

Appeal No. CIS/1798/2018

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal given at Fox Court on 2 February 2017 under reference SC242/16/04103 involved the making of an error on a point of law.

That decision is set aside and re-made in the following terms:

- 1. The appeal is allowed.**
- 2. The decision of the Secretary of State issued on 20 August 2015 is set aside.**
- 3. As at 20 August 2015, and by virtue of regulation 6 of the Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004/1232), the claimant was not subject to the right to reside test established with effect from 1 May 2004 by regulation 21(3)(g)—and subsequently continued with effect from 30 April 2006 by regulations 21(3) and 21AA—of the Income Support (General) Regulations 1987.**
- 4. Therefore, the claimant has not at any time relevant to these proceedings been a person from abroad with an applicable amount of nil.**
- 5. The Secretary of State is directed to reconsider the claimant's claim on that basis and to notify him of his entitlement, if any, to income support from and including 14 August 2015.**
- 6. If there is a dispute as to any aspect of the Secretary of State's decision under paragraph 5 above, then either party may refer that dispute back to the Upper Tribunal and I, or if I am not available, another Judge of the Upper Tribunal will decide it.**

REASONS FOR DECISION

Introduction

1 The claimant appeals with the permission of Upper Tribunal Judge Jacobs against the above decision of the First-tier Tribunal.

2 That Tribunal confirmed an earlier decision made on behalf of the Secretary of State on 20 August 2015 that the claimant was not entitled to income support from and including 14 August 2015 because he did not have a right to reside in the United Kingdom and was therefore a “person from abroad” who, in the technical terms used by the income support scheme, had an applicable amount of nil.

3 Both parties are now agreed that that decision was wrong in law and that the correct decision is as stated in bold type above. Whether or not the claimant had a right to reside was not relevant to his entitlement to income support because the right to reside test did not apply to him.

Where the First-tier Tribunal went wrong

4 The First-tier Tribunal did not exercise its enabling and inquisitorial jurisdiction and therefore failed to consider all the relevant facts. Had the judge made the enquiries that I have since put in hand, he would have discovered that the claimant had been continuously entitled to a means-tested benefit since 30 April 2004, the day before the right to reside test was introduced by the Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004/1232). He therefore had the benefit of the transitional protection established by regulation 6 of those Regulations.

5 So far as is relevant to this appeal, that regulation is in the following terms:

“Transitional arrangements and savings

6.—(1) Paragraph (2) shall apply where a person—

(a) is entitled to a specified benefit in respect of a period which includes 30th April 2004;

...

(2) Where this paragraph applies—

...

(b) regulation 21 of the Income Support [(General)] Regulations [1987] shall continue to have effect as if regulation 3 had not been made;

...

(3) The provisions saved by paragraph (2) shall continue to have effect until the date on which entitlement to a specified benefit for the purposes of paragraph (1) ceases, and if there is more than one such specified benefit, until the last date on which such entitlement ceases.

(4) In this regulation—

...

(b) “specified benefit” means income support, housing benefit, Council tax benefit, jobseeker’s allowance, state pension credit and employment and support allowance.”

Regulation 3, to which reference is made in paragraph (2) is the provision that introduced the right to reside test into the Income Support Scheme.

6 On 23 January 2018, I made the following observations when giving directions:

- “4. ... in my provisional judgment, the First-tier Tribunal did err in law by failing to consider whether [the claimant] was entitled to income support by virtue of regulation 6 of the Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004/1232) which confers transitional protection on claimants who have been continuously entitled to a “specified benefit” (see regulation 6(4)(b)) since 30 April 2004.
5. In the current state of the evidence, I am unable to tell whether that error was material (i.e., I do not know whether it would have affected the outcome of the appeal).
6. I have not overlooked paragraph 15 of the Secretary of State’s submission to the Upper Tribunal and, in the absence of further evidence to the contrary, I would be prepared to accept that [the claimant] was not continuously entitled to the specified benefits that are administered by the Department for Work and Pensions.
7. However, housing benefit is [also] a specified benefit and is not administered by the Department for Work and Pensions but by local authorities.
8. In this case, the Secretary of State’s decision was made on 20 August 2015. My provisional view is that to benefit from transitional protection, [the claimant] has to establish entitlement to some specified benefit on every single day between 30 April 2004 and 20 August 2015.
9. If he has to rely on specified benefits administered by the Department for Work and Pensions, he cannot quite do

so. There may be a gap from mid-February late March 2015 (depending on how many weeks of arrears were included in the first payment of JSA made on 10 April 2015). And there is also a gap from 26 June 2015 to 20 August 2015.

10 However, because the First-tier Tribunal did not investigate the issue of transitional protection at all, it did not investigate whether those gaps could be bridged by entitlement to *housing benefit* during those periods. If they can, it would appear that [the claimant] would have been entitled to transitional protection and therefore, the First-tier Tribunal's failure to deal with the issue would have been a material error.

11 The evidence suggests that, during the period from February to August 2015, [the claimant] was either living at his current address in the London Borough of [] or at an address near [] in the London Borough of [], or possibly at both at different times The First-tier Tribunal does not appear to have asked whether he was in receipt of housing benefit at either of those addresses."

7 I then directed:

- (a) the claimant to produce details of his entitlement to housing benefit for the two "gap" periods identified in paragraph 9 of those observations; and
- (b) the Secretary of State to attempt to obtain confirmation of that entitlement from the two councils that had awarded him housing benefit.

8 The evidence produced by those enquiries establishes conclusively that the claimant was indeed entitled to housing benefit throughout both "gap" periods and had therefore been continuously entitled to a specified benefit since 30 April 2004.

9 The First-tier Tribunal has an enabling and inquisitorial jurisdiction. It must deal with issues that are "clearly apparent from the evidence" (see *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495 at [28], applying *Mongan v Department of Social Development* [2005] NICA 16 reported as R4/01 (IS) at [15]) as well as those that are raised expressly by the parties to the appeal.

10 I accept that it is not necessary for the First-tier Tribunal to ask in every right to reside appeal whether the claimant is transitionally protected.

11 However, in this appeal, where the evidence established entitlement to specified benefits administered by the Secretary of State for virtually the whole of the period from 30 April 2004 to the date of the Secretary of State's decision, and there was other evidence showing that the claimant had been living in rented accommodation for a considerable period the possibility that he might be transitionally protected by virtue of entitlement to housing benefit was "clearly apparent" and the judge's failure to investigate it was an error of law.

The Upper Tribunal's decision

12 As that error affected the outcome of the appeal, the only appropriate course for me to take is to set the Tribunal's decision aside.

13 As a result of the further evidence available to the Upper Tribunal, I am able to make the additional finding of fact that the claimant was entitled to a "specified benefit" as defined in regulation 6(4)(b) on every single day between 30 April 2004 and 20 August 2015.

14 On that basis, the correct decision is as set out in bold on page 1 and I have therefore re-made the decision in those terms.

Coda: the decision in *OB v Secretary of State for Work and Pensions*

15 I should perhaps add that this was a case in which the claimant was able to establish a lengthy period of continuous residence which included various non-continuous periods in which that residence was "legal", in the sense that it was in accordance with the Immigration (European Economic Area) Regulations 2006.

16 Although no single continuous period of "legal" residence exceeded five years, the periods taken together might have exceeded five years in aggregate.

17 Therefore, the claimant might have acquired a permanent right of residence by virtue of the decision of the Upper Tribunal (Judge Rowland) in *OB v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 225 (AAC). In my judgment, the Tribunal also erred in law by failing to consider whether that was the case.

18 As I am setting the Tribunal's decision aside for other reasons, it is unnecessary for me to examine whether that error was material, or to deal with the point at all, other than to say that those advising the claimant would do well to gather all the evidence they can on this issue. Income support is in the process of being phased out and replaced by universal credit and, although it would be wrong for me to make a ruling on the point in a case where it does not yet arise, it is—at the very least—arguable that the transitional protection established by regulation 6 does not apply where the benefit being claimed as universal credit.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

18 September 2018