[2017]AACR 39

AEKM-v-Department for Communities (JSA)
[2016] NICom 80

Commissioner O Stockman **C11/14-15(JSA)**
13 December 2016

Jobseeker's allowance – person from abroad – habitual residence - three month "living in" test – factors to be considered in deciding whether a claimant meets the test – compatibility of the test with the requirements of European Union law

The appellant claimed jobseeker's allowance (JSA) from 5 February 2014, having returned to Northern Ireland from New Zealand where she had spent two months caring for a sick relative. Her claim was disallowed on the basis that she was a person from abroad within regulation 85A of the Jobseeker's Allowance Regulations (NI) 1996, as amended from 1 January 2014. She was not to be treated as habitually resident in Northern Ireland within the terms of that regulation as she had not been "living in" the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (the Common Travel Area (CTA)) for the three months prior to her claim. The appellant appealed to a tribunal, who found that "living in" should be given its natural meaning. It reasoned that a person cannot live somewhere without actually being there. It found that the appellant had not been living in the CTA for the relevant three months period. The appellant appealed to the Social Security Commissioner, with the leave of the legally qualified member of the tribunal. The appellant submitted (1) that the tribunal's finding that she was not living in the CTA for the three months prior to her claim was irrational and (2) that the tribunal's interpretation of the relevant test arising from regulation 85A of the Jobseeker's Allowance Regulations (NI) 1996, as amended from 1 January 2014, disproportionately interfered with her rights as an European Union (EU) citizen with a right to reside in the UK.

Held, allowing the appeal, that:

1. the meaning of "living in" was not defined in regulation 85A(2)(a) and an element of ambiguity arose in applying it. Considering the Explanatory Memorandum to the relevant amending legislation, it was clear that the policy change was primarily addressed to new migrants. Nevertheless, persons who were not a target of the amendment could nevertheless fall within its scope (paragraphs 33 to 37);

2. in addressing the position of persons resident in the CTA who were returning after a temporary absence, existing case law on the habitual residence test, such as CIS/4474/2003, continues to have relevance. A decision maker will need to decide firstly whether the claimant has ever lived in the CTA. If so, and they are returning from a temporary absence the question arises as to whether he/she ever ceased living in the CTA and has recommenced living there on return (paragraphs 39 to 42);

3. a range of factors which continue to link the claimant to the CTA whilst absent must be considered to determine whether he/she has ceased living in the CTA. The factors relevant to the question of whether someone is living in the CTA are those which tend to establish whether that is where he or she has a home. The particular tribunal erred in law by concluding that the appellant had not been living in the CTA on an insufficient evidential basis (paragraphs 46 to 49);

4. under EU law (following Collins *v Secretary of State for Work and Pensions* (C-138/02)), it is legitimate to link entitlement to JSA to a genuine connection with the labour market of the host Member State and whilst a residence test is appropriate for that purpose, it must not exceed what is necessary for the national authorities to be satisfied the person is genuinely seeking work (paragraphs 50 to 52);

5. whereas a three month residence test which precluded consideration of other representative factors may be disproportionate and contrary to EU law (following *Prete (C-367/11)),* the three month test here was not simply a presence test, as a range of factors must be considered to determine whether someone is living in the CTA (paragraphs 54 to 58). Therefore, regulation 85A(2)(a) was not contrary to EU law if applied in a broad way (paragraph 61).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of a tribunal sitting at Belfast on 4 June 2014, leave to appeal having been granted by the legally qualified member (LQM) of the tribunal.

2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The appellant claimed jobseekers allowance (JSA) from the Department for Social Development (the Department) on 5 February 2014. On the claim form the appellant indicated that she had returned to live in the United Kingdom (UK) from abroad. She stated that she was a Moroccan national and had come from New Zealand, having left the UK on 21 November 2013. A "Habitual Residence Test Action Sheet" was completed by the appellant on 11 February 2014. In it, the appellant stated that she had come to the UK on 25 May 2008, and had since lived in the UK for over five years. She stated that she had travelled to New Zealand on 21 November 2013 to care for her sick brother, returning to the UK on 22 January 2014 and intending to remain permanently in the UK. In response to enquiries about her right to reside in the UK, she produced a copy of her Irish passport, issued on 15 September 2006. When asked why she had come to the UK, she replied that it was because she lived there.

4. On 13 February 2014, the Department decided that the appellant "had not resided in" the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland for the three months prior to her claim and therefore was not entitled to JSA from 5 February 2014. The territory described in the Department's decision coincides with the Common Travel Area given legislative form by section 1(3) of the Immigration Act 1971 and I shall henceforth refer to it as "the CTA". The appellant appealed to a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed her appeal.

5. At the appellant's request, on 8 December 2014 the tribunal issued a statement of reasons for its decision. The appellant applied to the LQM for leave to appeal to the Social Security Commissioner and on 28 January 2015 the LQM granted leave to appeal. The point of law on which leave to appeal was granted was whether the tribunal had correctly interpreted and applied regulation 85A of the Jobseekers Allowance Regulations (NI) 1996 (the JSA Regulations). By a letter dated 27 February 2015 the appellant lodged her appeal with the Office of the Social Security Commissioners. (The Department was renamed the Department for Communities from 8 May 2016).

Grounds

6. The appellant submits that the tribunal has erred in law on the basis that:

   (i) the tribunal made a material error of law by deciding that the appellant was not "living in" the CTA for the three months prior to her claim to JSA;

(ii) the requirement imposed by regulation 85A(2)(a) that the appellant should be living in the CTA for three months before she can be entitled to JSA is contrary to EU law.

7. The Department was directed to make observations on the grounds of appeal. Mr Donnan of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal's decision was not an unreasonable one on the facts and indicated that the Department opposed the appeal.

The tribunal's decision

8. The tribunal had documentary material before it which consisted of the Department's appeal submission and a copy of DMG Memo Vol 2/41 entitled "JSA(IB) THREE MONTHS RESIDENCE REQUIREMENT". The appellant attended and gave oral evidence. She stated that she had first come to Northern Ireland in May 2008 with her husband, who was from Belfast. She had attended college for a year and then worked for a year in a company canteen. She had returned to Morocco for a month or so each year. In November 2013 the appellant's brother in New Zealand became ill with meningitis. He paid for her travel to New Zealand to look after him for a while. She travelled to New Zealand on 21 November 2013 with a return ticket for 21 January 2014.

9. The tribunal found that "living in" [the CTA] should be given its natural meaning. It reasoned that a person cannot live somewhere without actually being there. It found that the appellant had not been living in Northern Ireland for the three months from 5 November 2013 to 5 February 2014 (i.e. the three month period prior to the date of claim). It reasoned that the "living in" requirement was aimed at simplifying the habitual residence test and that defining the phrase in terms of habitual residence would make it meaningless. While it accepted that an absence for a short period does not necessarily mean that the three month test could not be met, it considered that the length of the particular absence and its defined nature meant that it was not satisfied.

10. The tribunal noted that the appellant's argument under EU law was not fully developed. However, the appellant's representative adopted a pragmatic approach of not seeking adjournment to permit fuller argument. On the basis of the argument before it, the tribunal decided that the three month "living in" requirement was not a disproportionate restriction in EU law terms in the context of JSA and disallowed the appeal.

Relevant law

11. The provision at the heart of the appeal results from an amendment to regulation 85A of the JSA Regulations made by the Jobseekers Allowance (Habitual Residence) (Amendment) Regulations (NI) 2013 (SR 2013, No.308) with effect from 1 January 2014. This has been amended further since then, notably from 31 May and 9 November 2014. However, at the material date, regulation 85A read:

> 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) 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).

(3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—

(a) regulation 13 of the Immigration (European Economic Area) Regulations 2006;

(aa) regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;

(b) Article 6 of Council Directive No. 2004/38/EC.; or

(c) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).

(4) A claimant is not a person from abroad if he is—

(a) a worker for the purposes of Council Directive No.2004/38/EC;

(b) a self-employed person for the purposes of that Directive;
(c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive;

(d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive;

(e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive;

(f) a person who is treated as a worker for the purpose of definition of a "qualified person" in regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 pursuant to-

(i) regulation 6 of the Accession (Immigration and Worker Authorisation) Regulations 2006 (right of residence of a Bulgarian or Romanian who is an "accession State national subject to worker authorisation") or

(ii) regulation 5 of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 (right of residence of a Croatian who is an "accession State national subject to worker authorisation");

(g) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva at 28th July 1951(a), as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;

(h) a person who has been granted leave or who is deemed to have been granted leave outside the rules made under section 3(2) of the Immigration Act 1971 where that leave is—

(i) discretionary leave to enter or remain in the United Kingdom;

(ii) leave to remain under the Destitution Domestic Violence concession, or (iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005;

(hh) a person who has humanitarian protection granted under those rules; or

(i) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act and who is in the United Kingdom as a result of his deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom;

12. Following my direction for written submissions on the issue, it was clarified that it was common case between the parties that regulation 85A(4) had no application on the facts of the present case and therefore could not assist the appellant.

Hearing

13. The case was initially listed for hearing in November 2015. However, on an application by the appellant, supported by the respondent, the proceedings were stayed to await the outcome of the case of *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* (Case C-299/14) before the Court of Justice of the European Union (CJEU). Following the decision of the CJEU in *García-Nieto*, the parties agreed that it had not advanced understanding of the relevant law. This was because it dealt with social assistance, which is not involved here, and rights in the first three months of entry to a Member State.

14. I held an oral hearing of the appeal on 2 June 2016. Mr Hatton of Law Centre NI appeared on behalf of the appellant, who was not present. Mr Donnan of DMS appeared for the Department. I am grateful to the representatives for their helpful submissions.

15. In the context of UK domestic law, Mr Hatton submitted that the tribunal had taken an unnecessarily strict and overly narrow approach to the test. The legislation did not define "living in" the CTA. It was necessary to give that expression its ordinary everyday meaning. The

Department's own guidance at DMG Memo Vol 2/41 similarly advised decision-makers to give it its everyday meaning.

16. Mr Hatton submitted that the tribunal did not accept that factors apart from actual presence should be taken into account. Nevertheless, while taking the view that actual presence was a required element, the tribunal also held that some short absence from the UK might be ignored. It had reasoned that the length of the particular appellant's absence and its defined nature meant that the requirement of the legislation was not met. Mr Hatton submitted that the fact that the absence was of a defined nature was indicative that the appellant did not intend to transfer her residence to another state. He submitted that the legislation could have introduced a physical presence test but did not. The "living in" test was not simply a case of assessing whether any particular absence was too long but required a consideration of broader factors.

17. Mr Hatton submitted that the tribunal erred by not taking relevant factors into account. The appellant temporarily left the CTA for a defined period for defined reason. She had no intention to cease residence in the CTA. She retained a home and property in the CTA. She resumed her search for employment shortly after return. He submitted that it did not fit the natural meaning of the phrase to say that the appellant was "living in" New Zealand during her period of absence from the CTA.

18. The parties had directed me to paragraph 5 of DMG Memo Vol 2/41 which was before the tribunal and which reads:

> "Meaning of "living in"
>
> This expression is not defined in the regulations and as such should be given its ordinary everyday meaning taking into account the context. The New Oxford English Dictionary says that to "live" somewhere means "to make one's home in a particular place". The Shorter Oxford English Dictionary says that "living" means dwelling in a specified place. "Dwelling" is defined as the action of residing living or having one's home."

19. DMG Memo Vol 2/41 had also said at paragraphs 6 and 7:

> "Temporary Absences
>
> If, during the three month period the claimant has spent some time outside the Common Travel Area, the DM will have to make a judgement as to whether that claimant ceased to be "living in" the Common Travel Area during that absence.
>
> It is not possible in this Memo to deal with all the circumstances in which a temporary absence from the Common Travel Area will mean that a person has or has not ceased to be living in the Common Travel Area. DMs should take a common sense approach by applying the normal everyday meaning of "living in".

20. Mr Donnan indicated that the position of the parties was not very far apart. He submitted that the provision was aimed at people arriving in the CTA for the first time, but that it also potentially affected persons returning from temporary absences from the UK. He accepted that, had the tribunal simply focused on the length of absence, it might have fallen into error. However, he submitted that it took into account broader considerations and had reached a reasonable conclusion. He referred to a finding by the tribunal – made in the context of the EU

law proportionality argument - that three months equated to a length of time "which an employee cannot usually be away from work without a particular reason such as serious illness". Mr Donnan speculated that the tribunal was equating absence from employment with absence from the job market.

21. Mr Donnan indicated that the Department had issued additional unpublished guidance to its JSA decision-makers. This advised that the following questions, or similar, should be asked by a decision-maker in cases where the claimant has declared on their claim form that he or she was temporarily absent from the CTA prior to claiming JSA(IB). While not in the public domain, he shared it to help in understanding the Department's approach to such cases. The internal guidance provides:

> **"Temporary absence: factors to be considered:**
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> **1) Length of the absence**
> • How long was the claimant out of the CTA during the 3 month period under consideration?
> • Was the length of the absence determined before the claimant left the CTA (i.e. was there a definite date for return) or was it open-ended at the time of their departure?
> • Was the length of the absence extended after the person left the CTA? Was this something that the claimant had any control over or was it outside of their control?
>
> **2) Reason for the absence**
> • Was the absence because of a holiday or family visit? Was the claimant absent in order to attend a funeral or wedding?
> • Was the absence for an educational or vocational reason?
> • Did the claimant work abroad?
> • Was the absence to look for work abroad?
>
> **3) Accommodation used while outside the CTA**
> • Did the claimant organise fixed-term accommodation in advance, e.g. in a hotel, guest house or B&B?
> • Did they stay with family or friends?
> • Did they enter into an open-ended or long term accommodation agreement?
> • Did they own or co-own the property that they stayed in?
>
> **4) Accommodation in the CTA before and after the absence**
> • Had the claimant established a home in the CTA prior to their absence?
> • What type of accommodation was this (e.g. mortgaged or rented), and were responsibilities for it maintained during the absence (e.g. mortgage/rental/insurance payments continued, liability for utility bills continued)?
> • Did the claimant return to that same home following their absence?
>
> This list is not exhaustive."

22. In terms of the European law dimension, Mr Hatton submitted that the "living in" requirement was disproportionate and contrary to EU law. He relied upon the decision of the former European Court of Justice in *Collins v Secretary of State for Work and Pensions* (C-138/02) as authority for the proposition that residence conditions, while not prohibited by EU

law, must be proportionate in their application. Whereas that case was concerned with the habitual residence test, Mr Hatton submitted that the Court's comments in *Collins* applied equally to the present case, as the three month "living in" requirement was also a residence test.

23. Mr Hatton accepted that paragraphs 69-72 of *Collins* establish that it is legitimate for a Member State to grant JSA only after it has been established that a genuine link exists between the person seeking work and the employment market of a Member State. He accepted that the jurisprudence of the CJEU permitted a Member State to impose a residence requirement in order to be satisfied that a person residing in its territory as a "worker" was genuinely seeking work. However, he submitted that a residence test would only be proportionate and lawful if the period of residence was only so long as to establish whether a claimant was a person who was genuinely seeking work.

24. He submitted that it was disproportionate that a person who was merely temporarily absent from the CTA should be placed in exactly the same position as someone entering the CTA for the first time and with no connection to the labour market. He submitted that there was no justification for a three month residence rule in such a case. He relied on the cases of *Vatsouras and Koupatantze v Arbeitsgemeinshaft (ARGE) Nürnberg* (C-22/08 and C-23/08) and *Prete v Office national de l'emploie* (C-367/11) and submitted that the application of the "living in" requirement must be given an interpretation which is compatible with EU law.

25. Mr Donnan pointed out that the rule would apply to UK nationals who had lived all their life in the UK but who were temporarily absent. On this basis, he submitted, there was no difference in treatment between a UK national and an EU national such to give rise to discriminatory treatment. He accepted that there might be hard cases, but submitted that the rule as a whole was proportionate.

26. He accepted that the *Prete* decision was correct on its own facts, as a requirement of six years spent in the education system of a member state in order to qualify for a "tideover" allowance was too onerous and disproportionate. He submitted that *Collins* remained good case law and therefore that an EU national could validly be required to demonstrate a genuine link to labour market for a reasonable period. Whereas the test could be disproportionate in case of a temporary absence, it had to be considered as a whole, rather than on an individual case by case basis. He relied upon *Jobcenter Berlin Neukölln v Alimanovic* (C-67/14) and *García-Nieto*.

Assessment

27. This case concerns an EEA national who jointly holds the nationality of a country within the CTA along with the nationality of a non-EEA country. She had been living in the CTA for a period of five years which included periods of study, employment and, more recently, unemployment in the course of which she was receiving JSA. She left the CTA for a period of two months to visit a country outside the European Union. She reclaimed JSA on her return. There was no dispute that the appellant was actively seeking work.

28. There was no dispute that possession of an Irish passport, in all the circumstances of her past residence and employment history in the UK, gave the appellant a right to reside in the UK. As a dual national of the Republic of Ireland and Morocco, she would also enjoy a right of residence in the Republic of Ireland. It was therefore common case that she enjoyed a right to reside in the CTA for the purpose of regulation 85A(2)(b) of the JSA Regulations. It was also common case that none of the exceptions in regulation 85A(4) applied.

29. The sole issue which led to the disallowance of her claim was that she had not been living in the CTA for the three months prior to that claim.

30. The parties agreed that there were two dimensions to this appeal. The first was based entirely within a domestic law context and concerned the legitimacy of the tribunal's finding that the appellant was not "living in" the CTA for the three months prior to her claim for the purpose of regulation 85A(2)(a) of the JSA Regulations. The second involved consideration of the extent to which the application of regulation 85A(2)(a) interfered with any rights which the appellant might enjoy as a citizen of the EU with a right to reside in the UK, and the proportionality of any interference, in particular.

The domestic law dimension

31. Turning first to the question of the tribunal's approach to the expression "living in", I observe the often cited words of Lord Reid in *Brutus v Cozens* [1972] UKHL 6. That case concerned the behaviour of an anti-apartheid protester who disrupted play on the No.2 Court during the Wimbledon tennis tournament. He had been charged with the offence of "insulting behaviour" and was acquitted by magistrates, but was convicted on an appeal by way of case stated to a Divisional Court. The Divisional Court in turn framed a question for the House of Lords as to whether the protestor's conduct was "insulting behaviour" as a question of law. Lord Reid noted that the Divisional Court assumed that the meaning of "insulting behaviour" was a question of law. He then said:

> "In my judgment that is not right. The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the Court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

32. In the decision before me, the tribunal has found on the facts that the appellant was not "living in" the UK for the three month period up to the date of her JSA claim. Mr Hatton candidly accepted the obstacles before him in establishing that the tribunal's decision was irrational. Nevertheless he submitted that the tribunal decision was irrational for reaching a decision on the basis of insufficient findings of fact. He further submitted that by finding that the appellant had not been living in the CTA in the three months prior to her claim, it reached a decision which no tribunal acquainted with the ordinary use of language could reasonably reach.

33. It was not in dispute between the parties that the meaning of "living in" was not clearly defined and that an element of ambiguity arose in applying regulation 85A(2)(a). As explained at paragraph 41 of *MM v Department for Social Development* [2014] NI Com 48, Explanatory

Memoranda can be referred to when the content of legislation is ambiguous. Carnwath LJ (as he then was) in *R(D) & Others v SSWP* [2010] EWCA Civ 18 said that:

> 48. "In relation to explanatory notes, the orthodox position is, in my view, as stated by Lord Hope (in a speech agreed by the other members of the House, including Lord Steyn):
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> "… an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous" (*Coventry and Solihull Waste Disposal Co Ltd v Russell* [2000] 1 All ER 97, 107g)
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> 49. It is to be noted that Lord Hope's comments were directed to the explanatory notes to an amending Order made under a statute. If anything the case for using such assistance may be even stronger in relation to a statutory instrument than a statute, at least where the explanatory material emanates from the Secretary of State who is directly responsible for making the instrument. Thus, the explanatory memoranda in the present case represent formal statements of the Secretary of State's intentions as the author of the relevant statutory instrument, given first to the main statutory consultee, and secondly to Parliament. Furthermore, unlike primary legislation, Parliament's function was limited to approving or rejecting the instrument, rather than amending it."

34. I consider that the phrase "living in" within the statutory instrument is ambiguous. Consequently, I have considered the Explanatory Memorandum to SR 2013 No.308. It states at paragraph 2.1, that:

> "The purpose of the regulations is to make amendments to the Jobseekers Allowance Regulations (Northern Ireland) 1996 in relation to the definition of "person from abroad" with the effect that a person claiming a jobseeker's allowance who has entered the United Kingdom or the Common Travel Area (the Channel Islands, the Isle of Man or the Republic of Ireland) within the three months before making a claim, can only be treated as habitually residence in those places if they had already been habitually resident and were returning after a temporary absence".

35. It further states at paragraph 3.5:

> "This policy is being introduced to protect the benefit system and to discourage people who do not have any established connection with the UK, or any prospect of work, from migrating to the UK and seeking to claim Jobseeker's Allowance immediately, It strengthens and provides tighter definition for the existing Habitual Residence test which will simplify the application of the rule".

36. The Explanatory Memorandum further indicates that the particular regulations were not formally referred to the Social Security Advisory Committee due to urgency on the basis that, inter alia, it was necessary to reduce opportunities for those wishing to abuse the system before the change entered into operation and to avoid any rush of migration.

37. It appears clear 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 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.

38. The tribunal reasoned that the legislative change was aimed at simplifying the habitual residence test. The change introduced a requirement of three months residence. The case law had previously required an "appreciable period of time" to be spent in the UK before the habitual residence test could be satisfied (see *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937). The requirement of living in the UK for three months seems to me to simplify the "appreciable time" requirement and bring certainty. It clarifies the position of persons arriving in the UK for the first time without any prior connection to the CTA. Nevertheless, the position of persons who have been living in the CTA and who return following a temporary absence is less clear.

39. While concerned with the application of an older version of the habitual residence test, it seems to me that cases of the Great Britain Commissioners which concern person who enjoy habitual residence and then return to the UK after a period of absence, such as CIS/4474/2003 which was cited in argument by Mr Hatton, continue to have relevance to a case such as the present one. In CIS/4474/2003, Commissioner Jacobs said at paragraphs 5-11:

> 5. "The issue for the decision-maker or the tribunal is: where is the claimant habitually resident? The key to getting the right answer is to know where to begin. There are two possibilities:
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> 6. One possibility is that the claimant has never been resident here. In this case, the starting point is when the claimant last entered the United Kingdom before claiming income support.
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> 7. The other possibility is that the claimant was previously resident in the United Kingdom. In this case, the starting point is when the claimant last left the United Kingdom. The first question to ask is: was the claimant habitually resident here at that time? If the answer is no, it is as if the claimant had never been resident here. If the answer is yes, there are three possible analyses of what has happen since.
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> 8. The first analysis is that the claimant remained habitually resident here, despite being physically absent from the country. Obvious examples are where the claimant has gone abroad on holiday or for a short visit to relatives.
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> 9. The second analysis is that the claimant ceased to be habitually resident here, but resumed that habitual residence on re-entry. An obvious example is where the claimant has been posted abroad by an employee and has returned to resume employment in this country. Remember that it is possible to be habitually resident in two jurisdictions at once. An extreme example is C v FC (Brussels II: Free-standing application for parental responsibility) [2004] 1 Family Law Reports 317. In that case, the judge held that parents could remain habitually resident in England despite having been away for well over 2 years and having established habitual residence in Hong Kong. Admittedly, habitual residence was there relevant to jurisdiction rather than to benefit entitlement.
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> 10. The third analysis is that the claimant ceased to be habitually resident here (on leaving or later) and has not resumed habitual residence on re-entry. An example is where the claimant emigrated and has returned temporarily for medical treatment or to give birth before leaving again.

> 11. The second and third analyses show that a returning former resident does not necessarily resume habitual residence on re-entry. That is a possibility, as recognised by the House of Lords in *Nessa v Chief Adjudication Officer* [1999] 4 All England Law Reports 677. But whether or not it has occurred, depends on the circumstances of the case..."

40. It appears to me that very similar considerations arise under regulation 85A of the JSA Regulations to those before Commissioner Jacobs. In deciding whether a claimant has been living in the CTA for three months, a decision maker will first need to decide whether the claimant has ever lived in the CTA. If not, entitlement to JSA cannot begin until he or she has been living in the CTA for three months. It seems to me that that is the straightforward case and the principal scenario envisaged by the policy behind the legislation.

41. However, if the claimant has previously lived in the CTA, it seems to me that the next question that arises for the decision maker is whether the claimant has ceased living in the CTA where he or she has been absent from the CTA in the previous three months. As envisaged by the tribunal in this case, it is possible to be absent from the CTA yet not cease living in the CTA.

42. If, on an examination of the facts, it is decided that the claimant has ceased living in the CTA, the question arises as to whether he or she has recommenced living in the CTA on return. Such a person may not be in a very different position to the person entering the CTA for the first time.

43. It appears to me that the tribunal in the present case decided that her absence from the CTA for a two month period meant that the appellant had ceased living in the CTA. As observed above, it placed weight on the duration of the particular appellant's absence from the CTA and on the "defined nature" of her absence. However, the Explanatory Memorandum explains that the legislation sought to distinguish between persons with an established connection to the CTA and those who were migrating to the CTA in order to take advantage of the possibility of claiming JSA. This suggests that "living in" requires more than actual presence, and that all factors demonstrating a connection to the CTA are relevant.

44. The tribunal found that "a person cannot live somewhere without actually being there", yet accepted that "an absence for a short period does not necessarily mean that the three month test could not be met". I accept Mr Hatton's submission that this is an inherently contradictory approach to whether the rule equates to a presence test. Once absence of some duration is permitted, the question arises as to what is a permissible length of absence. The tribunal has not clearly rationalised this, except to the extent that it has referred to the appellant's absence being of a "defined nature". It further made reference to a benchmark of "the time from which an employee cannot usually be away from work without a very particular reason, such as a serious illness".

45. It appears to me that employment contract terms are a private law matter and would vary considerably from employer to employer. They are inherently flexible, apart from those areas governed by statutory rights. I can see no warrant for assessing the three month "living in" requirement in terms of normal practice under a notional employment contract.

46. Mr Donnan opened to me the internal criteria applied by the Department, and I consider that many of these are relevant to the question in hand. It seems to me that the factors relevant to the question of whether someone is living in the CTA are those which tend to establish whether that is where he or she has a home. Duration of past residence, previous enrolment in education,

a history of work, family connections, established ownership or tenure of a dwelling and the compatibility of the purpose of any temporary absence with continued "living in" the CTA all appear to me to be relevant factors. These factors are not exhaustive. Where the person has more than one home, I consider that it is connected to the question of which of these has been the person's primary home for the relevant period.

47. Before deciding that a claimant has ceased living in the CTA, it is relevant to consider whether he or she has given up the accommodation previously occupied when leaving the CTA, whether he or she has continued to make payments in respect of occupation when outside the CTA and whether he or she has maintained related utility and service contracts in respect of the accommodation. It may also be useful to consider whether he or she has retained services unrelated to accommodation, but which demonstrate a connection to the CTA, such as a phone contract, or has ongoing financial commitments within the CTA. It is further relevant to consider the circumstances in which he or she has been living outside the CTA in terms of matters such as accommodation, employment and other connections.

48. In the particular case, the tribunal has addressed itself to the duration of the appellant's temporary absence from the CTA. It appears to me that this was an insufficient evidential basis for a conclusion that the appellant "has not been living in" the CTA and irrational in that technical sense. In the context of the purpose of the legislation, I consider that the ordinary meaning of "living in" is connected to the question of where a person has their home. It follows that I am persuaded by Mr Hatton that the tribunal has erred in law and has reached its decision on the basis of insufficient findings of fact.

49. Therefore, the appeal succeeds on the domestic law ground.

The EU law dimension

50. Mr Hatton also sought to persuade me that the tribunal's decision was erroneous in law on the basis that it was incompatible with the appellant's EU law rights. He submitted that the three months "living in" requirement imposed by regulation 85A(2)(a) of the JSA Regulations, and applied by the tribunal, was contrary to Article 45 of the treaty on the Functioning of the European Union (TFEU). His argument was based on *Collins v Secretary of State for Work and Pensions* (C-138/02), at paragraph 68-72. In essence, he submitted that the three months "living in" requirement was disproportionate in the context of a returning EU national who should be entitled to demonstrate a genuine connection with the UK labour market by other evidence.

51. I consider that JSA is a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State, as envisaged in paragraph 63 of *Collins*. By analogy with *Collins*, I further consider that Article 45 of the TFEU does not preclude national legislation which makes entitlement to JSA conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

52. Therefore, I accept that *Collins* demonstrates that, whereas it may be legitimate for a Member State to link entitlement to JSA to a genuine connection with the labour market, and whereas a residence test is in principle appropriate for that purpose, it must not exceed what is necessary for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work.

53. In *Vatsouras and Koupatantze,* at paragraph 40, it was said that "nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article 39(2) EC [now Article 45 TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market". I accept that the cases of *Vatsouras and Koupatantze* show that the principles of *Collins* continue to apply in the period after Directive 2004/38/EC, and that such a benefit does not amount to social assistance. The principles decided in cases addressed to social assistance, such as *Jobcenter Berlin Neuköln v Alimanovic* (C-67/14), are therefore to be distinguished.

54. Mr Hatton placed reliance on *Prete* (C-367/11). In that case a French national living in Belgium, and married to a Belgian national, was refused a "tideover allowance" on the grounds that she did not meet the condition of entitlement that she had completed a minimum of six years study in the host Member State before obtaining her certificate in secondary education. Belgium sought to justify the condition on the basis that it ensured a genuine connection with its labour market. The CJEU noted that the condition would more easily be met by nationals of the host Member State. Noting that the claimant in that case would not satisfy the study condition no matter how long its duration, as she had never attended school in Belgium, the CJEU declined to address the proportionality of the duration of the six year rule. Rather, at paragraph 39, it addressed the question of whether the national legislation should be considered incompatible with the right of freedom of movement of workers on the basis that it prevented account being taken of circumstances unrelated to where studies had been carried out, but which might nevertheless be representative of whether there was a real link between the claimant and the relevant labour market.

55. Mr Donnan accepted that the facts of the case in *Prete* demonstrated disproportionality, due to the duration of the six year rule. However, he submitted, the three month rule in the present case did not involve such a degree of disproportionality and the circumstances of the present case should be distinguished. However, it appears to me that this is not the point of *Prete*. In *Prete* the CJEU held that the six year condition prevented other representative factors being taken into account and that this went beyond what was necessary in establishing a link between the person claiming the allowance and the labour market of the host Member State.

56. It seems to me that the same criticism might be made of the three month "living in" requirement. As a bright line rule, it could be argued that it prevents consideration of other factors which might be demonstrated as establishing links to the labour market.

57. At the same time, there are differences between the situation in the present case and that in *Prete*. The principal difference is that the nationals of the host Member State are equally affected by the three month rule in regulation 85A, whereas in *Prete*, Belgian nationals would have been largely unaffected by the six year rule. As the six year rule would more easily have been met by Belgian nationals, indirect discrimination would result, which could only be justified by objective considerations independent of nationality and proportionate to a legitimate aim. It seems to me that the prospective difference in treatment of non-Belgian nationals was a crucial factor in that case. Here, the same rule applies to all claimants regardless of nationality. Indeed, the appellant holds the nationality of a country which is part of the CTA.

58. A further criticism in *Prete* was that the test applied in the case did not admit consideration of other relevant factors in establishing links to the labour market. However, as I have held above, the three month test is not a presence test. The question of whether a claimant

is "living in" the CTA is not necessarily affected by temporary absence. In such a case, it is open to a decision maker or a tribunal to consider a range of factors to determine whether someone is "living in" the CTA. I have previously referred to matters such as where a claimant has their home. There may be other factors.

59. For example, in addressing the third question before the CJEU, Advocate General Wathelet in *García-Nieto* said, at paragraph 89:

> "89. The matters that can be inferred from family circumstances (such as the children's education or close ties, in particular of a personal nature, created by the claimant with the host Member State) or the fact that the person concerned has, for a reasonable period, in fact genuinely sought work are factors capable of demonstrating the existence of such a link with the host Member State. The fact of having worked in the past, or even the fact of having found a new job after applying for the grant of social assistance, ought also to be taken into account in this connection".

60. As the CJEU did not need to answer the first question asked by the referring German court in the light of *Dano v Jobcenter Leipzig* (C-133/13), and as the third question fell as a result of the affirmative answer to that question, *García-Nieto* was not directly of assistance. Nevertheless, it seems to me that the factors highlighted by the Advocate General are relevant to the issue of connection with the labour market and the broad context of whether a claimant has been living in the CTA.

61. I consider that a fixed three month presence condition which would not allow other factors to be taken into account would potentially fall foul of the requirements of EU law. However, the jurisprudence of the CJEU reinforces my view that the expression "living in" can and should be afforded a broad construction which is capable of admitting and assessing evidence of the connection of the claimant with the CTA. On the basis of *Prete*, I do not consider that regulation 85(2)(a) of the JSA Regulations would be necessarily contrary to EU law if approached in that broad way.

62. However, the tribunal did not adopt that approach. It adopted an interpretation which effectively reduced the "living in" requirement to a test of presence, without addressing other relevant factors. I accept the submissions advanced by the appellant on EU law grounds that the tribunal erred in law for that reason, while holding that the test in itself is not contrary to EU law.

63. As I consider that the tribunal has erred in law on the grounds submitted, I allow the appeal and I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.