IN THE UPPER TRIBUNAL **Appeal No: CF/66/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal.

The decision of the First-tier Tribunal sitting at Wakefield on 1 September 2016 under reference SC008/16/00023 involved an error on a material point of law and is set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

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

DIRECTIONS

Subject to any later Directions by the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal will be decided by the First-tier Tribunal after an oral hearing.

(2) Both the appellant and HMRC should attend that hearing.

(3) Prior to that hearing, and in any event within one month of the date of issue of this decision, HMRC must provide to the First-tier Tribunal, and through it the appellant and those acting for her, A completely new written appeal response that sets out the relevant law correctly and explains with reference to that law and the evidence the basis for HMRC's decision of 5 February 2016.

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

Julie Smyth of counsel appeared for the Secretary of State for Work and Pensions and Her Majesty's Revenue and Customs, instructed for both by the Government Legal Service.

REASONS FOR DECISION

Introduction

1. This is a right to reside appeal which arises in the context of a claim for child benefit and concerns the "genuine chance of being engaged [in employment]" test in respect of pure workseekers or 'jobseekers' under what was, at the time relevant to this appeal, regulation 6(1)(a) 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:

> "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…..
> (4) For the purpose of paragraph (1)(a), a "jobseeker" is a person who satisfies conditions A, B and, where relevant, C.
> (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….
> (b)in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

> (9) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B.....
> (b)in the case of a jobseeker, for at least 91 days in total,
> unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.
> (10) Condition C is that the person has had a period of absence from the United Kingdom.
> (11) Where condition C applies—
> (a)paragraph (7) does not apply; and
> (b)condition B has effect as if "compelling" were inserted before "evidence"."

2. The appeal in this case was heard at the same time as the appeal in *KH –v- Bury MBC and SSWP* [2020] UKUT 0050 (AAC), though the issues on the two appeals differed in the end. The decision in *KH* concerns a person who had worked for over a year and retained her worker status under regulation 6(2)(b) of the 2006 EEA Regs. The issue before me in that case was whether the 'genuine chance of being engaged in employment' test was lawful as a matter of EU law. No such issue arises on this appeal. It is accepted that the appellant was a 'jobseeker' at the relevant time and the 'genuine chance of being engaged in employment' test applied to her. It was further accepted that the decision-making function on this test rests with HMRC in respect of 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]) and that *SSWP v MB* (JSA) [2016] UKUT 372 (AAC); [2017] AACR 6 sets out the law on how this test is to be applied.

3. The issue with which this appeal is concerned, though now to a greatly diminished extent for the reasons elaborated below, concerns 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 in employment' test in a context where no such adjudication has yet been carried out by the Secretary of State's decision maker within the DWP. The concern was how, and on what

evidence, HMRC may determine whether a claimant has 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 has 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 HRMC would obtain and interrogate such evidence. HMRC's answer to this, in short, was that its guidance enabled it properly to make such determinations. As we shall see, that was not the case on this appeal. The effect of this appeal, it seems, has been to cause HMRC to rewrite its guidance. Whether that rewrite has been successful was not a matter for me on this appeal.

Background

4. The appellant is an Italian national who came to the came to the UK on 12 June 2015 with her two young children, who were born in August 2009 and July 2011. She came to the UK looking for work and so was a 'jobseeker' for the purposes of regulation 6(1)(a) of the 2006 EEA Regs. The appellant found work in the UK in September 2015 but it was for a short duration. She herself described it as being for 22 hours, on the minimum wage, in the first week of September 2015, though HMRC and the First-tier Tribunal proceeded on the basis that the work was for 1½ weeks. The appellant then made a claim to HMRC for child benefit in respect of her two children on 20 November 2015. That claim was decided on 8 February 2016.

5. It is convenient to here set out the other relevant statutory materials. Entitlement to child benefit is governed by section 146 of the Social Security Contributions and Benefits Act 1992, which provided at the relevant time (and still provides) as follows.

> "146.-(1) No child benefit shall be payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week

> (2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week
> (3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsection (1) or (2) above as being, or as not being, in Great Britain."

6. The relevant regulation made under section 146(3) for the purposes of this appeal is regulation 23(4) of the Child Benefit (General) Regulations 2006. This provided insofar as is material as follows.

> "23.....(4) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of SSCBA where he makes a claim for child benefit on or after 1 May 2004 and
> (a) does not have a right to reside in the United Kingdom....."

7. Unlike housing benefit, there is no specific exclusion from a qualifying right of residence for child benefit purposes in respect of a 'jobseeker'. A person who has a right to reside as a mere workseeker or 'jobseeker' is therefore not excluded from being entitled to child benefit.

8. The decision that HMRC made on the appellant's claim for child benefit was in two parts. The first part was that the appellant was not entitled to child benefit before 14 September 2015. That part of the decision is not in issue on this appeal and I therefore say no more about it, save to note that it was based on regulation 23(5) and (6) of the Child Benefit (General) Regulations 2006.

9. The second part of HMRC's decision was that the appellant was not entitled to child benefit from 21 December 2015 because she did not have a right to reside in the United Kingdom. As HMRC sought to explain in its appeal response to the First-tier Tribunal, this was because it accepted the appellant had entered the UK as a jobseeker but "for Child Benefit purposes she can only be considered as a jobseeker for a period of 6 months from the date she arrived in the UK". This was, seemingly, the reason the child benefit entitlement ended on 20 December 2015. I should add that HMRCs appeal went on to say the following (at paragraph 24):

> "If at the date the 6 months stage expires, a person can provide compelling evidence that they have a genuine prospect of obtaining and being engaged in work, the qualifying period as a jobseeker can be extended for a further 3 months."

10. I should say at this point that the appellant had two other arguments she made to the First-tier Tribunal, neither of which turned on the application of the 'genuine chance of being engaged in employment' test in relation to her as a 'jobseeker'. Her first argument was that the employment she had done in September 2015 had made her a 'worker' under EU law (because that work was "genuine and effective") and her circumstances were such that she still retained that status at the time of her claim for child benefit because she had been looking for work. Her second argument was that she had a derivative right to reside in the UK as the parent of a child in education. In relation to this second argument, the Secretary of State in her submissions before me set out that the appellant had been awarded income-based JSA from 11 January 2016, and that by a decision dated 22 April 2016 the Secretary of State had concluded that the appellant had a right to reside in the UK pursuant to regulation 15A(3) and (4) of the 2006 EEA Regs (derivative right to reside as a carer of a child in education) based, it would seem, on the appellant having been "in UK employment". I mention these two points because, given the appeal is being remitted to be redecided by a new First-tier Tribunal, they may be areas the new First-tier Tribunal will need to address.

11. For present purposes, however, the issue on this appeal is the ability of HMRC properly to determine whether the appellant met the statutory criteria in regulation 6 of the 2006 EEA Regs at the time of its decision on 8 February 2016.

12. Reverting to the narrative, the First-tier Tribunal heard and dismissed the appeal on 1 September 2016. It gave as short form reasons for doing so in its Decision Notice that:

> "….After she left her job in September 2015 she did not retain worker status after 12/12/15 and thus was no longer a job seeker and was not entitled to Child Benefit from 21/12/15."

13. In the subsequent statement of reasons for its decision the First-tier Tribunal said the following of relevance:

> "5. The appellant had a right to reside in this country as an EEA national for a period of 6 months from the date of her arrival and thereafter unless she had a right to [reside] under another ground she would no longer be entitled to receive child benefit.
>
> 6. The appellant had a right to continue to be seen as a jobseeker throughout the first 6 months of her residence in the country, providing that she was able to show that she was seeking employment and that there was a genuine chance of her being engaged.
>
> 7. She was entitled to receive child benefit after 6 months residence in this country if she could satisfy me that she was a worker within the meaning of article 39 (formerly article 45) of the Treaty on the Functioning of the European Union.
>
> 8. A person can only be regarded as a worker if she has undertaken genuine and effective work and if she has a genuine prospect of obtaining and being engaged in work. I found she had not done genuine and effective work in the one and half weeks that she worked in September.
>
> 9. This appellant had not been working for anything other than one full week and one part week in the whole of her time in the UK and the wage that she received was less than £150 per week.
>
> 10. It is my finding that was not genuine and effective not only because of the shortness of the period but also because of the fact that it was not for a fixed period as in the Wimbledon Barry case [*Barry v Southwark LBC* [2008] EWCA Civ 1440; [2009] ICR 437]. It was not for certain hours, nor was it consistent pay, and the periods worked [were] entirely for the convenience of the appellant rather than the requirements of the employer.
>
> 11. She thus lost her status as a jobseeker after 6 months had expired from her arrival in this country. This occurred on 21st December 2015 and, as she could not be regarded as a worker thereafter, she could not be found to be entitled to Child Benefit after that date."

14. In giving the appellant permission to appeal, I said the following.

> 1. .....it is arguable with a realistic prospect of success that the First-tier Tribunal erred materially in law (and HMRC before it) in applying the wrong statutory scheme to the case before it. Further, even within its own terms (i.e. applying the statutory scheme the

tribunal arguably wrongly thought it needed to apply) it is unclear what the basis is for the First-tier Tribunal's (and HMRC's) reliance on an additional qualifying period as a jobseeker of 3 months (see, for example, paragraph 24 of section 6 of HMRC's written appeal response to the First-tier Tribunal)[1].

2. The claim for child benefit was made in November 2015. By that time regulation 6 of the Immigration (European Economic Area) Regulations 2006 – very arguably the critical applicable provision – had been amended three times in the course of 2014. The form that regulation 6 was in by November 2015 does not appear, however, to be reflected in section 6 of HMRC's appeal response to the First-tier Tribunal. Nor, arguably, was it applied by the First-tier Tribunal, which seemed simply to adopt HMRC's view of the applicable law. For example, the version of regulation 6(4) of the Immigration (EEA) Regulations (defining "jobseeker" for the purposes of that regulation) set out in HMRC's appeal on the face of it is not the definition in place by November 2015. Nor is it apparent what the legislative basis was in November 2015 for HMRC's (and the First-tier Tribunal's) view that "for Child Benefit purposes the appellant can only be considered as a jobseeker for a period of 6 months from the date she arrived in the UK" (page 8 of the (unnumbered) appeal response of HMRC). This may be an incorrect reference to the period for which "worker" status under regulation 6(1)(b) may be retained: see regulation 6(2A) of the Immigration (EEA) Regs 2006.

3. The position for a "jobseeker" remaining a "qualified person" under regulation 6 is dealt with by a combination of regulation 6(1)(a), 6(4), 6(5), 6(6) 6(7) and 6(8). The effect of those provisions on their face is that a person who is a jobseeker is a qualified person and so has a right to reside for 91 days (reg 6(8)(b)) and can only (per reg 6(7)) retain that status for longer than 91 days if they "can provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged". There is, therefore, no maximum period of 6 months, nor does this provision seemingly set out a maximum extension period of 3 months.

4. On the face of the First-tier Tribunal's reasoning, however, it would appear it applied the above, arguably wrong, 6 month rule. The process of the First-tier Tribunal's reasoning is, very arguably, difficult to follow. It would appear that it considered whether after the (arguably wrong) 6 months right of residence as a "jobseeker", [the appellant] may have become a "worker" and thus had a right to reside on that basis. Having rejected that argument (on the basis that the work [the appellant] had done was not genuine and effective), the tribunal however arguably failed to give any adequate consideration to whether [the appellant's] right of residence as a "jobseeker" continued beyond 91 days, because it (arguably wrongly) took the view that such a right was fixed at 6 months. There is arguably no, or no evident, consideration given

[1] In fairness to the First-tier Tribunal judge I should make clear that on further consideration I realise I was wrong to ascribe this 'additional qualifying period of 3 months' to him.

> by the tribunal to the tests under regulation 6(7) of the Immigration (EEA) Regs 2006.
>
> 5. I do not, however, consider there is any merit in the "genuine and effective" grounds advanced on behalf of [the appellant]. This legal construct is not subject to any subjective test concerning the earning capacity of the individual: see *Ninni-Orasche* [2004] 1 CMLR at paragraph 24 and *RP –v- SSWP* (ESA) (Interim Decision) [2016] UKUT 0422 (AAC). And it applies equally in respect of the derivative right to reside based on the child of a "worker" in education under article 10 of Regulation (EU) No 492/2011: see paragraph 13 of CSJSA/292/2016.
>
> 6. However, for the reasons given above it does seem to me to be well arguable that the First-tier tribunal misdirected itself as to the correct law and as a result failed properly to decide this appeal."

Discussion and conclusion

15. It is common ground between the parties before me that the First-tier Tribunal applied the wrong legal test to the evidence before it and failed to apply the correct 'right to reside' test. I agree. What the First-tier Tribunal needed to be apply, but failed to do so, was the provisions of regulation 6 of the 2006 EEA Regs as set out above (and summarised in paragraph 3 of my grant of permission to appeal set out in paragraph 14 above), including the 'genuine chance of being engaged in employment' test as further explained in *MB*.

16. In addition, both parties seek remission of the appeal to a new First-tier Tribunal for it to establish the relevant facts under the correct legal tests, with which I again agree.

17. In fairness to the First-tier Tribunal it was singularly not assisted by the wholly misleading explanation of the law put before it by HMRC in its appeal response. However, that does not excuse the First-tier Tribunal's error. It is, I would accept, entitled to expect to be informed of the correct law in the appeal response put before it by the statutory agency or body charged with applying that law in individual cases: see, for example, *IS v Craven DC* (HB) [2013] UKUT 9 (AAC). But the First-tier Tribunal's function as an independent tribunal is diminished if not

lost altogether if it does not itself scrutinise with care the respective cases of the parties before it, including the law those parties may say applies. This is underscored by the fact that the proceedings before the First-tier Tribunal are inquisitorial and not adversarial and that investigatory function of the First-tier Tribunal must, in my judgment, extend to checking what the correct law is. Indeed, to posit the reverse – that it is not the function of the First-tier Tribunal judge to satisfy him or herself about the correct applicable law – reveals the absurdity of that proposition. Moreover, and as a more general point but one which is specific to HMRC, the caselaw of the Upper Tribunal is, unfortunately, well supplied with examples of where HMRC's appeal responses to First-tier Tribunals have been markedly inadequate: see, for example, *JR v HMRC* [2015] UKUT 192 (AAC) at paragraph [4], *ZB v HMRC* [2015] UKUT 198 (AAC), *DG v HMRC and EG* (TC) [2016] UKUT 0505 (AAC) (at paragraph [1]) and *HO v HMRC* (TC) [2018] UKUT 105 (AAC) (at paragraph [3]).

18. I bear in mind that the law on right to reside is detailed and complex, and can be subject to not infrequent change. However, the version of regulation 6 of the 2006 EEA Regs set out in paragraph 1 above had been in force since November 2014. Furthermore, the retention of status as a 'jobseeker' for six months, to which HMRC and the First-tier Tribunal were seemingly referring, ceased to apply under that regulation 6 from 1 July 2014 (see regulation 3 of the Immigration (European Economic Area) (Amendment) Regulations 2014 (SI 2014/1451)). The decision HMRC took on this appeal was made well over a year after those changes, on 5 February 2016, and the appeal was decided by the First-tier Tribunal approximately two years after these legislative changes. By that time the First-tier Tribunal judge ought to have had available the correct version of regulation 6, in its amended form, as it appeared both in the 2015/2016 or 2016/2017 editions of Volume II of Sweet and Maxwell's *Social Security Legislation*. Reading the (correct) version of regulation 6 of the 2006 EEA Regs in either of

those editions would have made clear the obvious error in the law HMRC was saying was applicable.

19. In his initial submissions on the appeal to the Upper Tribunal, Mr Hignett for HMRC questioned whether HMRC had sought to determine whether the appellant satisfied the 'genuine chance of being engaged in employment' test prior to deciding the claim for child benefit in February 2016. Mr Hignett pointed out that although HMRC said in its appeal response to the First-tier Tribunal that further enquires had been made by it of the appellant about whether she had a right to reside in the UK, to which it was said she had not replied, nothing in the appeal response or the documents attached to it evidenced when those enquiries were made or what questions they asked of the appellant. On its own (wrong) case about the applicable law, HMRC considered that the qualifying period as a jobseeker with a right to reside in the UK could be extended for a further period of three months, after the period of six months from the date of arrival in the UK had expired, if the appellant had "a genuine prospect of obtaining and being engaged in work", so the application of the above test still had relevance even on HMRC's understanding of the law.

20. These criticism of HMRC's approach in one sense are irrelevant to whether the First-tier Tribunal erred in law in upholding HMRC's decision. Moreover, that tribunal's understanding of the law was sufficiently confused that it never addressed whether the appellant had a genuine chance of being engaged in employment after the period for which HMRC had awarded her child benefit (and that award itself was based on a wrong view of the law). Where, however, HMRC's approach may have a bearing on the First-tier Tribunal making an error of law is in the HMRC guidance that lay behind its decision making on this appeal and the appeal response it put before the First-tier Tribunal.

21. This takes me to the issue of how a non-DWP decision making body is properly and adequately - particularly in terms of evidence - able to make a decision on whether a person has a genuine chance of being engaged in employment, when the Secretary of State through a decision maker in the Jobcentre has not made such a decision. It is the Jobcentre, and not HMRC, which holds the primary role, as State actor, in registering those who are looking for work and gathering evidence about individuals attempts to find work once so registered.

22. It was on this issue that the Secretary of State for Work and Pensions sought and became a party on this appeal. Both she and HMRC argued, initially, that:

> "HMRC decision-makers apply HMRC guidance when determining [whether a child benefit or tax credit claimant who is a 'jobseeker' has a genuine chance of being engaged in employment]. It is not necessary that [the Secretary of State] should made any [such] decision, and nor is it necessary for input to be provided by [the Secretary of State for Work and Pensions].....
>
> As to how, and on what evidence, HMRC determines whether a claimant has a genuine prospect of work, HMRC invites evidence from the claimant and makes its own assessment of that issue (whether SSWP has made [such a decision] or not).
>
> HMRC decision-makers follow guidance in HMRC's Manuals. HMRC guidance was developed in co-operation with the SSWP, albeit against the background that both departments worked against their own statutory and operational framework.
>
> While HMRC decision-makers have access to some DWP data (such as dates of award and cessation of award), that information does not play any significant part in HMRC's decision-making process. HMRC also has access to its own data (for example, showing a summary of earnings. Tax and other deductions)."

23. In response to these submissions I made directions asking HMRC to put its guidance before me, which it did. I said this in so directing.

> "The.....submissions made on behalf of the respondents rely on HMRC guidance which it is said is applied by HMRC when determining the 'genuine prospects of work' issue. It is further stated in those submissions that it is not necessary for there to be any input from the Secretary of Stare when HMRC decide this issue..... Given the weight placed on this guidance, it would be of benefit on this

> appeal for HMRC to provide copies of any of its past and current guidance (operational, adjudicatory or otherwise) on the application of the 'genuine prospects of work test'. What may be of particular interest will be how such guidance has dealt, and deals, with the provision and gathering of evidence so as to enable HMRC to properly and fairly decide whether a claimant has 'genuine prospects of work' in a context where no such adjudication had, or has, yet been carried out by the Secretary of State's decision maker."

24. Commenting on the volumes of HMRC guidance that were put before me in these proceedings may not be a wholly useful or relevant exercise in circumstances where:

(a) HMRC has since conceded that the manifestly wrong appeal response HMRC had put before the First-tier Tribunal in this case had, it assumed, been written on the basis of HMRC's guidance (and so that guidance must have been wrong in its explanation of what regulation 6 of the 2006 EEA Regs required by February 2016);

(b) HMRC accepted that its guidance did not correctly reflect the correct application of the 'genuine chance of being engaged in employment' test as set out in *MB*;

(c) perhaps as a result of the two preceding points, HMRC told me in April and May of 2019 that it was "currently amending and updating the Child Benefit guidance relating to jobseekers and workers, in particular the sections relating to genuine prospects of work"; and

(d) in any event, it is agreed that the appellant's appeal must be allowed because the First-tier Tribunal (aided and abetted by HMRC's appeal response) got the relevant law completely wrong and so failed to apply the correct law to the evidence before it, and on the rehearing of the appeal HMRC's new guidance might properly inform the new appeal response I have directed it to provide above and the new guidance might even usefully be something which ought to be before the new First-tier Tribunal.

I therefore limit myself to the following observations.

25. First, it is unclear whether the HMRC guidance was or is to be made publicly available. The guidance shown to me, and shared with CPAG in these proceedings, consisted, as 'Current Guidance' of the *Child Benefit Manual* and the *Child Benefit Technical Manual*, and as 'Historic Guidance' of the *Child Benefit Procedural Manual*. I was told, and this appeared to be the case, that the *Child Benefit Manual* contains the detail on how HMRC decide whether someone has a 'genuine prospect of being engaged in employment'. However, CPAG said that neither it nor the *Child Benefit Procedural Manual* had been or were available to members of the public. Keeping such guidance, or any new version of it, out of sight of those persons directly affected by it might not be considered to be lawful: see, albeit in both cases in the context of departmental policies, *Mandalia v SSHD* [2015] UKSC 59; [2015] 1 WLR 4546, and *B v SSWP* [2005] EWCA Civ 929; [2005] 1 WLR 3796: *R(IS)9/06* (at paragraph [43]).

26. Second, unless and until satisfied by the sight of new HMRC guidance or the terms of a properly crafted and legally accurate HMRC appeal response, First-tier Tribunals may need to examine with caution appeal responses put before them by HMRC in right to reside cases and satisfy themselves that HMRC has engaged in proper evidence gathering before it made the 'genuine chance of being engaged in employment' decision under appeal. As set out above, *MB* correctly sets out how to apply the 'genuine chance of being engaged in employment' test to the evidence. Further, and by way of identifying one particular flaw in the HMRC guidance put before me, earnings below the minimum earnings threshold are not decisive: see *RF v LB Lambeth* (HB) [2019] UKUT 52 (AAC).

27. Third, CPAG raised concerns about the HMRC guidance in respect of other bases under which a person may have a right to reside in the UK (e.g. the 'Saint Prix' right: see *Saint Prix v DWP* (Case C-507-12) [2014]

All ER (EC) 987 and *SSWP v SFF and others* [2015] UKUT 502 (AAC); [2016] AACR 16). It is not for me to adjudicate on such areas of dispute in this appeal, though no doubt HMRC will wish to satisfy itself that its new right to reside guidance is correct in all respects.

28. Fourth, and last, although Mr Hignett was correct that HMRC had not sought any evidence from the appellant (or, as far as I can see, any other party) relevant to whether she had a genuine chance of being engaged in employment before making its decision, it did make such enquiries of her after she had sought 'mandatory reconsideration of its decision. This itself is a bit of a curiosity because, as Mr Williams pointed out, such lines of enquiry were not apparent in the HMRC guidance. However, I would suggest it would be a concern if proper evidence gathering and adjudication was only being conducted by HMRC *after* the decision had been made and only then in respect of those claimants who seek to challenge the decision. The 'reconsideration' is just that, considering again the initial decision made, but that initial decision ought lawfully to have been made on the basis of a consideration of all relevant evidence and the exercise of all relevant legal rules.

29. On this last point I should add in fairness to HMRC that its guidance in effect from 7 January 2016 in its (internal) *Child Benefit Manual*, at CBM050610, did not appear to apply only at the stage of mandatory reconsideration, notwithstanding what in in fact occurred in this case. However, that guidance was written in terms of having a maximum qualifying period as a jobseeker of six months. CBM050615 in the same *Manual*, effective from 29 January 2016, did refer to the 91 day period in regulation 6(8)(b) of the 2006 EEA Regs. However, it did not do so clearly - the context being "[For a] jobseeker to have a right to reside in the UK beyond six months, 182 days or beyond 91 day (<u>whichever is appropriate</u>)" (my underlining added for emphasis), without explaining when '91 days' would be appropriate - and then set out a limited number of circumstances in which the status of 'jobseeker' may be retained which are inconsistent with the law as set out in *MB*.

30. For the reasons given above, however, this appeal is allowed. I set aside the decision of the First-tier Tribunal as being in material error of law and remit the appeal to be redecided by a freshly constituted First-tier Tribunal of the Social Entitlement Chamber, at a hearing.

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

Dated 28th February 2020