second argument is that, even if the appellant had retained her 'worker' status at the relevant time, regulation 6(2)(b)(ii) of the 2006 EEA Regs, and conditions A and B to which it refers, were lawful aspects of identifying whether a person was involuntary unemployed and/or registered as a jobseeker at an employment office. She relied in particular under this second argument on the decision of the Court of Appeal in *SSWP v Elmi* [2011] EWCA Civ 1403; [2012] AACR 22 and the decision of the Court of Justice of the European Union (CJEU) in *Prefeta v SSWP* (Case C-618/16) [2019] 1 WLR 2040. The Secretary of State argued that properly understood the requirement on a claimant of having compelling evidence showing a genuine chance of being engaged in employment was a lawful expression of the EU law test that to retain worker status a person has to show that they are able and available <u>to enter the labour market within a reasonable period of time</u>. If a claimant has a very small change of getting a job then they cannot satisfy this EU law test.

9. As for the appellant's alternative argument that the genuine chance of being engaged in employment test can only be conducted by the Member State's employment office, and so not a housing benefit authority, the Secretary of State argued that nothing in the Directive ascribed decision-making to any particular body within the Member State. Further, as a matter of domestic law it was for the housing benefit authority to determine this test as part of deciding whether a claimant has a right reside and thus is entitled to housing benefit: *EP v SSWP* (JSA) [2016] UKUT 0445 (AAC).

10. In order to understand the context for these arguments I need first to say a little bit about the factual background to this appeal. Before doing that, however, I should note one issue which this appeal does not address

An issue not to be addressed – non-DWP decision makers

11. This issue is one I addressed in directions on this and a number of other appeals. Those directions raised the issue of the basis on which a non-DWP public authority should properly approach the exercise of its decision-making function on the 'genuine chance of being engaged test' (assuming it holds such a function) in a context where no such adjudication had yet been carried out by the Secretary of State's decision maker within the DWP[1]. I had commented in this appeal that, if it was still operative, the Secretary of State's guidance to housing benefit authorities in HB Circular A6/2014 might have suggested that for housing benefit authorities at least the information provided to them by the DWP about a claimant's 'right to reside' status beyond that claimant having such status as a "jobseeker" (under regulation 6(1)(a) of the 2006 EEA Regs) may have been limited or non-existent in

[1] I should add that, absent the alternative argument made by appellant about who can make the decision under Article 7(3)(b) (and (c)) of the Directive, it was agreed before me that as a matter of domestic statutory law the decision-making function on the 'genuine chance of being engaged test' rests with the local authority on a claim for housing benefit (or with HMRC for tax credits and child benefit) and not the Secretary of State for Work and Pensions: see further *EP v SSWP* (JSA) [2016] UKUT 445 (AAC), particularly at paragraph [25].

circumstances where the 'genuine chance of being engaged test' was yet to be applied by the Secretary of State.

12. The concern I had was how, and on what evidence, a housing benefit authority (or HMRC) may have determined whether a claimant had a 'genuine chance of being engaged in employment' (assuming no other right to reside arguments are in issue) where the Secretary of State has not made such a decision. If the DWP through the Jobcentre had not yet gathered and interrogated the evidence about the jobseeker's allowance claimant's 'genuine chance of being engaged in employment', I was troubled as to basis (evidential and otherwise) on which a housing benefit authority (or HRMC) would obtain and interrogate such evidence.

13. However, this issue does not now arise for decision on this appeal given the altogether different arguments on which the appellant is relying. (It does not arise on the HMRC appeal that 'travelled with' this appeal either (CF/66/2017), for a different set of reasons.)

Relevant factual background

14. The appellant in this appeal is a Polish national who came to the UK in October 2008. She worked between 8 October 2012 and 13 March 2014. On ceasing work, she made a successful claim for income-based jobseeker's allowance (JSA) which commenced on 17 March 2014. That award ended on 17 April 2014 because a decision maker for the Secretary of State for Work and Pensions decided that the appellant had failed to attend at the Jobcentre. The appellant then reclaimed JSA, which was awarded from 14 May 2014. That award also ceased, on this occasion on 6 August 2014 on the basis that the appellant had failed to 'sign on' at the Jobcentre. She reclaimed JSA on 2 October 2014 and that benefit was awarded to her from 2 October 2014 in a decision dated 14 October 2014. That last award of JSA was made to the appellant by the Secretary of State on the basis that she held the status of a 'jobseeker' only: per regulation 6(1)(a) of the 2006 EEA Regs. On 8 December 2014 the Secretary of State decided that the

appellant was no longer entitled to JSA because she did not satisfy the 'genuine chance of being engaged test'.

15. I pause to note here that the Secretary of State bases her first argument, that the appellant had lost her retained status of 'worker' by the time of the 2 October JSA claim, on the gaps in the appellant's entitlement to JSA in 2014 before the 2 October 2014 claim.

16. The appellant appealed the 14 October 2014 JSA decision to the First-tier Tribunal but did not appeal the 8 December 2014 decision. On 6 May 2016 the First-tier Tribunal allowed her appeal against the decision awarding her JSA from 2 October 2014. The First-tier Tribunal's Decision Notice gave the following short form reasons for why it had allowed the appeal.

> "1. The decision of 14/10/14 is revised as I allow the appeal.
>
> 2. I am satisfied having heard the evidence that the appellant had a retained right to reside as she had "retained worker" status at the time of the decision under appeal.
>
> 3. I accept that in failing to attend two appointments at the Jobcentre on 17/04/14 and 20/8/14[2] the appellant had good cause for so doing.
>
> 4. I believe I have the jurisdiction to make any decision which Decision Maker could or should have made in respect of those non-attendances by virtue of CDLA/5196/2001.
>
> 5. Whilst it follows from my decision that the appellant retained her "retained worker" status rather than that of a jobseeker, I am satisfied that the appellant only retains such a status for a period of six months from the time that she actually finished work on 13/03/2014.
>
> 6. I find I am bound by domestic legislation rather than any provisions of the European Treaty referred to by the appellant's [then] representative. I will, of course, grant leave for that matter to be determined by the Upper Tribunal if either party were to request the same."

[2] It is not clear what the basis for this second date is (repeated by the First-tier Tribunal in paragraph 8 of its statement of reasons below) as the date in the papers (see pages 145 and 148) appears to have been accepted as being 6 August 2014. It would seem it was provided to the tribunal by a presenting officer for one of the respondents at the hearing on 4 May 2016.

17. The Secretary of State then sought a statement of reasons for the decision. Before setting out the relevant parts of those reasons, I first need to say a little about the history of the appellant's entitlement to housing benefit as it is that benefit with which this appeal is directly concerned.

18. The appellant had an award of housing benefit in place from Bury Metropolitan Borough Council ("Bury") in early September 2014. Payment of housing benefit was suspended from 8 September 2014 because of an alleged change in the appellant's income and Bury required her to complete a new claim form for that benefit, which she did. On 3 October 2014 Bury notified the appellant (a) that her award of housing benefit had been 'cancelled' from 11 August 2014 because she no longer received JSA, and (b) she had as a result been overpaid housing benefit for four weeks from 11 August 2014 to 7 September 2014. The appellant made a further claim for housing benefit to Bury on 9 October 2014. In a decision dated 22 October 2014 Bury decided that the appellant was not entitled to housing benefit on this claim. This was on the basis that she only had entitlement to housing benefit as a 'jobseeker' and as such did not have a qualifying right to reside in the UK for housing benefit purposes: per regulation 10(3B)(l) of the Housing Benefit Regulations 2006.

19. This decision was appealed by the appellant and the appeal was heard and decided by the First-tier Tribunal at the same time as the JSA appeal above. I am prepared to proceed, for the reasons given on behalf of appellant in paragraphs 26 to 30 of CPAG's submissions of 14 February 2019, on the basis that the appeal was also against the 3 October 2014 decision.

20. The First-tier Tribunal's Decision Notice on the housing benefit appeal was in the following terms:

> "1. The decision of 22/10/14 is revised as I allow this appeal.

> 2. Having heard the evidence I am satisfied that the appellant had "retained worker" status for the purposes of any claim for Housing Benefit, but only up to and including 13/09/14. This decision should be read in conjunction with the decision of even date in respect of the appellant's Jobseeker's Allowance claim."

21. Pursuant to the Secretary of State's request mentioned above, the First-tier Tribunal then provided a statement of reasons that covered its decision on both appeals. This said the following of relevance.

> "1. The appellant had appealed against two decisions that she was not in an exempt group prescribed in regulation 85(A) of the Jobseekers Allowance Regulations 1996 and the decision refusing to award Housing Benefit on the basis that the appellant had been classed as an EEA jobseeker. The second decision under appeal was dependent upon the outcome of the appeal against the first decision and accordingly this statement is in respect of both decisions.
>
> 2. The appellant came to the UK on the 07/10/2008 together with her mother and siblings. She is a single parent with one dependent child and was employed between the 08/10/12 and 13/3/14. She ultimately claimed benefit as a "work seeker".
>
> 3. Having been classified as a "jobseeker" for the period from the 02/10/2014 to the 07/12/2014 the appellant appealed that decision because she needed to have "retained worker" status to secure entitlement to housing benefit.....
>
> 8. The appellant's representative also argued that it was open to me to consider whether the appellant had good cause for failing to attend to sign on, on the 17/04/2014 and the 20/08/2014. The appellant said she was unwell at the time of the first interview and had received a phone call to tell her that her second interview appointment had been changed. She had not appealed either decision because she had not realised the implications of the same. I felt on the brief facts available to me, having formed the view that the appellant was a credible witness, that the appellant had established good cause for her failure to attend both interviews and to find otherwise in the circumstances would have been disproportionate. The Presenting Officer [for the Secretary of State] confirmed that the appellant would not be notified that one of the consequences of an adverse decision closing her claim was that her immigration status could have been adversely affected.
>
> 9. Having considered the facts as outlined in paragraph 8 the decisions closing the appellant's claim to JSA may well have been defective. That being the case and applying the principles set out in CDLA/5196/2001 it seems to me that that it was open to me to make any decision in respect of continuing entitlement to JSA that the Decision Maker could or should have made. In those circumstances I felt that I could consider good cause even though the appellant would have been out of time for appealing against the decisions in question.

> 10. Regulation 6 of the [2006 EEA Regs] sets out the conditions in which an EEA national has a right to reside in the UK as a worker, retained worker or jobseeker. When the appellant registered as a jobseeker at the time of her original [JSA] claim on the 17/03/14 her right to reside at that point was as a "retained worker". When she subsequently failed to attend an interview at the jobcentre her claim was closed with effect from 17/04/14. The effect of this was that the appellant lost her "retained worker" status which she had previously gained.
>
> 11. Amendments to the [2006 EEA Regs] provide that since 01/01/2014 the rights of an EEA national to reside in the UK as a jobseeker or as a person who retains worker status is time-limited unless the person can provide compelling evidence that he is continuing to seek work and has a genuine prospect of being engaged.
>
> 12. In this case that meant that the appellant could only retain "worker status" for a maximum period of six months from the date upon which she first became involuntarily unemployed. As the appellant finished work on the 13/3/2014 the six month period will run from that date.
>
> 13. There was no "compelling evidence" before me that the appellant had a genuine prospect of engagement at the end of the relevant period of six months.....
>
> 14. Unfortunately this decision not assist the appellant. Even though I was prepared to accept the good cause for her failure to attend the job centre on the facts available to me, I have no jurisdiction to extend the period of retained "worker status" beyond six months after 13/03/14."[3]

22. The appellant then applied for leave to appeal against both decisions. The judge who decided the appeals then purported to refer the appeals to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007. I dealt with why he was wrong to do so in the reasons for my decision on the JSA appeal and for completeness set those reasons out here.

> "17.....I need to address one other matter. This concerns the First-tier Tribunal's purported attempt to refer the appeal to the Upper Tribunal pursuant to section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007. I have dealt with the wrong use of this statutory power by the First-tier Tribunal in an earlier decision: *LM –v- HMRC* (CHB) [2016] UKUT 0389 (AAC). Regrettably, a similar wrong use of the

[3] Quite how on this reasoning, with its seeming conclusion that the appellant ceased to have any qualifying right to reside after 13 September 2014, the First-tier Tribunal considered it was **allowing** the appellant's appeals is probably best left to posterity.

referral power applies in this case. Most relevantly and fundamentally, the referral power under section 9(5)(b) can apply only if the First-tier Tribunal on review has set aside its decision for error of law; and the error of law here has to be a plain one – *R(SB) –v- FtT (Review)* [2010] UKUT 160 (AAC); [2010] AACR 41 – and not just grounds which are "arguable". If the grounds are (only) arguable then: (i) that may provide a basis for the First-tier Tribunal giving permission to appeal to the Upper Tribunal, but (ii) without more, it is difficult to see on what basis arguable error of law grounds provide for set aside on review for an established error law in the First-tier Tribunal's decision.

18. The evidence of what the District Tribunal Judge, who also decided the appeal, did in and post his decision, does not support his in any proper sense or lawful sense having carried out a review and then referral to the Upper Tribunal under section 9 of the Tribunals, Courts and Enforcement Act 2007. In the Decision Notice he said "I will of course grant leave for that matter to be further determined by the Upper Tribunal if either party were to request the same" (my underlining added for emphasis). The statement of reasons concludes similarly "I will grant leave to either party if I receive a request for Leave to Appeal this decision…". Such an application for leave to appeal was made by the appellant. The District Tribunal Judge then used a pro forma "referral" decision notice. After reciting that the representative had applied for permission to appeal, the typed pro forma continued "The decision is reviewed because it contains an error of law, namely" to which the DTJ added in handwriting "the grounds of appeal are arguable in that I have not addressed all the issues raised in my Statement of Reasons". The typed pro forma then concluded with "The matter shall be referred to the Upper Tribunal in accordance with section 9(5)(b) of the Act".

19. I limit myself to two observations about this decision notice. First, nowhere in it does the DTJ set aside his own decision, even though such a step is a legal condition precedent to his operating the referral power. Second, grounds of appeal which are merely arguable cannot provide a basis for set aside.

20. For these reasons, I reject the notion that this is a referral case. That does not matter because by my setting aside and then re-deciding the first instance appeal I am in substance doing that which I could have done on referral. However even though the result may be the same it is important that the route by which it is achieved is the correct and lawful one under the Tribunals, Courts and Enforcement Act 2007.

21. It is to be hoped after this case and the *LM* case referred to above that such wrong use of the referral power is not repeated. Certainly, I find it difficult to conceive on what proper basis the typed pro forma "referral" decision notice described above should continue sensibly to be used."

23. My decision on the JSA appeal had been formally to allow the appellant's appeal to the Upper Tribunal, though that did not benefit her in substance. This was because I concluded that the First-tier Tribunal ought to have struck out the JSA appeal as having no reasonable prospects of success because it was against a decision awarding the appellant JSA and she could have obtained no more favourable decision on the appeal. As I explained:

> "3.....this appeal could never lead to a more favourable decision for the appellant. The reason for this is that the decision of the Secretary of State which the appellant sought to appeal to the First-tier Tribunal was that she **did** have a right to reside (as a jobseeker) and **was** habitually resident in the UK at the time of her claim for JSA on 2 October 2014 and the 14 October 2014 decision on that claim, and so was not disentitled to JSA on either basis. In short, on those issues, and it is only those issues that have been raised in these proceedings, the decision was entirely to the appellant's benefit and therefore no useful purpose could be achieved by the appellant seeking to appeal the decision. Indeed, no other grounds of disentitlement arose and it was common ground that following the 14 October 2014 decision she was awarded JSA at the (correct) rate of £72.40 per week with effect from 2 October 2014.
>
> 4. The concern the appellant understandably had (but in terms of legal jurisdiction such concern was irrelevant) was that it was indicated in the reasons for the 2 October 2014 decision that a review date was to be set for 8 December 2014 to identify whether the appellant had "genuine prospects of work" and so could remain entitled to JSA on that later date. That review occurred and the appellant was found not to satisfy the "genuine prospects of work" test on 8 December 2014, and so was found not to be entitled to JSA from 7 December 2014. However, it was no part of the 2 October 2014 decision that entitlement to JSA would end on 7 December 2014. Moreover, whatever steps were intended to be taken after 14 October 2014 were, by virtue of section 12(8)(b) of the Social Security Act 1998 ("SSA"), factually and legally irrelevant to the correctness of the 2 October 2014 decision. A related concern which the appellant had was that she considered the reason why she had been found to have a right to reside (as a jobseeker) was wrong and should instead have been based on her having a permanent right of residence.
>
> 5. What ought the First-tier Tribunal have done when faced with an appeal against a decision which was in the claimant's favour but where the claimant through her representative wished to raise extensive arguments against what was in terms of the 2 October 2014 decision merely an indication that a negative decision might later be made under the "genuine prospects of work" test and where the reason for that decision if wrong could be challenged on an appeal against any later adverse decision depending on the same reasoning?

6. In my judgment there was only one possible result. That was that the appeal should have been struck out on the basis that it had no reasonable prospects of success (per rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008) as the most the appellant could achieve by the appeal was the same decision, albeit perhaps by different reasoning which would be more favourable in the longer term (i.e. if entitlement was founded on the appellant having a permanent right of residence).

7. It might be thought odd at first sight that an appeal can be made against a decision which is entirely in a claimant's favour. However, section 12(1)(a) of the SSA vests the right of appeal against any decision of the Secretary of State subject to certain exceptions, but none of those exceptions (such as in Schedule 2 to the SSA) apply to stop an appeal against a favourable decision. The rationale for not having such a prohibition is likely to be that identifying whether a decision is entirely in a claimant's favour may not be clear cut in many cases and these nuances are thus better dealt with on an individual, case-by-case basis under rule 8(3)(c) rather than by some inflexible exclusionary rule.

8. A good example of the need for a nuanced rule was given by Mr Boote in argument, albeit he was seeking to rely on it in support of his argument that the appeal against the Secretary of State's decision of 14 October 2014 should not be struck out. He argued that the reason for the award of JSA, that the appellant was a jobseeker, was part of the decision and so stood open to challenge in the same way as an employment and support allowance ("ESA") decision that a claimant is entitled to ESA with (only) the work-related activity component. This is a false analogy. The sole issue with which the decision in issue on this appeal was concerned was whether the appellant had a nil entitlement to JSA because she did not have a right to reside. The reason why she had a right to reside was wholly irrelevant to that decision because the different bases upon which a right to reside may have accrued to her could not affect the entitlement decision. On the other hand, with ESA the decision that a person (only) has limited capability for work is also an affirmative decision that the person does not have limited capability for work-related activity: *KC and MC –v- SSWP (ESA)* [2017] UKUT 0094 at paragraph [14].

9. Sticking with ESA, the better analogy in my judgment is with a person who is found to be entitled to ESA with the 'support' component. Whether that is because the person satisfied Schedule 3 or regulation 35(2) to the Employment and Support Allowance Regulations 2008 (i.e. the reason why the person is in the support group) is simply irrelevant to whether the outcome decision that the person is entitled to ESA with the support component is correct.

10. A further problem with Mr Boote's argument is that the right of appeal to the First-tier Tribunal under section 12 of the SSA is concerned with the <u>decision</u> and not the reasons for it. The perhaps somewhat looser view taken of the relationship between the decision and reasons for it by the Court of Session in *SSWP –v- Robertson* [2015] CSIH 82 on an appeal from an Upper Tribunal decision arguably has no application in a context where (i) the Secretary of

> State's decision has no binding effect beyond the decision, and (ii) an appeal against a later decision can allow argument to be made as to the proper basis for satisfaction of the right to reside test."

24. So it is that the housing benefit appeal remained to be decided. Given the nature of the issue I raised about non-DWP decision makers, and subsequently the argument made by CPAG on behalf of the appellant, the Secretary of State was joined to this appeal as second respondent. It is she who has made the running in opposing CPAG's arguments for the appellant, and it is to those arguments that I now turn.

Remedies sought

25. Before doing so I should briefly set out that the Secretary of State argues that the First-tier Tribunal erred in law in its application of the above test to the evidence before it and seeks the remittal of the appeal to a new First-tier Tribunal for that test to be applied correctly. The appellant through CPAG argues that the test can have no application to her circumstances as a person seeking to retain her prior held 'worker' status. She argues that I should set aside the decision of the First-tier Tribunal for error of law because it did apply the test to her, and redecide the decisions under appeal in her favour because, in the absence of the 'genuine chance of being engaged test', she satisfied at all material times the requirements in Article 7(3)(b) of the Directive.

The lawfulness of regulation 6(2)(b)(ii) of the 2006 EEA Regs

26. I recognise that if CPAG are correct in the argument they make for the appellant then it is an argument that would seem to hold good in respect of the equivalent provision in regulation 6(2)(b)(ii) of the Immigration (European Economic Area) Regulations 2016 (the "2016 EEA Regs"). It would seem also to apply to render unlawful and of no legal effect regulations 6(2)(c)(ii) of the 2006 EEA Regs and the 2016 EEA Regs. However, the first hurdle the appellant has to get over is whether she had retained worker status at the time of her 2 October

2014 claim for JSA. If she did not then it is accepted that she only had the status of a 'jobseeker' and, following the *SSWP v MB* case referred to above, the 'genuine chance of being engaged test' lawfully applied to her.

Retention of 'worker' status

27. In my judgment, this point should be decided in favour of the appellant. I am satisfied, therefore, that the appellant had retained her status as a 'worker' at the time she made her 2 October 2014 claim for JSA. I say this for the following, inter-locking reasons.

28. First, although the reasoning may otherwise have been lacking, the plain import of paragraph eight of the First-tier Tribunal's statement of reasons was that, having heard from the appellant at the hearing before him, the First-tier Tribunal judge was satisfied on the evidence that the appellant had good cause for failing to attend at the Jobcentre on both dates in 2014. Whether the analysis here is in terms of my redeciding the appeal having set aside the First-tier Tribunal's decision[4], or my deciding the factual condition precedent to the main argument about the lawfulness under EU law of the 'genuine chance of being engaged test', it is open to me to adopt those findings of good cause made by the First-tier Tribunal: see *Sarkar –v-SSHD* [2014] EWCA Civ 195. Any error of law the First-tier Tribunal made about the above test does not necessarily vitiate its findings on retention of prior held worker status and failure to attend, particularly where those findings have support elsewhere.

29. The notional effect of the claimant having good cause for not 'signing-on' was that the requirement to attend/register on future dates at the Jobcentre lapsed or was waived by the Secretary of State: see *CJSA/1080/2002* and *GM v SSWP* (JSA) [2014] UKUT 0057 (AAC). Put another way, but for the excused failures to sign-on, the appellant would have been able to continue to register as a jobseeker at the

[4] As set out in paragraph 24 above, both parties agree (though for differing reasons) that the First-tier Tribunal erred in law and that its decision should be set aside.

Jobcentre. And put yet another way, there is nothing to show that in substance the appellant had withdrawn from the labour market.

30. The above approach is supported by consideration of the authorities that deal with whether there was "undue delay" in a person registering or reregistering as a jobseeker at the unemployment office. Delays of five and six weeks were accepted as not being 'undue' on the facts in, respectively, *SSWP v MM* (IS) [2015] UKUT 128 (AAC) and *FT v (1) LB Islington and (2) SSWP* (HB) [2015] UKUT 121 (AAC). The gaps in this case were not dissimilar to those gaps, though the second one is of about eight weeks.

31. The First-tier Tribunal had before it a somewhat confused picture as to the reasons for the failures of the appellant to attend. In respect of the first gap, the appellant's case in a letter dated 21 May 2014 was that she had not signed on in April 2014 because she had received a phone call from the Jobcentre on the day telling her the appointment was cancelled. Her case was that it then took some time for her to be notified in writing that her JSA had stopped, whereupon she reclaimed JSA in mid-May 2014. As for the second gap, at one point her case on this was that she had been advised by the Jobcentre to claim income support instead (because she was a single parent), that claim was then refused and it was this which led her to reclaim JSA on 2 October 2014. It is of note in any event on that JSA claim that it was accepted by the Secretary of State in a letter dated 14 October 2014, when the appellant had sought backdating of her 2 October 2014 JSA claim to 15 September 2014, that she satisfied the "labour market conditions" for JSA from 15 September 2014. Reverting to the alleged income support claim, it would appear from a DWP letter of 4 March 2015 to the appellant's then representative, which has not since been controverted, that the only record the DWP then held of a claim for income support from the appellant was one made at the very end of December 2014. It would seem, therefore, that the 'diversion' to claim income support may not have occurred in August 2014.

32. As far as I can discern from the records of proceedings (there was an earlier adjourned hearing at which evidence was taken), the appellant's case may have been that both 'appointments' had been cancelled by the Jobcentre, though the record of the hearing on 4 May 2016 seems to record some evidence from her that she was too ill to attend the first 'signing-on' date in April 2014.

33. Despite this somewhat confused picture, the First-tier Tribunal came to a clear view that the appellant had good cause for not attending on both occasions. Given this and (a) the First-tier Tribunal's view about the appellant being a credible witness of truth (which is supported by the housing benefit authority – see below), (b) the Secretary of State's acceptance that the appellant met the JSA 'labour market' conditions from 15 September 2014, (c) the appellant's evidence to me, which I accept, that she had enrolled herself on a NVQ course from 1 June 2014 to improve her employability as a nursey care assistant, and (d) her consistent evidence of looking for work in and around June 2014, it is my judgment, on the balance of probabilities, that the appellant had not left the labour market during the two relevant periods in 2014 when she was not 'signing on'. In this context I therefore do not consider that the two delays in her re-registering with the Jobcentre were 'undue'.

34. The second inter-locking reason, which is perhaps of even greater significance, is that the actual decision maker in this case – that is, the housing benefit authority – accepted at the first hearing of this appeal before me "the verbal account that [the appellant] had given to the First-tier Tribunal and [as a result] accepts that she retained worker status throughout the period [up to 2 October 2014]". This supports the analysis I have undertaken above. Moreover, this was a clear concession as to the relevant facts by the decision-making authority and one which it has not withdrawn. The effect of that concession is to remove as between the primary decision maker and the appellant her status at the time she made the 2 October 2014 claim for JSA as an issue arising on the appeal between them: per paragraph 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. Although I exercise

an inquisitorial jurisdiction, in a context where there is now no issue between the principal parties to this appeal on this point, and where the Secretary of State has expressed no interest on matters of fact, in my judgment it would be unfair to proceed on a basis contrary to this concession (see *Glatt v Sinclair* [2013] EWCA Civ 241; [2013] 1 WLR 3602), particularly where it was not obviously wrongly made.

35. The Secretary of State in the end did not press her view on the 'gaps' with any great force and was content to leave this issue to be decided by me on the facts. Having decided this preliminary point in the claimant's favour, I move to address the arguments as to the legality in EU law of the domestic law test of having a genuine chance of being engaged in employment.

Legality of "genuine chance of being engaged" test

36. In my judgment, the appellant's argument here also prevails. As a matter of EU law, when it is properly understood, having a genuine chance of being engaged in employment is no part of the test for retained worker status found in Article 7(1)(b) of the Directive.

37. The appellant's argument focused on the "genuine chance of being engaged [in employment]" part of 'Condition B' and in regulation 6(7) of the 2006 EEA Regs. The requirement for "compelling evidence", or more accurately what that may lawfully require, has been addressed in *MB* at paragraphs [23] and [54]-[58], albeit in the context of (mere) 'jobseekers' under regulation 6(1)(a) of the 2006 EEA Regs.

38. The crux of the appellant's argument, which I accept, is that EU law draws a distinction between mere workseekers (i.e. what are termed 'jobseekers' under regulation 6(1)(a) of the 2006 EEA Regs), primarily those who have never worked in the Member State in which they are seeking work, and those who have worked in the Member State in question (here the UK) and have become 'workers' by so doing and who

then retain that worker status by remaining in the labour market and looking for work.

39. For the latter group it is said that their status as persons who have worked in the Member State is recognised by the differing periods for which that status may be retained depending on the length of time they previously worked in the Member State. A person who has worked for less than a year retains the status of worker for no less than six months under Article 7(3)(c) of the Directive, provided he or she is involuntarily unemployed and has registered as a jobseeker with the relevant employment office. The person who has worked for more than one year has no temporal limitation on the period when his or her worker status may be maintained under Article 7(3)(b), provided he or she is involuntarily unemployed and has registered as a jobseeker with the relevant employment office. The retention for this second category of person is indefinite. But beyond this, those who have been employed for more than a year are entitled under EU law to retain worker status for as long as they remain involuntarily employed in the labour market and registered as a jobseeker at the employment office. It is no part of meeting those requirements, however, that such a person must show they have a genuine chance of being engaged in employment. By contrast, the test of a genuine chance of being engaged in employment is an appropriate means of identifying whether mere workseekers continue to have a connection with the Member State's employment or labour markets.

40. On the point about retention being indefinite for those who have worked for more than one year and who satisfy the other conditions in Article 7(3)(b) of the Directive, but also on the conditions attached to the exercise of this right, the following was said in *SSWP v MM* (IS) [2015] UKUT 128 (AAC):

> "53. Under Article 7(3)(b) of the Citizenship Directive, there is no indication of the duration for which a person continues to be treated as a worker. My interpretation is that the period of retention of the status is open-ended though not forever more. I justify this in part by

> the provision in Article 7(3)(c) of the Citizenship Directive which limits the period of retention of the status to "no less than six months" where the period of employment is less than a year.
> 54. The claimant retained her worker status in April 2011 and claimed income support in March 2012. That is a period of less than a year. If a person falling within Article 7(3)(b) is able to retain the status of worker for no less than six months, then it seems to me to be eminently reasonable to conclude that there is no difficulty in a person retaining worker status under Article 7(3)(b) of the Citizenship Directive for a year <u>in the absence of some intervening event which indicates that the person has withdrawn from the labour market entirely</u>." (my underlining added for emphasis)

41. The words I have underlined in *MM* encapsulate the correct approach to be taken to retained worker status for those who have worked for more than a year in the Member State. That status is retained indefinitely unless and until the evidence shows the person has withdrawn from the labour market entirely. It is through registration with the employment office that the connection with the labour market is shown, through being available and actively <u>seeking</u> work, but it is not a necessary part of showing that connection that a person must have a genuine chance of being employed. As it was put by CPAG in its skeleton argument for the appellant:

> "The fact that a person has found and performed a job for in excess of a year in the absence of an intervening event and is now registered as a jobseeker is clearly thought sufficient [under Article 7(3)(b) of the Directive] to establish the ongoing real connection to the labour market of the host [Member State]."

42. The issue of whether retention of worker status for those who have worked for more than a year may be indefinite has been addressed more recently by the CJEU in *Tarola v Minister of Social Protection* (Case C-483/17), though there the focus was on Article 7(3)(c) of the Directive. The judgment in *Tarola* also addresses what is required of the person who has worked in order to retain that status of worker. It says the following of relevance to this appeal (I have underlined so as to emphasise particular points in the judgment concerning the two issues I have just identified).

"22. By its question, the referring court asks, in essence, whether Article 7(1)(a) and (3)(c) of Directive 2004/38 must be interpreted as meaning that a national of a Member State who, having exercised his right to free movement, worked in another Member State for a period of two weeks, otherwise than under a fixed-term contract, before becoming involuntarily unemployed, retains the status of worker for no less than a further six months for the purposes of those provisions and, as a result, is entitled to receive social assistance payments or, as the case may be, social security benefits on the same basis as if he were a national of the host Member State.

23 It should be borne in mind that the purpose of Directive 2004/38, as may be seen from recitals 1 to 4 thereof, is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right (see, to that effect, judgments of 25 July 2008, *Metock and Others*, C‑ 127/08, EU:C:2008:449, paragraph 82, and of 5 June 2018, *Coman and Others*, C‑ 673/16, EU:C:2018:385, paragraph 18 and the case-law cited).

24 Article 7(1)(a) of Directive 2004/38 provides, thus, that all Union citizens have the right of residence for a period of longer than three months on the territory of a Member State other than that of which they are a national, provided that they have the status of worker or self-employed person in the host Member State.....

26 Article 7(3) of that directive provides that, for the purposes of Article 7(1)(a) of the directive, a Union citizen who is no longer a worker or self-employed person in the host Member State will nevertheless retain the status of worker or self-employed person in certain circumstances, which the Court has held are not listed exhaustively in paragraph 3 (judgment of 19 June 2014, *Saint Prix*, C‑ 507/12, EU:C:2014:2007, paragraph 38), including when he becomes involuntarily unemployed.

27 Article 7(3)(b) of Directive 2004/38 provides in that regard that a Union citizen who 'is in duly recorded involuntary unemployment after having been employed for more than one year' in the host Member State retains the status of worker, <u>without any condition as to duration</u>, provided that he has registered as a jobseeker with the relevant employment office.....

40. The Court has held, in that regard, that the possibility for an EU citizen who has temporarily ceased to pursue an activity as an employed or self-employed person of retaining his status of worker on the basis of Article 7(3) of Directive 2004/38, as well as the corresponding right of residence under Article 7(1) of the directive, <u>is based on the assumption that the citizen is available and able to re-enter the labour market of the host Member State within a reasonable period</u> (judgment of 13 September 2018, *Prefeta*, C‑ 618/16, EU:C:2018:719, paragraph 37 and the case-law cited).....

44. Thus, a Union citizen who has pursued an activity in an employed or self-employed capacity in the host Member State retains his status of worker indefinitely (i) if he is temporarily unable to work as the result of an illness or accident, in accordance with Article 7(3)(a) of Directive 2004/38, (ii) if he worked in an employed or self-employed capacity in the host Member State for more than one year before becoming involuntarily unemployed, in accordance with Article 7(3)(b) of that directive (judgment of 20 December 2017, *Gusa*, C‑ 442/16, EU:C:2017:1004, paragraphs 29 to 46), or (iii) if he has embarked on vocational training, in accordance with Article 7(3)(d) of the directive.

45 By contrast, a Union citizen who has pursued an activity in an employed or self-employed capacity in the host Member State for a period of less than one year retains his status of worker only for a period of time which that Member State may determine, provided it is no less than six months…….

49 Such an interpretation is consistent with the principal objective pursued by Directive 2004/38, which is, as has been recalled in paragraph 23 of the present judgment, to strengthen the right of free movement and residence of all Union citizens, and with the objective specifically pursued by Article 7(3) thereof, which is to safeguard, by the retention of the status of worker, the right of residence of persons who have ceased their occupational activity because of an absence of work due to circumstances beyond their control (see, to that effect, judgments of 15 September 2015, *Alimanovic*, C‑ 67/14, EU:C:2015:597, paragraph 60; of 25 February 2016, García-Nieto and Others, C‑ 299/14, EU:C:2016:114, paragraph 47; and of 20 December 2017, *Gusa*, C‑ 442/16, EU:C:2017:1004, paragraph 42).

50 That interpretation cannot, moreover, be considered to undermine the achievement of one of the other objectives pursued by Directive 2004/38, namely the objective of striking a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State are not placed under an unreasonable burden, on the other.

51 It is true that recital 10 of Directive 2004/38 indicates that the directive seeks to prevent persons exercising their right of residence from becoming an unreasonable burden on the social assistance system of the host Member State during an initial period of residence.

52 However, it should be noted in that regard that the retention of the status of worker pursuant to Article 7(3)(c) of Directive 2004/38 presupposes, as has been stated in paragraphs 24 to 29 above, first, that the citizen concerned, before his period of involuntary unemployment, did actually have the status of worker within the meaning of that directive and, second, that he has registered as a jobseeker with the relevant employment office. In addition, the retention of that status during a period of involuntary unemployment may be limited to six months by the Member State concerned……

54 It follows that Article 7(1) and (3)(c) of Directive 2004/38 must be interpreted as meaning that a Union citizen, in a situation such as

> that of the appellant in the main proceedings, who acquired the status of worker within the meaning of Article 7(1)(a) of that directive in a Member State, on account of the activity he pursued there for a period of two weeks before becoming involuntarily unemployed, retains his status of worker for a period of no less than six months, provided that he has registered as a jobseeker with the relevant employment office."

43. *Tarola* would appear to settle that the period of retention of worker status may be indefinite under Article 7(3)(b), provided the other conditions in that provision are met. However, it also provides material support for the appellant's argument. I say this because (i) it states that the retention of worker status is "without any condition as to duration" as long as (but without more than this) the person is involuntarily unemployed and has registered as a jobseeker with the employment office, (ii) the CJEU did not ally its views as to retention with the 'genuine chance of being engaged in employment' line of authority founded on *Antonissen* (see below) in respect of pure workseekers ('jobseekers' under regulation 6(1)(a) of the 2006 EEA Regs), and (iii) for the reasons given below, the underlying assumption of being "available and able to re-enter the labour market" is not to be equated with, nor does it require, that the person concerned has a genuine chance of being engaged in employment.

44. *Tarola* bases its decision in part on a stated assumption underlying Article 7(3) of the Directive that the person who has become involuntarily unemployed "is available and able to re-enter the labour market….within a reasonable period". In so doing the CJEU in *Tarola* relied on *Prefeta*. This is a decision on which the Secretary of State relies as supporting the "genuine chance of being engaged in employment" test, and so I turn now to consider *Prefeta* and to explain why I do not consider it has the consequence for which the Secretary of state contends. (I have again underlined the most relevant passages.)

45. I start first with the Opinion of Advocate General Wathelet in *Prefeta*, where the following of relevance to this appeal was said (the words in italics are those emphasised by the Advocate General):

> "60. In the judgment of 21 February 2013, *N v Styrelsen for Videregaende Uddannelser og Uddannelsesstotte* (C‑ 46/12) EU:C:2013:97, paragraph 47, the Court ruled that:
>
> > 'the definition of the concept of "worker" within the meaning of Article 45 TFEU expresses the requirement, which is inherent in the very principle of the free movement of workers, that the advantages conferred by EU law under that freedom may be relied on only by people genuinely pursuing or *genuinely wishing to pursue employment activities*'. (Emphasis added.)
>
> 61. Although Article 7 of Directive 2004/38 is entitled 'Right of residence for more than three months', paragraph 3 thereof provides a non-exhaustive (see *St Prix v Secretary for State for Work and Pensions (AIRE Centre intervening)* (Case C-507/12), paras 31 and 38 and my opinion *Gusa v Minister for Social Protection* (Case C-442/16), point 72) list of the circumstances in which an EU citizen who no longer pursues an activity as an employed or self-employed person for reasons beyond his control, such as involuntary unemployment and temporary incapacity for work as a result of illness or accident, is to retain, in addition to the right of residence to which he is entitled, the status of worker, with a view, *in particular, to his being able to take up a new activity as an employed or self-employed person*: see my opinion in *Gusa's* case, point 77.
>
> 62. The possibility for an EU citizen to retain the status of worker is therefore related to his demonstrating that he is available or able to pursue a professional activity and thus to re-enter the labour market within a reasonable period of time. I note that Article 7(3)(a) of Directive 2004/38 covers only *temporary* incapacity to work, and that Article 7(3)(b) and (c) of that directive requires that a worker be registered as a jobseeker with the *relevant employment office*.
>
> 63. In the light of the foregoing, I take the view that Article 7(3) of Directive 2004/38 covers situations in which European citizens' reintegration into the labour market is possible, meaning that that provision cannot be dissociated from Articles 1 to 6 of Regulation No 1612/68 which regulate eligibility for work."

46. It is in my view worth commenting on a number of aspects of the Advocate General's approach in *Prefeta*, particularly because the court itself relied on it (see paragraph 37 of its judgment below), but also because the appellant and Secretary of State both sought to rely on it, though to differing ends. The "therefore" in paragraph 62 of the

Opinion shows that that paragraph has to be read with the paragraphs that come immediately before it. So doing places the necessary emphasis back on whether the person who is involuntarily unemployed is "genuinely wishing to pursue employment activities", and on the person who is no longer able to work through no fault of their own (because of involuntary unemployment or temporary incapacity for work) retaining their worker status *with a view to* being "able to take up a new activity as an employed or self-employed person". None of this, however, in my judgment is mandating a test of having a genuine chance of being engaged in employment. The test, or assumption, is about ability and availability rather than the prospect of in fact being employed.

47. Moreover, it is in this context of people who are no longer in work through no fault of their own, that the Opinion then moves to speak of the EU citizen "demonstrating that he is available or able to pursue a professional activity and thus to re-enter the labour market within a reasonable period of time". The 'reasonable period of time' here, in my judgment, is relating back to the person being involuntarily unemployed or temporarily incapable of work, rather than any temporal qualification on employment in fact being obtained. In both cases, the retention of worker status is purposed on the person being able to take up employment or self-employment and not on any estimate of the actuality of his doing so in fact. If that purpose continues to be met and, as I read the Opinion, the person is thus *able or available* to re-enter the labour market within a reasonable period of time, then, as *Tarola* confirms, the worker status can be retained indefinitely under Article 7(3)(b). I cannot in these circumstances see the basis or scope in EU law for an additional test under Article 7(3)(b) of the Directive based on being the chance of actually being engaged in employment.

48. Being "available" to re-enter the labour market means having no impediment to working (such as immigration status or being in full-time education). And being "able" to re-enter the labour market means that the person is capable of performing work. It is a step beyond this to say the person will, or has a chance, of actually securing employment. Had that been the view of the Advocate General in *Prefeta* he would have said "with a view to his taking up" in paragraph 61 of the Opinion and not "with a view to his being able to take up". The Advocate General's Opinion in *Prefeta* does not therefore support the Secretary of State's case

49. Nor, in my judgment, does the court's judgment. The CJEU in its judgment in *Prefeta* said this of relevance:

> "37……it is important to point out, as observed by the Advocate General in point 62 of his Opinion, that the possibility for an EU citizen who has temporarily ceased to pursue an activity as an employed or self-employed person of retaining his status of worker on the basis of Article 7(3) of Directive 2004/38, as well as the corresponding right of residence under Article 7(1) of the directive, is based on the assumption that the citizen is available and able to re-enter the labour market of the host Member State within a reasonable period (see, by analogy, judgment of 19 June 2014, *Saint Prix*, C‑ 507/12, EU:C:2014:2007, paragraphs 38 to 41).
>
> 38 Article 7(3)(a) of Directive 2004/38 concerns the situation of an EU citizen who is temporarily unable to work as the result of an illness or accident, which implies that that citizen will be able to pursue an activity as an employed or self-employed person again once that temporary inability to work has come to an end. Moreover, Article 7(3)(b) and (c) of that directive requires economically inactive EU citizens to register as jobseekers with the relevant employment office and Article 7(3)(d) of the directive requires such persons, under specific conditions, to embark on vocational training.
>
> 39 Article 7(3) of Directive 2004/38 therefore covers situations in which the EU citizen's re-entry on the labour market of the host Member State is foreseeable within a reasonable period. Consequently, the application of that provision may not be dissociated from that of the provisions of Regulation No 492/2011 governing the eligibility for employment of a Member State national in another Member State, that is, Articles 1 to 6 of that regulation."

50. I will come on shortly to explain why I consider that the analogy the CJEU drew in *Prefeta* with the situation obtaining in *Saint-Prix* was not entirely apt or at best was an indirect one, and one which potentially obscures an important and material difference between those who are out of the labour market entirely and those who are seeking to retain their prior held employment in that market by seeking to be employed again in that market.

51. However, even ignoring that difference, it is important to appreciate the context within which, as the Advocate General did, the CJEU in *Prefeta* founded the stated assumption. This is because the protections afforded by Article 7(3) are not intended to be permanent (see paragraph 38 of the judgment). It is in that context that the court then speaks (in paragraph 39) in terms of Article 7(3) covering situations in which the person's re-entry to the labour market "is foreseeable within a reasonable period of time". That is as much true of the person who is temporarily incapable of work as it is of the person who is 'involuntarily unemployed'. It is important to appreciate that being 'involuntarily unemployed' is not to do with the basis on which the employment was left (voluntarily or otherwise) but whether the person is still in the labour market: see, inter alia, *R(IS)12/98*. Put somewhat crudely, 'involuntarily unemployed' is describing a person who does not want to be unemployed, who has not withdrawn from the labour market and is available and able to work and is seeking employment.

52. I recognise that the language used by the CJEU in paragraph 39 of *Prefeta* on one analysis may seem to provide support for the Secretary of State's case. I say this because the language of "re-entry on the labour market" in the context of those who are involuntarily unemployed might suggest that actually getting a job is foreseeable within a reasonable period of time. Those who are 'involuntarily unemployed', as I have just explained by reference to *R(IS)12/98*, have not withdrawn from the labour market and are still, to that extent, in

that market, and so, beyond getting a job, it does make sense to speak in terms of them coming back into the labour market.

53. However, it is important to bear in the mind the issue that was before the court in *Prefeta*. That was, in effect, whether the derogation in respect of 'Accession State' nationals from EU law provisions allowing for access to employment could be dissociated from the protections afforded by Article 7(3) of the Directive. Both the Advocate General and the court in *Prefeta* held that there could be no such dissociation because Article 7(3) covered the possibility or foreseeability of employment being accessed within a reasonable period, and hence Article 7(3) was linked to the EU law provisions allowing for access to employment from which the Accession State nationals had been excluded. It is in this context that the language of 're-entering the labour market' in *Prefeta* must be read. But once that context is understood, I do not read *Prefeta* as laying down any wider or more general principle of law that Article 7(3)(b) of the Directive requires or mandates a person having a chance of actually being engaged in employment in order for the indefinite protections under it to apply.

54. It was sufficient in the context of the question under issue in *Prefeta* that Article 7(3) may cover 'accessing employment' or 'getting a job', so as to provide the link with the provisions from which the Accession State nationals were excluded, but I do not consider it requires establishing a chance of being engaged in employment in order for Article 7(3)9b) to be met. Such a reading would be contrary to *Tarola*. Moreover, it would have the consequence of making the test little different to that for pure workseekers under *Antonissen*. I do not consider that to be justified as it would have the result of effectively removing the protections granted under Article 7(3)(b) to those who have worked and make them equivalent to mere workseekers.

55. The language of "genuine chance of being engaged" was coined in *R v Immigration Appeal Tribunal ex parte Antonissen* (Case C-292/89) [1991] ECR I-00745. One of the questions referred by the High Court

was "whether it was contrary to Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to look for employment there may be required to leave the territory of that State (subject to appeal) if after six months he has failed to find employment". This question was therefore about what I have termed pure workseekers (that is, a 'jobseeker' under regulation 6(1)(a) of the 2006 EEA Regs).

56. The court dealt with the question as follows.

> 9.... it has been argued that, according to the strict wording of Article 48 of the Treaty, Community nationals are given the right of move freely within the territory of the Member States for the purpose only of accepting offers of employment actually made (Article 48(3)(a) and (b)) whilst the right to stay in the territory of a Member State is stated to be for the purpose of employment (Article 48(3)(c)).
>
> 10 Such an interpretation would exclude the right of a national of a Member State to move freely and to stay in the territory of the other Member States in order to seek employment there, and cannot be upheld.
>
> 11 Indeed, as the Court has consistently held, freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation (see, in particular, the judgment of 3 June 1986 in Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 13).
>
> 12 Moreover, a strict interpretation of Article 48(3) would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective.
>
> 13 It follows that Article 48(3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.
>
> 14 Moreover, that interpretation of the Treaty corresponds to that of the Community legislature, as appears from the provisions adopted in order to implement the principle of free movement, in particular Articles 1 and 5 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), which presuppose that Community nationals are entitled to move in order to look for employment, and hence to stay, in another Member State.

> 15 It must therefore be ascertained whether the right, under Article 48 and the provisions of Regulation No 1612/68 (cited above), to stay in a Member State for the purposes of seeking employment can be subjected to a temporal limitation.
>
> 16 In that regard, it must be pointed out in the first place that the effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged……
>
> 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 as 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 jeopardize 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." (my underling added for emphasis)

57. As I have said, *Antonissen* was about pure workseekers. *Antonissen* is direct authority for having a test after six months of continuing to seek employment and of having "genuine chances of being engaged in employment" for pure workseekers. I accept the appellant's argument that the "genuine chance of being engaged" test is a necessary anti-avoidance measure to ensure Members States can easily and properly discern whether a mere workseeker should continue to be treated as a 'worker'. However, *Antonissen* is not an authority in respect of those who have moved to and worked in a Member State for over year who then become involuntarily unemployed. Nor do I see, unless it is obvious from the terms of Article 7(3)(b) (which it is not for the reasons I have given above), why the *Antonissen* test of 'genuine chances of being engaged [in employment]' should equally apply to those who have worked for a year and have the protected status provided for by Article 7(3)(b). To do so, it seems to me, robs that protection of

meaningful force and dissolves the distinction between mere worker seekers and those who have worked. As CPAG put it on behalf of the appellant:

> "..there is good reason why the test for whether someone is a [mere workseeker] is different and more stringent than the test for whether they retain worker status whilst involuntarily unemployed – the former worker, absent some change in position, has demonstrated their employability."

58. Nor does *Elmi* help the Secretary of State. That case concerned a French national who came to the UK but was made redundant after six months of work. The issue was whether she was covered by Article 7(3)(c) of the Directive when she made a claim for income support and in so doing ticked a box saying she was seeking work. It was common ground that the claimant met the first part of Article 7(3)(c) about being in duly recorded involuntary employment. However, the Secretary of State argued that the second condition of "registered as a jobseeker with the relevant employment office" could only be met by the claimant making a claim for jobseeker's allowance because it was only through that route that the continuing efforts of the claimant to obtain work could be monitored. That argument was rejected by the Court of Appeal: ticking the box saying the claimant was seeking work was sufficient to satisfy the condition of registration as a jobseeker with the relevant employment office. In the course of so doing the Court of Appeal rejected (at paragraph [15]) an argument that Article 7(3)(c) involved the test as set out in *Antonissen*. The relevant parts of the judgment in *Elmi* are as follows:

> "12. On behalf of the [claimant] Mr Simon Cox accepts that the reference in Article 7(3)(c) to registration as a job seeker enables a Member State to flesh out the concept of registration so as to oblige a claimant in relation to a particular social benefit to comply with reasonable continuing requirements which would enable the Member State to monitor his conscientiousness as a seeker of employment, such as the ones which undoubtedly exist in relation to JSA. However, in this jurisdiction there are no comparable express requirements in relation to Income Support. Mr Cox submits that it is not permissible to construe the concept of "registration" in Article 7(3)(c) as embracing a requirement of EU law obliging a claimant to subject

> himself to continuing monitoring and that the failure to legislate for such a regime in relation to Income Support means that the registration requirement in Article 7(3)(c) was satisfied by ticking the box to confirm that the respondent was seeking employment.
>
> 13. It seems to me that this submission is consistent with the ordinary and natural meaning of the word "register". One of its meanings ascribed in the Oxford English Dictionary is:
>
> > "to enter oneself or have one's name recorded in a list of people [frequently as a legal requirement] as being of a specified category."
>
> At first sight, this is what the [claimant] did when she ticked the affirmative box and handed the form to a DWP official.
>
> 14. Mr Coppel's attempt to give "registration" an enhanced and more prescriptive meaning, such as would exclude Income Support from Article 7(3)(c), is founded on the legislative history of the Citizen's Directive, and one of its predecessors, Directive 68/360/EEC, Article 7 of which provided:
>
> > "A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office." (emphasis added)
>
> 15. This provision was repealed by the [Directive]. The submission on behalf of the Secretary of State is that the text of Article 7(3)(c) of the Citizen's Directive should be seen as a deliberate departure from the "duly confirmed" test to a more demanding one based on *Antonissen*. Whilst it was a deliberate change, I do not feel able to view it in the way suggested on behalf of the Secretary of State. The two Directives are qualitatively different. Directive 68/360 was directed at confirmation of involuntary unemployment by the competent employment office, ie in a UK case, the relevant Jobcentre. Article 7(3)(c) of the Citizen's Directive is concerned with "duly recorded involuntary unemployment" and the requirement that the claimant "has registered as a jobseeker with the relative employment office".

Elmi cannot therefore support an argument that the tests of being “in duly recorded involuntarily unemployment” and being “registered as a job-seeker at the with the relevant employment office” include or are to equated with the *Antonissen* test of have a ‘genuine chance of being engaged [in employment’.

59. I turn then to the authority of *Saint Prix v DWP* (Case C-507-12) [2014] All ER (EC) 987 as it was referred to by both the Advocate General and the CJEU in *Prefeta*, though they seemingly did so on different bases.

The issue in *Saint Prix* in essence concerned whether a woman who gave up her employment in the latter stages of her pregnancy could retain worker status under Article 7(3). In holding that she could the CJEU said:

> "35. The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (*Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 26 and the case-law cited).
>
> 36 Consequently, and for the purposes of the present case, it must be pointed out that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, inter alia, *Antonissen*, C-292/89, EU:C:1991:80, paragraph 13).
>
> 37 It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, Lair, 39/86, EU:C:1988:322, paragraphs 31 and 36).
>
> 38 In those circumstances, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.
>
> 39 In the present case, it is clear from the order for reference, a finding not contested by the parties in the main proceeding, that Ms Saint Prix was employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity.
>
> 40 The fact that such constraints require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of 'worker' within the meaning Article 45 TFEU.
>
> 41 The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period

> after confinement (see, by analogy, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 50).

60. I have underlined the words in paragraph [41] of the judgment because they may suggest an argument, which was perhaps relied on by the court in *Prefeta* (at para. [37]), that being engaged in employment within a reasonable period is a necessary aspect of the protection afforded by Article 7(3)(b) and (c). The flaw with such an argument, in my judgment, is the failure to recognise that the situation addressed in *Saint Prix* concerned someone who was not available on the employment market and so during that period had effectively withdrawn from the labour market. It may be that in such a situation a test of actually returning to work, or getting a new job, within a reasonable period of time is thought necessary to demonstrate there was a continuing link with the employment market during the period of non-availability (though I note that in *SSWP v SFF and others* [2015] UKUT 502 (AAC); [2016] AACR 16, it was accepted (at para. [39]) that a return to work-seeking would suffice). However, absent cases involving, in effect, enforced removals from the labour market, I can identify nothing in *Saint Prix* (or the other authorities to which it links) which supports a thesis that Article 7(3)(b) requires that those seeking to benefit from it must demonstrate a genuine chance of being engaged in employment.

61. The cases of *Orfanopoulos and Oliveri* (Cases C-482/01 and C-493/01) [2005] 1 C.M.L.R. 18 (referred to in paragraph [41] of *Saint Prix*) was concerned with the rights of prisoners under EU law. The CJEU said the following of relevance in these cases.

> "50.....in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually finds another job within a reasonable time after his release (see, to that effect, Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 40)."

Again, in the unusual circumstances of that case the CJEU fashioned a retrospective retention of membership of the labour market whilst the person was in prison, provided he actually found a job within a reasonable time after his release from custody. I do not see it as providing any proper jurisprudential basis for the more general result for which the Secretary of State contends.

62. The decision in *Orfanopoulos and Oliveri* itself relied on the case of *Nazli*. It is, however, in my judgment instructive to note that the case in Nazli concerned the interpretation of, inter alia, "Article 6(1) of Decision No 1/80, of 19 September 1980, on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey". That Article 6(1) provided as follows:

> "Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:
>
> - shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
>
> - shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;
>
> - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment."

63. It can be seen immediately from the terms of Article 6(1) that it is concerned not with being available and able to work but entitlement to take employment that is offered or available. The relevant legal test is therefore focused on taking up employment. It is in that context that the court said the following.

> "37. It is true that a Turkish national is not entitled to remain in the host Member State if he has reached retirement age or has suffered an industrial accident as a result of which he is totally and permanently unfit for further employment. In cases of that kind, the person concerned must be regarded as having left the labour force of that Member State for good, so that the right of residence which he claims has no link even with future employment (see Case C-434/93 *Bozkurt v Staatssecretaris van Justitie* [1995] ECR I-1475, paragraphs 39 and 40).
>
> 38. The Court has held, however, that Article 6 of Decision No 1/80 relates not only to the situation where a Turkish worker is in active employment but also to the situation where he is incapacitated for work, provided that his incapacity is only temporary, that is to say it does not affect his fitness to continue exercising his right to employment granted by that decision, albeit after a temporary break in his employment relationship (see Bozkurt, cited above, paragraphs 38 and 39).
>
> 39. Thus, while the right of residence as a corollary of the right to join the labour force and to be actually employed is not unlimited, the rights granted by Article 6(1) of Decision No 1/80 are necessarily lost only if the worker's inactive status is permanent.
>
> 40. In particular, while legal employment for an uninterrupted period of one, three or four years respectively is in principle required in order for the rights provided for in the three indents of Article 6(1) to be established, the third indent of that provision implies the right for the worker concerned, who is already duly integrated into the labour force of the host Member State, to take a temporary break from work. Such a worker thus continues to be duly registered as belonging to the labour force of that State provided that he actually finds another job within a reasonable period, and therefore enjoys a right to reside there during that period.
>
> 41. It follows from the foregoing considerations that the temporary break in the period of active employment of a Turkish worker such as Mr Nazli while he is detained pending trial is not in itself capable of causing him to forfeit the rights which he derives directly from the third indent of Article 6(1) of Decision No 1/80, provided that he finds a new job within a reasonable period after his release.
>
> 42. A person's temporary absence as a result of detention of that kind does not in any way call into question his subsequent participation in working life, as is moreover demonstrated by the main proceedings, where Mr Nazli looked for work and indeed found a steady job after his release."

64. In my judgment it is instructive that the language of 'finding another job within a reasonable period of time' that runs from *Nazli* through *Orfanopoulos and Oliveri* to *Saint Prix*, and perhaps even to *Prefeta*, was founded originally on a Community instrument that was expressly

about access by Turkish nationals to employment that was available or even offered. This may well explain the reasoning of finding another job in a reasonable period in paragraph [40] of *Nazli*, but it less obviously applies by analogy where the Community law right (as set out under Article 7(3)(b) of the Directive) is not expressed in terms of taking up employment that is offered.

65. Be that as it may, for present purposes I can find nothing in any of these authorities which provides a general rule of EU law that means satisfaction of Article 7(3)(b) requires that the person must have a genuine chance of being engaged in employment.

66. I should add that argument was put before me concerning the terms of Article 7(2) of Directive 68/360 and whether the Directive, in replacing the terms of that article, was less generous if the Secretary of State's reading of Article 7(3)(b) of the Directive was correct. I did not find those arguments materially assisted and so have not referred to them in this decision. I also had arguments as to the correct reading of regulation 10(3B)(l) of the Housing Benefit Regulations 2006 but I do not see that that issue has any remaining application given my judgment on the main argument.

67. For the reasons given above, this appeal is allowed. I set aside the decision of the First-tier Tribunal as being in material error of law for applying 'conditions A and B' under regulation 6(2)(b)(ii) of the 2006 EEA Regs and regulation 6(7) of the same regulations, and remake its decision in the terms set out at the beginning of this decision.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 14th February 2020