DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 31 May 2016 at Wolverhampton under reference SC053/16/00758) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide whether the claimant had a right to reside at the time of his claim for an employment and support allowance.

REASONS FOR DECISION

1. The claimant is Italian. He last came to the United Kingdom on 27 March 2015; his wife and two children arrived at the around that time. He started work in a fish and chip shop on 4 May 2015; one of his children entered education the following day. He left that employment on 21 August 2015. In his letter of appeal to the First-tier Tribunal, he attributed this to his health condition. In his evidence to the tribunal, he said that he had cramps in his hands and his employer was shouting at him. It is not impossible that those two are linked; the employer may have shouted at him because he was having problems as a result of cramp in his hands. He only made a claim for an employment and support allowance on 20 October 2015, which was refused on the ground that he did not have a right to reside in the United Kingdom.

2. What did the claimant do between leaving his job and making his claim? His GP's surgery wrote that in that period he had had five appointments. I do not know what the appointments were for. They were certainly not all serious; one was for a flu injection. Hospital documents show that he attended for a bone marrow aspiration and biopsy on 15 September 2015. This may be related to his cancer diagnosis of chronic myeloid leukaemia. He also attended the dermatology clinic on 6 October 2015. In his appeal, the claimant explained that he was not familiar with the United Kingdom benefits system and only made his claim after receiving advice from a Macmillan Welfare Rights Adviser.

3. Regulation 70 of the Employment and Support Allowance Regulations 2008 deals with persons from abroad. These are persons who are not habitually

resident in the United Kingdom. A person who does not have a right to reside here on one of the basis covered by the regulation is treated as not being habitually resident with the result that they are not entitled to an employment and support allowance. Regulation 70(4)(za) provides that a person is not a person from abroad who is a qualified person for the purposes of regulation 6 of the Immigration (European Economic Area) Regulations 2006 as a worker. There has been no dispute that the claimant acquired worker status as a result of his employment in the chip shop. The issue is whether he had lost it by the time he made his claim for employment and support allowance.

4. Regulation 6(2)(a) provides that a person 'shall not cease to be treated as a worker … if he is temporarily unable to work as the result of an illness'. As I said in *CIS/4304/2007*:

> 35. The second question is: by what test or standard is the claimant's ability to work to be determined? Regulation 6(2)(a) implements Article 7(3)(a) of the Directive and must be interpreted and applied accordingly. Inability to work is a concept used in EC legislation and, in order to ensure uniformity in that legislation between Member States, it must be interpreted in the same way throughout the EU. It cannot, therefore, depend upon the particular domestic legislation governing incapacity benefits. The language of the legislation has to be interpreted and applied as it stands. The context provides some guidance. It ensures continuity of worker status for someone who would otherwise be employed or looking for work. That employment or search for employment provides the touchstone against which the claimant's disabilities must be judged. The question is: can she fairly be described as unable to do the work she was doing or the sort of work that she was seeking?

In other words, the claimant's ability to work has to be decided as a purely factual matter without regard to the particular tests applied by domestic legislation, in this case the employment and support allowance legislation. This is subject to two qualifications.

5. First, there is a difference between the test that has to be applied and the evidence that is relevant to the test. Accordingly, the way that the employment and support allowance legislation would apply to the claimant may be relevant as *evidence* of inability to work.

6. Second, there is a difference between the basis of the right to reside and the entitlement to benefit. If the claimant wishes to claim for a period before the date when he submitted his claim, his *entitlement* during that period will be determined by the domestic legislation.

7. It follows that the existence of a gap between ceasing work and claiming employment and support allowance is not necessarily fatal to the claimant retaining worker status. Judge White considered the effect of delay between ceasing work and making a claim in *Secretary of State for Work and Pensions v MK* [2013] UKUT 163 (AAC). In that case, the claim was for jobseeker's allowance; in this case, the claim was for employment and support allowance. That difference does not affect the principle that a delay is not necessarily fatal

to a claimant retaining worker status. If anything, the case is stronger for a claimant who delays in making a claim for employment and support allowance rather than for jobseeker's allowance. In the latter case, the issue arises whether the claimant remained in the job market. That issue does not arise for the purposes of employment and support allowance. Regulation 6(2)(a) does not impose any requirement that the claimant must claim benefit. It applies if the facts are such that the claimant has an illness and is, as a result, temporarily unable to work.

8. The tribunal dealt with the claimant's worker status and whether he retained it. However, it did not investigate the issue of his ability to work following his decision to leave his employment. It is not surprising, therefore, that its findings of fact do not go beyond rehearsing what he said in evidence. It did not discuss the possibility of the claimant's treatment by his employer being linked to his problems with his hands and it seems to have assumed that this could not be linked to his cancer. The tribunal treated the case as one in which the claimant had left his employment voluntarily. The position was not that simple legally and might be more complicated than that factually.

9. That is sufficient to explain how the tribunal went wrong in law and why a rehearing is required.

10. Depending on the evidence and the tribunal's decision on regulation 6(2)(a), it may be necessary to consider regulation 15A of the 2006 Regulations. This deals with the right to reside that is conferred on a child's primary carer in order to give effect to the child's right to education. Neither the Secretary of State nor the claimant's representative wanted an oral hearing to discuss these issues. In those circumstances, I prefer not to embark on an analysis in order to give directions to the tribunal on the law that may or may not apply depending on the evidence at the rehearing. I will limit myself to pointing out a couple of the problems that the tribunal may have to consider.

- The regulation defines 'primary carer' in terms of responsibility for the child's care. Does that mean the person who actually delivers the care or the person who has the responsibility to ensure that it is delivered? Does responsibility mean legal or practical responsibility? The answers may be require an analysis of the caselaw of the Court of Justice of the European Union from which the primary carer's right to reside derives.
- The tribunal accepted and repeated the argument put by the Secretary of State that the claimant could not benefit from regulation 15A as his wife had not exhausted all her rights to reside. I do not understand what that means, how it is derived from the language of the legislation, or how it is consistent with the caselaw of the Court of Justice of the European Union that the regulation was designed (I assume) to codify.

Signed on original
on 23 October 2017

Edward Jacobs
Upper Tribunal Judge