IN THE UPPER TRIBUNAL **Case No.** CJSA/2755/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Robin C A White

Decision: The decision of the tribunal of 23 June 2015 is erroneous in law. I set it aside. I remake the decision of the tribunal.

My substituted decision: On making his claim for a jobseeker's allowance on 26 February 2015, the appellant is *not* to be treated as a person from abroad.

REASONS FOR DECISION

The issue in this appeal

1. The issue in this appeal is the proper interpretation of regulation 85A(1) and (2) of the Jobseeker's Allowance Regulations 1996 as amended, which provides as follows:

> **Special cases: supplemental—persons from abroad**
>
> **85A..**—(1) "Person from abroad" means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless—
>
> (a) subject to the exceptions in paragraph (2A), the claimant has been living in any of those places for the past three months; and
>
> (b) the claimant has a right to reside in any of those places, other than a right to reside which falls within paragraph (3).

2. Neither paragraph (2A) nor paragraph (3) are relevant to the circumstances in which this appeal arises.

3. The issue concerns the meaning of the words "living in" in regulation 85A(2)(a).

Background and context

4. The appellant, who was born on 30 January 1973, is a British national. He has lived all his life in the United Kingdom and has a degree in English.

5. The appellant decided to spend time travelling using his savings. He left the United Kingdom in November 2013 and moved around countries in South East Asia.[1] He has not worked in any of the countries he visited and only ever had a visitor's visa for entry into those countries: Cambodia, Indonesia, Malaysia and Thailand. He stayed in hotels and hostels while abroad.

6. The appellant returned to the United Kingdom in February 2015.

7. On his return to the United Kingdom he stayed at his mother's house, which is where he had been living prior to his departure on his travels.

8. The appellant retained his bank accounts in the United Kingdom, and has maintained registration with the same GP since 2007.

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[1] The appellant had previously been away travelling for about a year before returning to the United Kingdom in mid-2013 for four months because his father was ill.

9. On 26 February 2015, the appellant claimed jobseeker's allowance, and on 5 March 2015 completed the habitual residence test questionnaire.

10. On 23 March 2015 a decision maker decided that the appellant was to be treated as a person from abroad because he had not been living in the United Kingdom for three months prior to his date of claim.

11. The appellant requested a reconsideration of the decision on the grounds that he had remained habitually resident in the United Kingdom during his prolonged travels abroad. He was represented at this time and his representative wrote:

> … we believe [the appellant] remained ordinarily resident in the UK throughout the period he was travelling abroad. He could not be said at any time to be living anywhere other than the UK, as he had not established residence elsewhere.

12. The decision was reconsidered on 9 April 2015 but was not changed. The decision maker accepted that the appellant had a right of abode in the United Kingdom as a British national, and noted "you may be factually habitually resident here, but if you have not been living in the UK or Common Travel Area for three months, your claim will fail."

13. On 20 April 2015 the appellant appealed against the decision dated 23 March 2015 on the grounds that his time travelling abroad "was a temporary absence." He said he had not been living anywhere else when travelling and had retained all his links to his residence in the United Kingdom.

14. The appeal came before the tribunal on 23 June 2015. The appellant attended with his representative. The Secretary of State was not represented. There is a helpful record of the proceedings. The outcome of the appeal was that the decision of 23 March 2015 was confirmed. A statement of reasons was subsequently sent to the parties on 22 July 2015.

15. The appeal now comes before me with the permission of a judge of the First-tier Tribunal.

The grounds of appeal

16. The grounds of appeal are that the tribunal has misdirected itself on the proper meaning of the words "living in".

Did the tribunal err in law?

17. The determination of this appeal has been delayed because its consideration was at one point stayed pending a decision of the Court of Justice, which it was thought might assist, but in the event it did not.

18. However, in the meantime, Commissioner Stockman in Northern Ireland issued a decision on the interpretation of the same words in the legislation applicable in Northern Ireland.[2] He considered both the DMG Memo on the interpretation of the words, as well as some unpublished guidance which had been issued to decision makers in Northern Ireland.

19. Commissioner Stockman noted the underlying policy basis for the amendments to the regulations which introduced the "living in" provision, which was to protect the benefit system and to discourage people who do not have any established connection with the United Kingdom, or any prospect of work from migrating to

[2] *AEKM v Department for Communities (JSA)* [2016] NICom 80.

the United Kingdom, and seeking to claim benefit immediately. The change was said to provide a tighter definition of what constituted habitual residence and to simplify the application of the requirement.

20. Commissioner Stockman observed:

> 37. It appears to me from the Explanatory Memorandum and the manner of making the amendment to the JSA Regulations that the policy change was primarily addressed to new migrants who were EEA nationals. Persons who were already habitually resident, albeit temporarily absent, and who had [an] established connection with the UK were not a particular target of the legislation. Nevertheless, it appears to me that such persons can fall within its scope.

21. Commissioner Stockman decided that interpreting and applying the words "living in" required a broad approach to be taken which would involve consideration of factors such as the duration of past residence, previous enrolment in education, a history of work, family connections, established ownership or tenure of property, and the compatibility of any temporary absence with continued "living in" the Common Travel Area: see paragraph 46 of the decision.

22. The parties were invited to make submissions in the light of the decision of Commissioner Stockman in *AEKM.*

23. The representative of the Secretary of State summarised what she saw as the principal propositions relevant to the domestic law dimension in *AEKM* as follows:

    i. The term "living in" should be interpreted broadly and is more than a test of physical presence. If it were just a test of physical presence, no absences could be permitted and that clearly was not the case. The duration of the absence was a relevant consideration but not the only factor to be taken into account (paragraphs 43-44)

    ii. Several factors had to be considered when applying the test, including whether or not the claimant had lived in the Common Travel Area previously, and if they had maintained accommodation during an absence. Ultimately the ordinary meaning of "living in" was *"connected to"* the question of where someone has their home (paragraphs 46-48).

24. The Secretary of State's representative say that she is in broad agreement with the propositions quoted above.

25. However, the representative of the Secretary of State makes the following observations on the circumstances of the present case:

    (a) it is necessary to determine whether the appellant was factually habitually resident in the United Kingdom in the light of his prolonged travels abroad, and his earlier travels abroad;

    (b) the duration of the absence was significantly longer than in the circumstances before Commissioner Stockman in *AEKM* and the reasons for departing were less compelling;[3] and

    (c) an absence of 15 months could not be regarded as temporary.

26. The appellant's representative appears also to accept the propositions I have cited in paragraph 23 above, but continues to argue that the absence, although for an extended period, was temporary.

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[3] In *AEKM* the claimant had travelled to New Zealand and spent two months there in order to care for her brother who had contracted meningitis.

27. I am in complete agreement with the analysis in the *AEKM* case, and I adopt it as my own in this case. Although the appeal before me does not have any European dimension, I am also in agreement with Commissioner Stockman's analysis of what he calls the "EU law dimension".

28. The First-tier Tribunal has plainly erred in law in the light of the views taken in *AEKM.* The tribunal did not, of course, have the benefit of the careful argument and analysis that led to the decision in *AEKM.* The tribunal has erred in law because it said that the words "living in" must mean being physically present. I set aside the decision of the tribunal as erroneous in law.

29. How should I now dispose of the appeal? The appellant's representative says I should remake the decision of the tribunal, since the facts are not in dispute. The representative of the Secretary of State says that I should remit the appeal with guidance to the First-tier Tribunal based on *AEKM* as to the correct approach to be followed.

30. I have decided that it is not necessary to remit this appeal back to the First-tier Tribunal. The facts are not in dispute. They have been set out with admirable clarity by the First-tier Tribunal such that I can adopt their findings of fact as my own.

31. The appellant was plainly habitually resident in the United Kingdom when he departed in November 2013. The representative of the Secretary of State calls this into question in the light of his earlier travels abroad. However, his return to the United Kingdom when his father became ill seems to me to support his close family ties and his links with the United Kingdom, rather than his travels calling that connection into question.

32. The question is then whether his absence for 15 months can be regarded as temporary so that he continued to be living in the United Kingdom for the purposes of regulation 85A(2)(a) of the Jobseeker's Allowance Regulations 1996, as amended.

33. The distinction between something being temporary and permanent is a flexible one to be determined in the light of all the relevant factors in the context in which the distinction arises.

34. In this case, the appellant had lived all his life in the United Kingdom and had been educated here to degree level. He lived in his mother's home. His bank account was here. He had been registered with the same GP since 2007. His travels were just that: an extended holiday which was expected to come to an end when he would return to the United Kingdom.

35. Duration is relevant but not determinative. The break in the earlier trip indicates that interests of family were given priority over holidaying. The appellant was never more than a traveller or tourist in the countries he visited.

36. The representative of the Secretary of State argues that an absence of "15 months is not temporary" but there is no further reasoning for that proposition.

37. My conclusion is that there is nothing inherent in an absence of 15 months that precludes it from being a temporary absence. There was always an intention to return. In so far as it is relevant, the break in the earlier travels when the appellant's father became ill demonstrates the appellant's priorities.

38. My conclusion is that the appellant was "living in" the United Kingdom for the requisite three months prior to his claim for jobseeker's allowance made on 26 February 2015 and he is not therefore to be treated as a person from abroad.

39. My formal decision in substitution for that of the tribunal is set out at the top of this decision.

Signed on the original
on 24 May 2017

Robin C A White
Judge of the Upper Tribunal