[2017] AACR 6

(Secretary of State for Work and Pensions v MB & others (JSA)
[2016] UKUT 372 (AAC))

Judge Ward **CJSA/446/2015 & CJSA/1960/2015**
5 August 2016 **CJSA/827/2015 & CJSA/2042/2015**

European Union law – free movement of workers – application of Genuine Prospects of Work test – compelling evidence requirement

The Secretary of State decided, following Genuine Prospects of Work (GPOW) interviews, that all four claimants were no longer entitled to jobseeker's allowance (JSA) as they had failed to provide compelling evidence that they had a genuine chance of obtaining employment. The Secretary of State was the appellant in three cases where the First-tier Tribunal (F-tT) had upheld the claimant's appeals and a claimant the appellant in the remaining case. The main issue before the Upper Tribunal was whether the claimants had provided compelling evidence of a genuine chance of being engaged in work, thereby retaining their status as jobseekers under the Immigration (European Economic Area) Regulations 2006 (as amended). In addition two claimants argued that they had alternative grounds.

Held, allowing the appeals, that:

1. the only civil standard of proof was that the fact in issue had more probably occurred than not, but in deciding that question regard should be had, to whatever extent appropriate, to inherent probabilities: *Re B (Children)* [2008] UKHL 35 (paragraph 23);

2. to satisfy the GPOW test a person had to have a chance of being engaged which was founded on something objective and offered real prospects of success in obtaining work (that was genuine and effective) within a reasonable time: *Antonissen*, C-292/89, EU:C:1991:80. A tribunal would need to take a period of six months (or longer) of unsuccessful jobseeking into account, along with other factors, in assessing whether a person did indeed have genuine chances. The "compelling evidence" requirement could not go further than that without undermining the *Antonissen* test. The argument that regard should only be had to qualifications possessed by the claimant either on entering the UK or, alternatively, at the date of the decision under appeal was rejected (paragraphs 42 to 57);

3. when deciding an appeal, tribunals should not limit themselves to considering whether a claimant met the Department for Work and Pensions' own guidance, as its narrow focus might mean that a claimant was not alerted to the need to raise other issues which might bear on their chances of getting a job (paragraphs 61);

4. the judge rejected the alternative grounds argued by two of the claimants (paragraphs 132 to 146).

The judge set aside the decisions of the F-tT in all four cases, re-making the decision in one case to the effect that the claimant was not entitled to JSA, in another staying a decision pending a Court of Appeal judgment in a related case and remitting the appeals in the remaining two cases to differently constituted tribunals to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Ms Julia Smyth, instructed by Government Legal Service, appeared for the Secretary of State.

Mr Michael Spencer and Mr Martyn Williams, both of Child Poverty Action Group, appeared for the claimants MB, AM and VA.

Ms Mary Shone, Bolton Citizens Advice Bureau, appeared for the claimant AB.

Decisions:

All

I abridge from three months to six weeks the time limit in rule 44(3) of the Upper Tribunal's Rules within which any application for permission to appeal is to be made

CJSA/2042/2015

The appeal by the Secretary of State is allowed. The decision of the First-tier Tribunal sitting at Wolverhampton on 10 February 2015 under reference SC053/14/01022 involved the making of an error of law and is set aside. I re-make the decision in the following terms:

> MB's appeal against the decision of 14 November 2014 is dismissed. She did not succeed in demonstrating in accordance with regulation 6 of the Immigration (European Economic Area) Regulations 2006 that she had a "genuine chance of being engaged", nor has she succeeded in demonstrating that she was a dependant family member in the ascending line of her daughter, SA, at the material time. Consequently she fell to be treated as a "person from abroad" for the purposes of her claim to jobseeker's allowance on and from 14 November 2014.

CJSA/1960/2015 (Interim decision)

The appeal by the Secretary of State is allowed to the following extent. The decision of the First-tier Tribunal sitting at Bolton on 17 April 2015 under reference SC122/15/00145 involved the making of an error of law and is set aside. I re-make the decision in the following terms:

> Inasmuch as AB seeks to contend that she had a genuine prospect of being engaged as at 8 November 2014, her appeal against the Secretary of State's decision of that date fails.
>
> I find as fact that AB was born in 1995. Her mother, JB, was continuously employed between 1 May 2009 and 9 August 2013, in employment which at no point was registered under the Worker Registration Scheme. I further find that JB was in receipt of jobseeker's allowance between 24 September 2013 and 16 February 2014. At all material times, AB lived with her parents. I record that the Secretary of State does not seek to allege there was undue delay between JB's employment ceasing and when she claimed jobseeker's allowance.
>
> I stay the question of whether the above facts and concessions are sufficient to confer on AB a permanent right of residence as a family member of her mother, JB, until after the Court of Appeal shall have given judgment in *Secretary of State for Work and Pensions v Gubeladze*, in which a hearing is due in February 2017, or further order.
>
> AB's claim to be entitled to rely on rights derived from C-507/12 *Saint Prix* from 1 November 2014 is rejected.

CJSA/446/2016

The appeal by the Secretary of State is allowed. The decision of the First-tier Tribunal sitting at Northampton on 8 October 2015 under reference SC316/15/00513 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with this decision.

CJSA/827/2016

The appeal by the claimant is allowed. The decision of the First-tier Tribunal sitting at Fox Court on 5 November 2015 (the date on the statement of reasons is in error) under reference SC242/15/05153 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with this decision.

REASONS FOR DECISION

1. These cases, which are lead cases behind which a significant number of others are stayed, raise a number of issues concerning the so-called Genuine Prospects of Work ("GPOW") test. The phrase "genuine prospects of work" does not appear in legislation or case law. The relevant test is correctly expressed as "a genuine chance of being engaged", or sometimes "genuine chances": It has not been suggested that the difference between the singular and plural forms is significant and I do not consider that it is. Whilst a jobseeker's chances of being engaged have always been relevant under the definition of "jobseeker" under the Immigration (European Economic Area) Regulations (SI 2006/1003) ("the 2006 Regulations"), the point has arisen more prominently following amendments made to the 2006 Regulations by SIs 2013/3032, 2014/1451 and 2014/2761 (together "the GPOW Regulations"), which required, *inter alia*, "compelling evidence" to be provided. That expression is not defined.

2. In CJSA/2042/2015, the claimant MB had appealed against the Department for Work and Pensions' (DWP) decision dated 12 November 2014. A summary of the facts can be found at [81]–[87] below. On 10 February 2015 the First-tier Tribunal held that she had met the compelling evidence requirement and allowed her appeal. The Secretary of State appeals, with the permission of the Upper Tribunal. Mr Spencer conceded that the tribunal's decision was in error of law but submits that it should be re-made in MB's favour on the basis that she did have a genuine chance of being engaged or in the alternative was "a dependant direct relative in the ascending line" of her daughter, who was a "worker" at the material time, with the consequence that MB enjoyed a right to reside.

3. In CJSA/1960/2015 the claimant AB had appealed against a decision dated 8 November 2014. A summary of the facts is at [96] below. On 17 April 2015 the First-tier Tribunal allowed her appeal on the alternative bases (a) that AB had established a permanent right of residence, based substantially on having been a family member of her parents, and (b) that she satisfied the compelling evidence requirement. The Secretary of State sought to appeal against (a). Subsequently a challenge was added to ground (b) also. The Upper Tribunal gave permission to appeal on both grounds. Ms Shone accepts that, as regards (a), the decision of the First-tier Tribunal was in error of law. She invites the Upper Tribunal, if it were to set aside the decision of the First-tier Tribunal, to re-make the decision in AB's favour on alternative bases, discussed below.

4. In CJSA/446/2016 the claimant AM had appealed against a decision dated 15 June 2015. A summary of the facts is at [105]–[106] below. On 8 October 2015 the First-tier Tribunal found that he met the test in *Antonissen*, C-292/89, EU:C:1991:80 for being a jobseeker and allowed his appeal. The Secretary of State appealed with permission of a judge of the First-tier Tribunal.

5. In CJSA/827/2016 the claimant VA had appealed against a decision dated 7 May 2015. A summary of the facts is at [118]–[120] below. On 5 November 2015 the First-tier Tribunal found

that he had not met the compelling evidence requirement and dismissed his appeal. VA appealed with permission of a judge of the First-tier Tribunal.

6. Accordingly in CJSA/827/2016 the claimant VA is the appellant and the Secretary of State the respondent. In CJSA/2042/2015, CJSA/1960/2015 and CJSA/446/2016 the Secretary of State is the appellant and the respective claimants MB, AB and AM are the respondents. References to "the claimants" are to the claimants in all four cases. Where I intend to refer to one claimant only I do so by his or her initials.

7. I begin by setting out basic features of (income-based) JSA ("JSA" and "IBJSA"), before turning to examine the relevant European and domestic legal background against which the GPOW Regulations were made.

Jobseeker's allowance

8. JSA requires a claimant, among other things, to be available for employment, to have entered into a jobseeker's agreement, which remains in force, and to be actively seeking employment. Domestic law does not, in general terms, make it a condition of entitlement that a person is likely to succeed in their search. The Jobseeker's Allowance Regulations (SI 1996/207) ("the 1996 Regulations") do however contain provisions, discussed in more detail below, under which the parameters of what constitutes being "available for employment" in a particular case may be modified, under which the prospects of success may become relevant. Notwithstanding that they may otherwise meet the conditions of entitlement, by regulation 85A and Schedule 5, paragraph 14 of the 1996 Regulations, a "person from abroad" has an "applicable amount" of £nil and so, in practice, does not qualify at all. However, subject (since 9 November 2014) also to fulfilment of a three month actual residence requirement (not an issue in any of the present cases), a person who has a qualifying right to reside in the UK or certain other territories will not be a "person from abroad". The qualifying rights for the purposes of IBJSA, unlike those for some other benefits, include the rights under EU law of those who are seeking work. It is to such rights that I now turn.

The rights of jobseekers under EU law

9. As is well known, the right of jobseekers under EU law relating to the freedom of movement is derived from the decision of the European Court of Justice in C-292/89 *Antonissen.* Mr Antonissen was a Belgian national who, having arrived in the UK in 1984, was in 1987 sentenced to two terms of imprisonment for drug-related offences. The Home Secretary ordered his deportation under section 3(5)(b) of the Immigration Act 1971 on the ground that it was "conducive to the public good". Council Directive 64/221/EEC gave a degree of protection from deportation to nationals of other Member States who were workers. The Immigration Rules then in force stipulated that a national of a Member State may be deported if, after six months from admission to the UK, he had not yet found employment nor was carrying on any other occupation. That was so in Mr Antonissen's case, so the Immigration Appeal Tribunal concluded he could not rely on the protection of Directive 64/221/EEC.

10. The question the Court of Justice was asked by the High Court (put shortly) was:

> "May the legislature of the [host] Member State provide that … a national [of another Member State] may be required to leave the territory of [the host] State…if after six months from admission to that territory he has failed to enter employment?"

11. The Court observed that Article 48 of the EEC Treaty (now Article 45 TFEU) had to be interpreted so as to allow freedom to move to other Member States and stay there for the purposes of seeking employment. It observed at [16] (in relation to subjecting the right to a temporal limitation) that:

> "In that regard, it must be pointed out in the first place that the effectiveness of Article 48 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged."

12. The key paragraph is [21]:

> "In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State."

13. It is important to note that the right is ultimately derived from what is now Article 45 TFEU, as was, for instance, the right of the claimant in *Saint Prix*, C-507/12, EU:C:2014:2007, [2014] AACR 18 to retain "worker" status while pregnant.

14. Ms Smyth, while accepting the applicability of *Antonissen*, as she has to, seeks to provide a "context" by making a number of general points which are correct as far as they go but which in my view are of limited assistance to the Secretary of State. Thus she makes points about the right of free movement being not unconditional, pointing out that such conditions are "based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States", including the "protection of their public finances": see *Brey* C-140/12, EU:C:2013:565, [2014] 1 WLR 1080 at paragraph 55 and, to similar effect, *Dano v Jobcenter Leipzig*, C-333/13, EU:C:2014:2358, [2015] All ER (EC) 1. She draws attention to the need for the management of Member States' regimes to remain not just economically viable, but also technically viable (see *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1; [2016] AACR 26 at paragraph 68, reviewing the various European authorities, notably C-67/14 *Alimanovic* and *Dansk Jurist- og Økonomforbund*, C-546/11, EU:C:2013:603, [2014] ICR 1) and to the importance of legal certainty and transparency: *Alimanovic*. These principles have been developed in the context of Article 21 TFEU, which provides:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

15. The benefits in issue in those cases were held to constitute social assistance or special non-contributory cash benefits, rather than benefits intended to facilitate access to the labour market, as the UK accepts for the purposes of this litigation JSA is. It is not axiomatic, as *Saint Prix* illustrates, that the considerations on which Ms Smyth relies will prevail in a case which turns, as does the present one, on Article 45. But even taking these submissions at their highest, they cannot avoid the fact that the Court of Justice has stipulated how, if not exactly where, the line is to be drawn so far as jobseekers are concerned. Indeed, it may in my view fairly be suggested that the decision in *Antonissen* reflects consideration being given to the sort of factors to which Ms Smyth has referred.

16. I accept, though, that, whilst the application of the *Antonissen* test may lead to a difference in treatment between nationals of the host Member State and those of other Member States, that is something which inevitably results from the absence of an unconditional right of residence in other Member States and is a difference in treatment which has been endorsed by the Court of Justice through its decision in that case.

17. In due course EU law in this area was largely consolidated in Directive 2004/38 ("the Directive"). The proposal for that Directive (COM/2001/0257 final – COD 2001/0111*) had proceeded on the basis that Union citizens would have a right of entry and residence – without more – for up to six months. No express provision was made for jobseekers. When the Directive came to be enacted however, the initial right of entry and residence was restricted to three months (Article 6) and other amendments were made in order to address specifically the position of jobseekers. Recital (9) of the Directive indicates that the restriction to three months was:

> "without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice."

18. Article 14 of the Directive provides:

> "Retention of the right of residence
>
> 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
>
> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
>
> 3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
>
> 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

> (a) the Union citizens are workers or self-employed persons, or
>
> (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged."

19. Article 24 provides:

> "Equal treatment
>
> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

20. It is clear from the legislative history (see [17]) and from recital (9) that the Directive intended to implement the Court's decision in *Antonissen*. The way in which it was done, however, was not by adding jobseekers to the list of other categories of people who enjoy a right to reside beyond three months (which can be found in Article 7) but by the somewhat haphazard-seeming series of carve-outs set out above. The United Kingdom applies the carve-out in Article 24(2) so as to exclude EU jobseekers from a range of benefits constituting social assistance; it is not applied to IBJSA, presumably on the basis that it is considered a benefit facilitating access to the labour market rather than social assistance (see *Vatsouras* and *Koupatantze*, C-22/08 and 23/08, EU:C:2009:344).

21. When it came to implementing the Directive, the 2006 Regulations took the more straightforward approach of including a "jobseeker" (as defined) in the list of those who are a "qualified person" under regulation 6, along with the other categories which can be found in Article 7. For this purpose, by regulation 6(4) in its original form:

> "'jobseeker' means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged."

22. It is not in dispute that, in this form, regulation 6(4) was consistent with *Antonissen*. It is convenient to note here that the United Kingdom has taken the view that regulation 6(4) applies just as much to those who, while being in the UK, have become unemployed after working and

to certain other categories of jobseeker who have previously enjoyed a right to reside on a different basis as it does to those who have entered the UK to seek work but have not yet found it. The position is a considered one: (see *Shabani v Secretary of State for the Home Department* [2013] UKUT 315 (IAC) at [10]) and has since been reflected in the GPOW Regulations, thus no point is taken in the present cases based on whether any of the claimants had or had not been previously employed in the UK.

Standard of proof

23. As Lord Hoffman made clear in *Re B (Children)* [2008] UKHL 35 at [13], rejecting suggestions to the contrary which had been made in other cases

> "[T]here is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

He continued at [15] by saying that while that was the only rule of law,

> "Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

The GPOW Regulations

24. In setting out the effect of the GPOW Regulations, I limit myself to describing their application to those who can only rely, if at all, on their status as *Antonissen* jobseekers. The GPOW Regulations do also effect amendments in relation to the position of those who seek to retain their status as "workers", pursuant to Article 7(3)(b) and (c) of the Directive and regulation 6 of the 2006 Regulations. That is not the position of any of the claimants in the present appeals.

25. The Immigration (European Economic Area) (Amendment) (No.2) Regulations (SI 2013/3032) came into force, subject to transitional provisions, on 1 January 2014. Along with other amendments, regulation 6 was restructured. The relevant definition became:

> "(4) For the purpose of paragraph (1)(a), a 'jobseeker' is a person who satisfies conditions A and B.
>
> (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 six months unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged."

Condition A thus was addressing the extended application of the term "jobseeker" discussed at [22], but it is with the requirements of paragraph (7) in relation to Condition B that we are concerned, with the introduction after six months of a requirement to provide "compelling evidence".

26. The Immigration (European Economic Area) (Amendment) Regulations (SI 2014/1451) then further amended regulation 6. In particular so far as jobseekers are concerned, it amended paragraph (7) so that the requirement to provide "compelling evidence" became applicable at a total of 182 days as a jobseeker, unless the person had since last residing as a jobseeker been continuously absent from the UK for at least 12 months. A further amendment provided that a person who had had a period of absence from the UK, but not as long as 12 months, would be subject to the "compelling evidence" test from the outset.

27. The Immigration (European Economic Area) (Amendment) (No.3) Regulations (SI 2014/2761) then reduced the figure of 182 days to 91, so that the three month period in which all Union Citizens have a right of residence pursuant to Article 6 of the Directive counted against the 182 day limit, which would then be reached after the further 91 day period expressly as a jobseeker.

28. This demonstrates the attempt to make the requirements increasingly stringent and so the importance of the issue to jobseekers. However, none of these cases turns on the further amendments made by SI 2014/1451 or by SI 2014/2761. Rather, the issue is, more generally, the effect of the right being stated to be dependent upon the ability to "provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged".

29. Before turning to that issue, I record that the intended operation of the "compelling evidence" test in practice is addressed in the Secretary of State's Guidance to Decision Makers ("the Guidance"), paragraphs 073099 and 073100 of which provide as follows:

> "Compelling Evidence
>
> 073099 The DM can extend the claimant's JSA entitlement where the claimant has provided compelling evidence that a change of their circumstances as set out below has now given them a genuine prospect of work -
>
> 1. where the claimant has provided reliable evidence that they have a genuine offer of a specific job which will be genuine and effective work (see DMG 073112 to 073113) provided that job is due to start within 3 months starting from the relevant period plus 1 day point. In this case the relevant period can be extended up to the day before the job actually starts or is due to start (whichever is the earlier) or
>
> 2. where the claimant can provide proof during the relevant period that a change of circumstance has given them genuine prospects of employment (which will be genuine and effective work (see DMG 073112 to 073113) and as a result they are awaiting the outcome of job interviews.
>
> In these cases the relevant period can be extended by up to 2 months. Any extension is backdated to the date of change. However, time within the current relevant period is disregarded and as such, any change that occurs more than 2 months before the last day of the relevant period will not, in practice, result in any extension beyond the six month point.

> Note: Examples of a change in circumstances could include evidence of recent completion of a vocational training course, or a recent change of location to improve labour market conditions, which may significantly improve the claimant's genuine prospect of employment. Using these examples, the date of change would be the date that any qualification was awarded from, or the date that the claimant moved into a different labour market area.
>
> 073100 The DM should accept there is compelling evidence if
>
> 1. the claimant has a definite job offer of genuine and effective work or
>
> 2. the evidence presented of their change in circumstances indicates that it is likely the claimant will receive a job offer imminently. The DM should note that it is irrelevant whether the evidence is compelling if the change in circumstances does not meet the "date of change" requirement stated at DMG 073099 2. above.
>
> Note: See DMG 073112 to 073113 for guidance on genuine and effective work."

A number of examples of the intended application of the Guidance are then given.

30. This is of course internal guidance, not law, as Ms Smyth readily accepts, and it does not assist me in the task of interpreting the legislation. Further, the case before me is not a judicial review of the Guidance, thus I do not propose to comment on it in detail except insofar as the appeals before me require it. I consider that the Guidance does have implications for tribunals, however, and return to these at [61] below.

31. The skeleton arguments for the claimants draw attention to what is said in a DWP press release of 8 April 2014. Like the Guidance, it does not assist me in interpreting the legislation. It is not necessary for me to express a view on whether or not the press release is consistent with what Ms Smyth now submits, or with what I am holding the law to be.

32. In R(IS) 8/08 Mr Commissioner Rowland observed at paragraph 6 that:

> "I think I was wrong to state in paragraph 14 of CJSA/1475/2006 that, in the light of Antonissen, "the 'right to reside' test … does not, in practice, provide an additional hurdle for citizens of the European Union claiming jobseeker's allowance, save where there is a derogation from the usual rules" and I may have inaccurately recorded the Secretary of State's concession in paragraph 13. I accept that some people may be available for work and be actively seeking employment but not have a genuine chance of being engaged because, for instance, they have an insufficient command of English or Welsh for the type of job they are seeking or, perhaps, they have settled in an area where there is a particularly high level of unemployment and a dearth of jobs, so that the requirement to have a genuine chance of being engaged can be an additional hurdle. However, that additional hurdle will not often be significant and I suggest that the proportion of cases in which it will be right to reject a claim for jobseeker's allowance on the ground that the claimant does not have a right of residence rather than on the ground that the claimant does not satisfy one or more of the conditions in section 1(2) of the Jobseekers Act 1995 – because, for instance, he or she is not genuinely available for, or is not actively seeking, employment – may be relatively small. It is true that a person who is not genuinely available for, or is not actively seeking, employment may not have a right of residence, but, in such a case, it is not helpful to reject the claim solely on the ground

> of the lack of a right of residence without reference to the underlying ground that would apply to British citizens as well as other EEA nationals."

33. In that case, the Secretary of State conceded that the claimant had a genuine chance of being engaged at the time of her claim. The Commissioner's remarks, which were *obiter*, did accept, contrary to the view he had expressed in an earlier case, that the requirement to have a genuine chance of being engaged did create an additional hurdle for jobseekers who are EU nationals. His suggestion that the additional hurdle would often not be significant is perhaps unsurprising, in a context where the Secretary of State only seeks to explore whether a "genuine chance of being engaged" exists after six months, given the rather non-specific evidence before me suggesting that "through the support of the work coach, over 80% of people have left the JSA register within six months of making a claim." In my view, the Commissioner's remarks should not however be construed as providing any discouragement to relying on the "genuine chance of being engaged" "hurdle" in cases where it arises, as did the Immigration and Asylum Chamber of the Upper Tribunal in *Shabani* at paragraphs 54–55.

34. As a preliminary, I consider (and it is not disputed) that grammatically the requirement to "provide compelling evidence" applies both to continuing to seek employment and to having a genuine chance of being engaged.

35. One proves a chance by proving the facts from which it may be inferred or demonstrated that a chance exists.

36. What constitutes a "genuine" chance in this context does not appear to have ever been the subject of a ruling. When Mr Antonissen's case returned to the High Court ([1992] Imm AR 196 at 199–200), Popplewell J observed there was "a total absence of any evidence that he had or has had…a genuine chance of being engaged" and so concluded that:

> "I do not have to interpret for the purpose of this judgment precisely the boundaries of the word 'genuine'; 'good', 'real', 'more than illusory' are words that have been canvassed in the course of argument."

37. For the purpose of considering the impact, if any, of the "compelling evidence" requirement, it is necessary to consider, at least in general terms, the nature of the matter to which the evidence is directed, namely the "genuine chance".

38. "Genuine" is an everyday word and one which takes its colour from its context. Its application in the context of a chance is not straightforward. In my view it implies both the need for the chance to be founded on something objective (ie it is genuine as opposed to illusory or speculative) but also something about the likelihood that the chance will come to fruition. If I buy a ticket for the National Lottery, I have a genuine chance in the sense that there will be a properly operated draw in which I have the same small chance as everyone else with a ticket to win the top prize, but it is in reality exceptionally unlikely to be I who do so: to describe such a chance in the present context as a "genuine chance" would in my view not be the use of language which the European Court of Justice was intending and which has been adopted in subsequent legislation.

39. Comparison of the judgment of the Court with the opinion of the Advocate General in *Antonissen,* EU:C:1990:387, demonstrates that it was the Court which introduced the requirement for "genuine chances of being engaged", something which had not been foreshadowed, certainly overtly, and possibly at all, by the Advocate General. The latter rejected

leaving the matter to national laws (paragraph 29), noted the absence of Community rules but concluded that it did not follow that such a right of residence was unlimited (paragraph 30). While the Court could fix a limit, it should not pluck one out of thin air (paragraph 31) and there was no clearly appropriate analogy (paragraph 32). Applying a reasonableness test would open up the risk of national legislation and its attendant problems (paragraph 34), even if a degree of supervision by the Court was possible (paragraph 35). So his preference was for a right dependent on "actively, persistently and seriously" seeking employment (paragraph 36) or, borrowing from *Levin*, 53/81, EU:C:1982:105 and other authorities, "effectively and genuinely seeking an effective and genuine activity" (paragraph 37). National authorities have the means to identify those who are not genuinely looking for employment (paragraph 39) and are used to doing that sort of thing (paragraph 40). His approach offered the advantage of not ignoring the reality of the employment market in the host State (paragraph 41).

40. I am respectfully doubtful about the last sentence, which is unexplained. An approach based on an individual's efforts, as the Advocate General recommended, could be fulfilled irrespective of the reality of the employment market.

41. By including at [21] of its decision a reference to "genuine chances of being engaged", the Court was adding something of its own volition, as the Advocate General had been concerned only with inputs. I agree with Ms Smyth that the bar for what constitutes "genuine chances" must not be set so low as to deprive the Court's additional stipulation of any meaningful content. The responsibility of a Member State for jobseekers from other Member States is clearly not intended to be open-ended.

42. It seems to me that what is contemplated are chances that, as well as being founded on something objective, offer real prospects of success in obtaining work. Such a view is, moreover, consistent with both the French version ("*des chances véritables d'être engagé*") and with the German ("*dass er mit begründeter Aussicht auf Erfolg Arbeit sucht*"). It is a significantly higher level than the "not hopeless" suggested by the skeleton arguments for the claimants.

43. I also reject the claimant's submission by reference to *Levin*, paragraph 17, that a "genuine" chance is simply one that is "more than marginal". The submission is drawing from language used in a different context, that of assessing whether work is sufficiently substantial to have legal significance in the free movement context, rather than that of assessing a chance. The Advocate General did the same thing but, as we have seen, his approach was not adopted by the Court.

44. I do consider, however, that *Levin* is relevant in that there has to be a genuine chance of being engaged in work that is "genuine and effective" in the *Levin* sense. If such work is what is needed in order to be regarded as a "worker" when actually doing it, there would be no sense in allowing the test for a jobseeker, ultimately under Article 45, as being satisfied by reference to anything less. A similar conclusion was reached by Mr Commissioner Rowland in R(IS)8/08 at paragraph 7.

45. A "genuine chance of being engaged" is not something that can only be satisfied if one can point to a particular job (though of course the offer of a specific job will be very powerful evidence).

46. Ms Smyth submits that whether the test is fulfilled has to be looked at strictly by reference to a person's qualifications and experience at the date when the question is being

assessed by the DWP. She submits that the reference in paragraph 21 of *Antonissen* to "appris[ing] themselves of… offers of employment corresponding to their occupational qualifications" carries an implication that it is solely the qualifications with which a person moves to a host Member State that are relevant. Whilst I accept that the paragraph can be so read, I do not consider such a reading is the correct one. The Court in *Antonissen* expresses itself by reference to a classic case of a person who moves from Member State A to Member State B and, having reached the latter, looks for work. As noted at [22] and [25] above, who is accepted to be a jobseeker goes far beyond that. The reading for which Ms Smyth contends would be highly anomalous in the case, for instance, of a person who moved to the host Member State four years ago and who has resided there as self-sufficient, or even as a student (both categories within the "paragraph (1)(b) to (e)" mentioned in regulation 6(5) of the 2006 Regulations as amended by SI 2013/3032 (see [25] above). Further, it would operate as a barrier to free movement (and so is unlikely to have been what the Court intended) if, for instance, regard could not be had to qualifications obtained by a person whilst in the host Member State – one obvious example being the worker from abroad who, though otherwise readily employable, lacks sufficient competence in the language of the host Member State and takes steps following arrival to obtain a qualification in it.

47. Ms Smyth further submits that it is necessary to focus on the date at which the matter is being looked at by the DWP but in my view her argument fails sufficiently to recognise that what is being looked at, as at that date, is a "chance", something which by its nature necessitates a degree of looking forward. One can devise scenarios to illustrate the point, such as the person who has been guaranteed a job once he has passed his course; who has obtained top grades throughout his coursework and who has already sat the exam, of which he is awaiting the result, due in two weeks' time; or the person who, in order to take up a position, requires only to complete a one week training programme next month, for which he has booked and paid. A somewhat similar scenario can be found in the Home Office guidance entitled "European Economic Area nationals qualified persons – version 3.0 Valid from 7 April 2015".

48. Ms Smyth submits that it was not within the contemplation of the Court that a national of another Member State should be able to remain on IBJSA while acquiring the qualifications which would render them more employable. In my view the protection for the host State from that arises not by way of a narrow reading of paragraph 21 of *Antonissen*, nor by making a strict cut-off based on a person's qualifications (etc) at the date of the DWP's decision, but in recognising, as did Popplewell J in the remitted *Antonissen* case, that the "genuine chance" has to be of something coming to fruition within a reasonable period of time. What is a "reasonable time" will fall to be determined bearing in mind the observation of the Court of Justice that:

> "a period of six months, such as that laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged."

If the test is applied, as the Secretary of State does, after a six month period, while a "reasonable period" may vary from case to case, it is unlikely that it will extend to a prolonged period for further qualifications to be obtained, bearing in mind that the person will have already had six months in which to pursue their job search.

49. A right under *Antonissen* will subsist as long as the conditions for it are met. It applies therefore from the start of jobseeking, even if a Member State is free to decide not to check for an initial period whether the conditions attaching to the right are fulfilled, as appears to be the Secretary of State's position. Applying the concept of the "reasonable period" after increasing periods of unsuccessful jobseeking may mean that the conditions become ever harder to satisfy, but there is no indication in anything I have seen that under EU law there is an absolute time limit on the right. Indeed, the decision in *Antonissen* itself indicates the opposite. It may be that a Member State wishes to provide for a review at frequent intervals after an initial period in order to satisfy itself that the *Antonissen* conditions continue to be met, but that must be distinguished from only granting the right for a set period of time. There is nothing to stop a Member State conducting a review after six months but nor is there anything in EU law which permits any kind of step change in what has to be proved at that (or any other) point. If Ms Smyth's submission that "It is for Member States to prescribe the temporal limitation i.e. the permitted period of job seeking" goes beyond this, it is inconsistent with *Antonissen*.

50. Contrary to the submissions for the claimants, no inference can be drawn from *Alimanovic* regarding the periods for which status as a jobseeker can be retained. The referring German court may have accepted the position (see paragraph 57) but it was not the subject of the case before the CJEU.

51. On the other hand, I do not consider that it is possible to confine the Court's remarks about a period of six months to their particular context of ruling on a limitation under national law expressed by reference to such a period. It is Article 45 which dictates that, to a degree, the position of jobseekers be taken into account and the effectiveness of which has to be secured (cf *Antonissen* at [16]), but also the interpretation of that Article which defines (albeit in somewhat general and non-prescriptive terms) the limitations upon their rights thereunder. If the Court says, as it does, that "a period of six months does not appear in principle to be insufficient" to carry out the steps which the Court saw as comprised within the job search which Article 45 requires, that is in my view something which a national court or tribunal has to take into account. It is not a trump card given the qualified terms in which the Court expressed itself, but it is in my view certainly a material consideration. It is one which invites, indeed in my view requires, the enquiry of a claimant:

> "Given that you have had six months of unsuccessful jobseeking, a period appearing to the Court of Justice to be in principle not insufficient to take the steps which Article 45 requires you to be allowed to take, on what basis do you say you nevertheless have a genuine chance of being engaged?"

For these reasons a tribunal will need to take a period of six months (or indeed longer) of unsuccessful jobseeking into account, along with other factors, in assessing whether a person did indeed have "genuine chances" as at the date that it required to be looked at and a failure to do so will in my view amount to an error of law.

52. Against that background, I now turn to the requirement for "compelling evidence". The only example of such a requirement, enshrined in legislation, to which I was taken was section 78 of the Criminal Justice Act 2003, but that section, unlike the GPOW Regulations, explains –in subsection (3) – what the term means in its statutory context. Such a requirement may also be found in case law in a context where a court is indicating that it will take some persuading that the grounds for making some particularly draconian intervention are made out in, for instance,

family or criminal law, or for intervening in the normal course of the judicial process, but I was taken to no authority bearing on the meaning of the phrase and have found none.

53. I reject the submission for the claimants that *Commission v Belgium*, C-344/95, EU:C:1997:81 is direct authority that the imposition of a "compelling evidence" test would contravene EU law. The case concerned a requirement under Belgian law that a person who had not found employment after a three month period was automatically required to leave the country. Belgium conceded that it was unlawful and undertook to amend domestic legislation so that it became consistent with *Antonissen.* So far as relevant, the Court's decision was to declare the requirement to leave after three months to be unlawful. There is no such requirement in the present case.

54. The test under *Antonissen* remains whether a person has "genuine chances of being engaged" and that is a matter which falls to be decided on the civil standard of proof. In assessing whether a person has genuine chances of being engaged, the (flexible) principle that "regard should be had, to whatever extent appropriate, to inherent probabilities" (*Re B*) is available to a tribunal. However, that is a matter of "common sense, not law" *per* Lord Hoffman. It would appear to follow that a failure to apply it would only be challengeable in an error of law jurisdiction on the basis of perversity or other conventional public law grounds. Such may however in practice perhaps be more readily established when among the factors which the tribunal has to take into account is the passage of a period of six months or more for the reasons given in [51].

55. Ms Smyth submits that:

> "the UK is clearly entitled to require that an individual demonstrate a more compelling case at the conclusion of a six month period of unsuccessful job seeking than he has hitherto. In a nutshell, that is what the 'compelling evidence' requirement is intended to achieve. It amounts to no more than applying Article 14(4)(b) of the Directive at the conclusion of the six month 'Antonissen period'."

56. If regulation 6(7) of the 2006 Regulations does not go beyond the process which *Re B* permits and requiring *Antonissen* to be fully applied in accordance with its terms, then in my judgment it is unexceptionable. It does not detract from the Community interpretation of who is a "worker" and does not interpret the term, as regards jobseekers, any more restrictively than the Court of Justice already has. It may be said that on that view the requirement for "compelling evidence" does not add anything, save for making express to decision-makers and tribunals what was the case anyway, but that is not necessarily an inappropriate purpose for legislation.

57. What in my view the amendment cannot do and does not do is anything more than that. In particular, it cannot raise the bar for what constitutes a genuine chance (or chances) of being engaged higher than it falls to be set in accordance with *Antonissen*, which I have sought to interpret in this decision. The risk that it may do so arises particularly acutely in the context of proving a chance: the evidence which is likely to be considered more or less compelling is not that going to the existence of the primary facts, but the constellation of primary facts from which a chance may be inferred. Insistence on "compelling" evidence may, if care is not taken, all too easily result in raising the bar above the level I have found to be required, namely chances that are founded on something objective and offer real prospects of success in obtaining genuine and effective work within a reasonable period.

58. It follows that a decision-maker or tribunal can square the circle and give effect to regulation 6(7) by applying the processes permitted by *Re B* to the *Antonissen* test as I have explained it to be. If however they go further then that, there is likely to be a failure to apply *Antonissen* (and law derived from that case) correctly. On the other hand, a tribunal which fails to apply an approach to the evidence authorised by *Re B* may find itself on the end of a "facts and reasons" challenge.

59. My conclusion is, at least broadly, consistent with that of Upper Tribunal Judge Sir Crispin Agnew of Lochnaw Bt QC in *KS v Secretary of State for Work and Pensions* (JSA) [2016] UKUT 269 (AAC), a recent decision given without the benefit of oral argument.

60. The approach I have adopted appears consistent with the principle, which I accept exists, that a Member State is entitled to adopt its own reasonable conditions and requirements to give effect to EU law where EU law itself does not provide for them (*Secretary of State for Work and Pensions v Elmi* [2011] EWCA Civ 1403; [2012] AACR 22), as long as it does not elevate the domestic measures into something which undermines, rather than gives effect to, the European law test.

Implications of the Guidance

61. When deciding an appeal, the First-tier Tribunal should bear in mind that the Guidance to decision-makers is no less and no more than that. In particular, tribunals should be alive to the risk that, because the Guidance is framed in the limited way in which it is, GPOW interviews may have been conducted, and/or the Secretary of State's submissions to the tribunal written, by reference to a restricted palette of issues. I accept that the DWP in at least some cases does provide a factsheet at the start of a claim drawing claimants' attention to the fact that in a number of months' time they will need to provide compelling evidence that they have a genuine chance of being engaged. Nonetheless, when it comes to the interview, even if the interviewer does ask the claimant whether there is anything s/he would like to add, that question may be perceived as taking its colour from what has been discussed previously and claimants may not necessarily have a developed perception of the range of matters which, appropriately evidenced, might be relevant to the question to be decided. I accept that the matters to be established will, in general, be likely to be within the claimant's knowledge rather than that of the DWP, but (*per* Baroness Hale in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372, also reported as R1/04 (SF), at 1390F):

> "The department is the one which knows which questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met"

and if this is not conveyed accurately or sufficiently the inquisitorial jurisdiction of the First-tier Tribunal in social security matters may require it to ask a broader range of questions.

62. I am not persuaded that the fact that the *Antonissen* test, Article 14(4)(b) and the domestic legislation all refer to the requirement on a claimant to provide evidence as part of the test adds anything to how *Kerr*, properly applied, would operate in this context: matters of a claimant's qualifications and job search are always likely to be for him rather than the Department to establish.

Relevance of agreed restrictions on availability

63. Here is a convenient point to deal with an argument (also raised in other cases) which was raised on behalf of the claimants, but which it was then acknowledged during the oral hearings did not require to be decided on the evidence before me, but should be kept for a case in which the point did arise.

64. It arises because there are various provisions in the 1996 Regulations which allow claimants to impose restrictions on their availability for employment. Regulation 7 permits, within limits, restrictions on the hours and pattern of hours; regulation 8 permits restrictions on the nature of the employment for which a person is available, the terms and conditions of employment and the locality or localities of employment. Regulation 13(2) allows restrictions on the nature of the employment arising by reason of a sincerely held religious belief or a sincerely held conscientious objection. Regulation 13(4) makes special provision enabling carers to restrict the hours for which they are available. All of these regulations are subject to the condition that, notwithstanding those and any other restrictions on availability, a person must have reasonable prospects of employment.

65. There are other provisions as well which allow restrictions on availability, but which are not subject to such a condition: such is the case under regulation 13(3) for a person who seeks to restrict their availability in any way, "providing the restrictions are reasonable in the light of his physical or mental condition."

66. In relation to the former category, regulation 10 provides:

> "(1) For the purposes of regulations 7 and 8 and paragraphs (2) and (4) of regulation 13, in deciding whether a person has reasonable prospects of securing employment, regard shall be had, in particular, to the following matters –
>
> (a) his skills, qualifications and experience;
>
> (b) the type and number of vacancies within daily travelling distance from his home;
>
> (c) the length of time for which he has been unemployed;
>
> (d) the job applications which he has made and their outcome;
>
> (e) if he wishes to place restrictions on the nature of the employment for which he is available, whether he is willing to move home to take up employment.
>
> (2) It shall be for the claimant to show that he has reasonable prospects of securing employment if he wishes to restrict his availability in accordance with regulation 7 or 8 or paragraph (2) or (4) of regulation 13."

67. It had been submitted that some or all of the claimants had restricted their availability in one or more of the ways to which regulation 10 applied and it followed from the fact that they had been permitted to do so, that the Secretary of State had accepted that each claimant concerned had shown (regulation 10(2)) that he or she did have "reasonable prospects of securing employment". That test was said to be indistinguishable from (or virtually so) the test under *Antonissen* of "genuine chances of being engaged" and so the existence of the restrictions provided powerful evidence that the claimants did indeed meet the *Antonissen* test.

68. To explain why the submission fails in the present cases requires a look at the evidence. I begin with the claimants' jobseeker's agreements and/or "Claimant Commitments" – a Claimant

Commitment under "old style" JSA (ie cases such as these in which universal credit under the Welfare Reform Act 2012 has not come into operation) is still in law a jobseeker's agreement.

69. MB's Claimant Commitment provided that she was available to work between 08.30 and 17.30, Monday to Friday, for up to eight hours a day and that she would look for work within 90 minutes travel time each way from her home.

70. AB's jobseeker's agreement was in evidence in a form which consisted of several screen prints and similar documents. These contained a reference to "40:00" and a field "Permitted Period: 0". The significance of both is addressed below.

71. AM's jobseeker's agreement was in similar form to AB's and contained similar provisions.

72. VA's Claimant Commitment indicated that he was available for work up to a minimum of 40 hours per week and that he accepted the same 90 minute travel provision as had MB.

73. A witness statement aimed at helping interpret the various printouts was helpfully provided. It was made by Mr Adrian Richards, currently a policy adviser on EU and international policy across the main DWP benefits but also with 22 years' operational experience of DWP managerial roles in benefit delivery and jobcentre services. His evidence was unchallenged. It was given by reference to AM's case but for the reasons at [71] was equally applicable to AB's. He explained, and I accept, that the figure "40:00" in AM's jobseeker's agreement without any further explanation denotes that he had placed no restrictions on his availability for work and in particular had placed no restrictions on his pattern of availability with regard to days or hours. The document showed that he had agreed to be willing and able to take up employment of at least 40 hours a week in accordance with regulation 6 of the 1996 Regulations. Mr Richards further gave evidence that if AM had sought to restrict terms and conditions, rate of remuneration, location etc, this would have fallen to be considered for a "Permitted Period". Because the "Permitted Period" field had been completed with the figure "0", it indicated that AM had not placed any restriction in relation to any of those matters.

74. With regard to the provisions in MB's and VA's Claimant Commitments in relation to travel time, I note that regulation 72 of the 1996 Regulations provides:

> "A person is not to be regarded as having a good reason for any act or omission for the purposes of section 19(2)(c) and (d) and section 19A(2)(c) if, and to the extent that, the reason for that act or omission relates to the time it took, or would normally take, for the person to travel from his home to the place of the employment, or a place mentioned in the jobseeker's direction, and back to his home where that time was or is normally less than one hour and thirty minutes either way… ."

75. The sections cited are some of those which provide for sanctions where a claimant has failed to comply with certain obligations required of him or to pursue available opportunities with sufficient vigour. While regulation 72 operates the other way round (it does not say that a claimant shall be taken as having a good reason for something which would otherwise attract a sanction if the relevant place is more than 90 minutes from his home), it does reflect a degree of acceptance by the Secretary of State that up to 90 minutes each way is an amount of time reasonably to be expected.

76. There was also a witness statement before me from Ms Debbie Ralph, Policy Adviser on conditionality regimes, whose evidence was likewise unchallenged. In it she sets out the role of work coaches (formerly personal advisers). She describes the intended purpose of conversations between claimants and their work coach before continuing:

> "In conversations with their work coach, claimants can be flexible and can opt to restrict their availability as long as they remain available for 40 hours per week and have not considerably reduced their prospects of finding employment for his [*sic*] revised hours. As can be seen from her claimant commitment, MB was available for work for 40 hours a week, on weekdays only. However, as she did not restrict the total number of hours below 40 hours a week, the work coach did not raise a doubt to a decision maker on the grounds of restricted availability. However, should the coach have decided that there could have been grounds (i.e. there was no restriction below 40 hours but the choice to not be available at weekends at some point could have been restricting availability), they could have chosen to raise a doubt.
> …
> Where…the work coach has been given grounds to doubt that the jobseeker has satisfied the availability condition, they inform the jobseeker that JSA cannot be paid to them under the normal rules until a decision maker has made a decision on whether restrictions placed on their availability still provide a reasonable prospect of securing employment. A record is made of the conversation and the work coach completes a referral form which is sent to the decision maker for consideration. If such a referral was made, it is recorded on departmental systems and referral forms are retained for 14 months. No such referral was made in any of the present cases.
> …
> Due to the limited circumstances upon which claimants can restrict their availability, and the flexibility claimants have to vary their availability within reasonable limits, JSA regulation 10 is not often used in practice and not applied routinely to every claim for JSA."

77. In the light of the evidence, Mr Spencer (from whom Ms Shone did not subsequently dissent) indicated that it was accepted that in none of the cases had a decision been taken on the application of regulation 10 of the 1996 Regulations and therefore the point was not being pursued.

78. Mr Spencer suggests that it will be relevant for a tribunal to ask in every case whether a claimant has restricted his or her availability for employment and, if so, whether that has been the subject of a referral to a decision-maker. I can see that they may well be prudent questions to ask in some cases but whether it may ever be an error of law not to do so will have to be considered further in a case in which it arises.

79. There was, also some discussion about the obligation of the DWP to provide copies of a claimant's Claimant Commitment/jobseeker's agreement and the obligation of the tribunal to obtain it if the DWP had not done so. I have already indicated at [62] above my view that the fact that a requirement to provide evidence is inbuilt to the test being considered does not in my view materially alter the impact of *Kerr*. Claimants are given a copy of their jobseeker's agreement and thus they ought to be able to produce it if they think there is a point to be made in relation to it. If asked to direct its provision by the department, tribunals may wish to ascertain both why the claimant cannot produce it and why, given Ms Ralph's evidence recited above, production of it is said to be necessary.

Genuine chance of being engaged – the individual cases:

80. In this section I deal with the four appeals insofar as they relate to the "genuine chance of being engaged" test. In the cases of MB and AB, there are alternative grounds, which are considered separately below.

MB

81. MB is a Dutch national, born in 1958. She told the DWP she came to the UK in August 2010 in order to look for work. She brought £100 with her. She claimed JSA on 8 May 2014, having made previous claims for JSA and (sometimes unsuccessfully) for employment and support allowance (ESA).

82. On 15 May 2014 she indicated that in the period between her arrival and that date (three years and eight months) she had not been either employed or self-employed in the UK. She had applied for unspecified jobs and had asked about work through agencies but had not registered with any. She had no industry contacts or links with the labour market and no qualifications. She had fluent English, but no formal qualification in that regard. Notwithstanding the previous claims for ESA, she was not unable to work on the grounds of ill-health or disability.

83. By a decision dated 20 May 2014 the Secretary of State decided MB had "jobseeker" status, but would need to be prepared to provide evidence at any time during the claim that she had a genuine chance of being engaged and after six months to provide compelling evidence in that regard at a GPOW interview.

84. At the GPOW interview held on 12 November 2014, MB indicated that she still had not found a job or taken any steps to set up as self-employed. She had done nothing to increase her prospects of being offered a job imminently. She asked the Secretary of State "to consider giving me more time to find a job, I am looking at starting education so that I can increase my chances for employment".

85. She had, though, had a series of discussions with her "job coach" earlier in 2014. She had been looking for work on the internet, in the papers and by asking friends, with the usual outcome being that she was unsuccessful because of her lack of experience of work in the UK, and was finding a job very hard to come by. She had registered by August 2014 with Compass Group, a large company engaged in catering and support services, but to no avail. She was receiving assistance through "EOS-Wolverhampton".

86. On 14 November 2014, the Secretary of State decided that MB was no longer a qualified person and her JSA would end on 12 November 2014. Of the boxes reflecting the type of decision, the box for "other" was marked, rather than that for "supersession". No point has been taken on behalf of the claimant in that regard.

87. On 15 December 2014 MB registered with a local authority project whose aim was "to support residents to overcome barriers and to help them access work related training and employability skills leading to improved chances of finding work". MB attended group sessions and received one to one mentoring "to help her overcome some of the barriers she is currently [February 2015] facing in finding employment".

88. The grounds of her appeal were that she had been seeking work extensively but had been unable to find work.

89. MB gave oral evidence that she had an adviser at Jobcentre Plus called Angela. Her role was to help MB find a job and she said she "might be able to get [her] a grant to get a qualification and hence a job" (record of proceedings). The claimant's evidence was that "EOS said would get me a job".

90. The First-tier Tribunal noted the above evidence. It correctly directed itself in relation to the extracts from the Guidance: that it provided examples of what might be viewed as compelling evidence, but that there were other ways in which claimants might be able to meet that requirement. It found for MB on the basis of the evidence about what had been said to her by officials at JobCentre Plus and EOS. The judge attributed knowledge of the labour market to the officials concerned to allow them to make what he regarded as "very positive comments". Whilst he contemplated the possibility that such officials might be required to be positive with every claimant with whom they dealt, there was no evidence to that effect. He therefore accepted MB's unchallenged evidence and found that the officials' observations did provide compelling evidence that she had a genuine chance of being engaged.

91. Ms Smyth makes a number of criticisms of the tribunal's decision. First, she criticises the tribunal for failing to take into account MB's circumstances, including her lack of qualifications, her failure to find any work in a period of over four years and the lack of any change in her circumstances by the time she was interviewed. I agree. This was all material evidence which could (*Re B*) and should have been taken into account in assessing whether on the balance of probabilities she had genuine chances of being engaged. With or without the requirement for "compelling" evidence, a process of weighing up the observations made by the officials against MB's regrettable lack of success in the job market was required. Then, she says that it was impermissible to rely on what "Angela" said as evidence going to the claimant's present prospects of finding employment. Again, I agree. Angela's evidence as recorded was at best tentative. It was that she might be able to MB to get a grant to get a qualification and hence a job. That evidence was speculative and unparticularised. Even such chances as it did hold out were without any timescale and reliance on it involved (amongst other difficulties) ignoring whether "being engaged" was liable to occur within a reasonable period.

92. For MB, it is conceded that the tribunal did err in law by failing properly to address the genuine chance of being engaged test.

93. I do not need to deal further with Ms Smyth's other criticisms of the decision. I set it aside and re-make it.

94. I conclude that MB did not have a genuine chance of being engaged. Her long record of unsuccessfully seeking work, her lack of qualifications and the lack of response even when she had latterly stepped up her efforts all count against her. Even after the decision, there was evidence that in February 2015 she continued to face barriers to work which were having to be addressed with the help of the local authority project and there is no reason to suppose those barriers did not exist also at the date of the decision under appeal. Any chance of being engaged had to materialise within a reasonable period. Given the observations of the Court in *Antonissen*, MB had already had what might be generally regarded as a reasonable period, and more besides, in which to find work. While I accept that the evidence about what the advisers said could have some probative weight, as I am re-making the decision I am entitled to evaluate the evidence

afresh and would find it surprising if people fulfilling those roles were not disposed to be as positive as possible in order to motivate those they are seeking to help into employment. I consider that to be a matter of general experience rather than necessarily requiring to be evidenced. In any event, I take into account the weaknesses I have already indicated in the evidence about the conversation with Angela and the evidence addressing the conversation with EOS provides no sufficiently specific reasoned basis for concluding that MB had a genuine change of being engaged.

95. I return to her alternative ground at [132] below.

AB

96. AB is a Czech national, born in 1995. She came to the UK with her parents in May 2007. I deal at [140] below with her mother's subsequent employment, in the context of the alternative ground on which it is said the tribunal's decision should be upheld. AB left school at 16, with no GCSEs. In Summer 2013 she completed an (unspecified) course in business studies at her local college in which, as found by the First-tier Tribunal, she achieved merits and distinctions. Between 1 September 2013 and 19 February 2014 she was a jobseeker. Between 20 February 2014 and 19 March 2014 she worked as a packer at Park Cakes, through an agency. The work is variously said to have folded due to an (unspecified) administrative issue (skeleton argument) and "because of a reduction in work", but neither is adequately evidenced. On 1 May 2014 she claimed and was awarded JSA. Some time around then she became pregnant, with a due date of 29 January 2015. She was interviewed on 6 November. She confirmed that she had not been offered a job nor had taken any steps to be self-employed. She had taken no steps to improve her prospects of being offered a job imminently and when asked if there was anything she wanted to add replied only that her baby was due in just under three months' time. On 8 November a decision was taken (Ms Smyth says, on supersession, but the record of the decision is silent in this regard: no issue is taken on behalf of the claimant) terminating entitlement to JSA with effect from 1 November 2014. There was no evidence that her pregnancy exempted her from being available for work or actively seeking employment. No suggestion has been put forward in the present proceedings that her pregnancy was relevant to whether, as at the decision date, she had a genuine chance of being engaged or not.

97. The tribunal's reasons for concluding that AB had given "cogent" (which I take as equating to "compelling") oral evidence that she was seeking employment and had a genuine chance of being engaged consisted of the following:

> "The Tribunal found that she has lived in the UK since she was 11, that she has attended secondary school to the age of 16 and at Bolton College thereafter. She has therefore completed all her secondary education in the United Kingdom and can speak fluent English. She undertook a course of Business Studies …as a result of which she achieved merits and distinctions. She continued to look for work and was not prevented from doing so at the date of decision by reason of the fact that she was pregnant with a due date of 29 January 2015. It was the Tribunal's view that she had as good a chance of obtaining employment as any other young person seeking work and indeed the steps she had taken to obtain qualifications and her ability to speak two languages placed her in a stronger position than many jobseekers."

98. Ms Smyth submits the tribunal's decision was in error of law for a number of reasons:

(a) the tribunal ought not to have placed weight on the fact that she had continued to look for work;

(b) given that AB had sought work unsuccessfully for six months, a more rigorous analysis of her prospects of finding work thereafter was required;

(c) the tribunal failed to apply *Antonissen* properly;

(d) the tribunal, in examining whether AB had equal prospects to those of other jobseekers, asked the wrong question;

(e) simply pointing to what had already unsuccessfully been done to find work could not serve to demonstrate a genuine chance of being engaged thereafter; and

(f) there was no compelling evidence that AB had genuine prospects of finding work at 1 November 2014.

99. Ms Shone submits that:

(a) AB's actions in completing the Business Studies Course and securing employment, albeit brief, were "against the odds", when regard is had to research into the extent to which young people with similar (lack of) qualifications are often "NEET" – not in education, employment and training, and thus supports the tribunal's conclusion;

(b) the fact that AB secured a job "so quickly" after finishing school shows that she had a genuine chance of being engaged;

(c) the tribunal's reference to the prospects of other young people must be seen in the light of the fact that it was addressing a submission that had been put to it by AB's representative;

(d) the Secretary of State's submission that there was no compelling evidence is in effect arguing that the Guidance should be applied and the Guidance is unlawful; and

(e) the tribunal applied the right test. In doing so it took into account AB's skills and abilities, the length of time she had been unemployed and the fact that she had previously secured work.

100. Contrary to Ms Shone's submission, the tribunal did not rely on the short period of work with Park Cakes. In my judgment it was right not to do so. There is little about that job in evidence and specifically nothing reliable about the circumstances in which it came to an end. There are no findings as to the content and level of the business studies course, thus what value, if any, it may have had in enhancing AB's job prospects is a matter of speculation. Given the nature of the work at Park Cakes, it is impossible to draw any inference that completing the course contributed to her getting the job. Even though the tribunal was picking up on a submission made by AB's representative, it does not help save the decision if the submission was addressing the wrong test: the question is whether a particular claimant had genuine chances of being engaged. While it may be theoretically possible that that could be satisfied by detailed statistical evidence as to the employment outcomes for others with similar qualifications and circumstances in the relevant area, that is unlikely ever to be available to a tribunal and there was

none in this case. I consider below whether the Secretary of State's submission that there was no (compelling) evidence is right, but it does not equate to applying exclusively the Guidance.

101. Turning to Ms Smyth's submissions:

> (a) I accept that continuing to seek employment is conceptually different from having a genuine chance of being engaged. However, seeking employment is a necessary condition in establishing whether there is a genuine chance of being engaged. I would not set the tribunal's decision aside merely because it had included seeking employment in the section directed to whether there was a genuine chance of being engaged, when it played only a minor part in its reasoning on the point.
>
> (b) and (c) I agree the tribunal failed to bear in mind what was said in *Antonissen* about a six month period (see [51] above).
>
> (d) I agree that the prospects of jobseekers generally cannot provide the answer to the statutory question, unless backed up with the sort of evidence referred to in the previous paragraph.
>
> (e) This submission is made out. While the tribunal did note AB's skills and abilities, it failed to conduct any scrutiny of how they affected her prospects of securing employment given six months of unsuccessful jobseeking.
>
> (f) I take the submission as referring to a genuine chance of being engaged. I agree. There was nothing in the evidence that provided a ground on which a conclusion that there was such a chance could be based. Even if one takes speaking two languages as a factor going to the chances in absolute terms rather than relative to the chances of other jobseekers, I do not see how, of itself when coupled with AB's other circumstances, that could be said to mean she had a real chance of securing employment within a reasonable period.

102. Indeed, I would go further. The tribunal simply failed to consider the prospects of this claimant, with no GCSEs and an unspecified completed course in business studies, one month's previous unskilled work which ended in unclear circumstances, but with English and (as I assume) Czech languages, obtaining employment. It found some relevant facts but then allowed itself to be distracted into a comparison with the chances of others.

103. I would therefore set the tribunal's decision aside on this ground. I also set it aside on the basis that, as is accepted, its conclusion that AB had a permanent right of residence as the result of her parents' work was in error of law, as there was no evidence before the First-tier Tribunal to support a finding that either of her parents was working between 7 April 2010 and 30 April 2011 (as one of them needed to have been for AB to succeed on this ground). My interim decision above makes make further findings on that issue with the benefit of additional evidence, addressing AB's alternative case at [133] below.

104. I have not heard argument on the implications of (as submitted) supersession or other decision-taking processes in these cases, but even on the assumption that, it being a supersession, it was for the Secretary of State to show that, given the passage of time, she no longer had a genuine chance of being engaged at the date of the DWP's decision, I conclude that she did not. I do not accept that being bilingual in English and Czech of itself is likely to lead to work, particularly given the paucity of AB's other qualifications. Her work record is short and how the

work she did do came to an end has no clear explanation. In the absence of an adequately evidenced case, the chances of other young people generally in obtaining employment are not material to what I have to decide. While it may have been fair enough initially to assume that, despite her modest qualifications and work record, AB had a genuine chance of being engaged, once one bears in mind the observations in [21] of *Antonissen*, the passage of six months without success calls into question reliance on those matters alone.

AM

105. AM is a Portuguese national, born in 1964. He arrived in the UK on 14 October 2011. He worked in the remainder of the 2011/12 tax year – whether continuously or not I cannot say. It appears from his national insurance contributions record that for 50 of the 52 weeks in the tax year 2012/13 he was either on JSA or claimed ESA (which was disallowed for failing the right to reside test). If he worked at all in that year, it was for a very short period of time. The same comment applies in relation to 2013/14 where for 51 weeks of the 52 he was on either ESA or JSA. In relation to both of those tax years there is no positive indication that he did any work, although the Secretary of State's submission to the First-tier Tribunal appears to concede that he did do some. On 21 May 2013 he successfully claimed JSA again.

106. On 11 June 2015 he was required to attend a GPOW interview. By then he had been claiming JSA for over two years without having found work (I do not rely on earlier periods of being without work in view of the Secretary of State's concession mentioned above, even though I doubt its correctness). At the interview he confirmed that he had no pending offer to start work and had taken no steps towards setting up as self-employed. He said he had completed a Pre-SIA (Security Industry Authority) five week training scheme at EYS, which he considered would improve his job prospects as he said there was a current need for qualified SIA officers in the area. When asked if he had anything to add, he said he was waiting for an SIA course due to start "in the next couple of weeks". No documentary evidence about the course appears to have been provided. He explained that before claiming JSA he had worked for Roadchef for about eight months (the documentary evidence does not support this) and that since claiming JSA he had had neck surgery. The Secretary of State in a decision whose nature is once again not indicated, concluded that he did not have a genuine prospect of work.

107. A written submission had been prepared by Community Law Service:

a. it was submitted that the word "compelling" in regulation 6(7) is an unnecessary and unwarranted gloss on the EU source legislation;

b. it recited the relevant parts of *Antonissen*;

c. it submitted that "the very act of claiming JSA and satisfying the labour market conditions of that benefit are sufficient to demonstrate that the claimant is seeking employment and has a genuine chance of being engaged;

d. it submitted that AM had complied with all his claimant responsibilities, had never been sanctioned and had consistently been available for and actively seeking work;

e. it provided further evidence about one week SIA course. AM had been unable to provide sufficient forms of identity and had lost his initial place on the course. Although having sorted out his ID he had been approaching those responsible for the course

regularly, there was no place on it available until week commencing 7 September 2015, which would mean "he can get his SIA licence, once he passes the course".

f. it also provided evidence of courses which he had already successfully completed, as follows:

- Entry Level Certificate in ESOL Skills for Life – Entry 3, Speaking and Listening, Written and Reading (Awarded October 2012)
- Level 1 City and Guilds Certificate in Employability and Personal Development (awarded 24 January 2013)
- OCR Entry level 3 Certificate in English "Read Straightforward texts" (awarded 28 May 2014)
- BTEC Level 1 Certificate in Work Skills (awarded January 2015) (it appears that this formed part of a composite training package with the SIA course).

108. AM gave evidence that after he had claimed JSA in May 2013 he had made "hundreds" of applications. He had previously worked in security (though when and where was not made clear). By the time of the First-tier Tribunal hearing he had completed the SIA course and was awaiting the result.

109. In her statement of reasons, the Tribunal Judge:

a. recalled that the *Antonissen* test allowed a jobseeker to remain so long as "the person concerned provides evidence that he is continuing to seek employment and has genuine chances of being engaged";

b. indicated that she considered the effect of the GPOW Regulations was that since 1 January 2014 an EEA national's right to reside as a jobseeker is time limited (though she acknowledged that there was still the possibility of retaining it for longer than the "relevant period" as defined);

c. noted that the written submission by the Secretary of State, on which the presenting officer had relied, and which adhered closely to the Guidance set out at [29] above, conflated guidance and law;

d. concluded that the amendments to regulation 6 did not mean that the standard of proof had changed;

e. made reasoned criticism of the Guidance;

f. expressed the view that it was contradictory that a claimant complying with his jobseeker's agreement did not have a genuine chance of being engaged, because under section 9 of the 1995 Act an employment officer was not permitted to enter into a jobseeker's agreement unless in his opinion the conditions of availability for, and actively seeking, work were satisfied; and

g. concluded that because AM was seeking work and had never been sanctioned, had attended courses on work programmes in 2012, 2013 and 2014 and had received the BTEC Level 1 certificate in January 2015 and as at the date of decision had been waiting to attend the SIA course, he had a genuine chance of being engaged.

110. Ms Smyth submits that the tribunal erred in a number of respects:

a. by disregarding the word "compelling", as it was bound to apply the 2006 Regulations, as amended by the GPOW Regulations, which were entirely consistent with EU law;

b. as a result of the error at a. it failed to take proper account of the fact that AM had sought work unsuccessfully for over two years without finding it and as a result needed to do more to establish that he had a genuine chance of being engaged;

c. by taking into account that AM was waiting to attend the SIA course, in that the tribunal was bound by section 12(8)(b) of the Social Security Act 1998 to assess the position as at the date of the Secretary of State's decision. Attending that course could not logically improve his prospects of work beforehand;

d. by taking into account in assessing whether AM had provided compelling evidence that he had a genuine chance of being engaged that he had been actively seeking work and "was complying with the terms of his jobseeker's agreement"; and

e. the tribunal's comments on the Guidance were both *obiter* and wrong for reasons which she set out.

111. Mr Spencer for AM submits that the tribunal's conclusion was open to it on the evidence and that "it can be assumed that the FTT took into account not only the evidence cited above but also the length of time AM had already spent seeking work and his credibility and comportment as a witness and as a potential candidate for work". The tribunal was entitled to look at the skills which were soon to be acquired through attendance on the course, as it had to evaluate a "chance". If the tribunal disregarded the word "compelling", it was right to do so. The tribunal was entitled to take into account compliance with AM's jobseeker's agreement but in any event compliance with it was not the sole or operative reason for the tribunal's decision.

112. I agree with the tribunal that the Secretary of State's submission to it did conflate Guidance and law; however, as indicated above, I am not conducting a judicial review of the Guidance and so comment neither on the tribunal's criticisms of it (which were, as Ms Smyth submits, *obiter*) nor on Ms Smyth's defence of it.

113. I agree with Ms Smyth that the First-tier Tribunal erred by relying on a perceived contradiction between the claimant complying with his Jobseeker's Agreement and being said not to have a genuine chance of being engaged. I do not think the comment was being made by reference to the particular circumstances of regulation 10 of the 1996 Regulations (see [66]) but is, rather, making a point in more general terms. Complying with the jobseeker's agreement may well go to whether a person meets the additional requirement of "continuing to seek employment" and non-compliance may affect negatively his ability to show that he has "genuine chances of being engaged". However, given that complying with domestic jobseeking requirements and the genuine chances of being engaged test are different things (see [32]), the former cannot alone be relied upon to establish the latter, and the contradiction perceived by the First-tier Tribunal does not arise.

114. I do not entirely agree with either representative in relation the other flaw I perceive in the First-tier Tribunal's decision. For the reasons I have given at [51], the (in principle)

sufficiency of a six month period for Article 45 purposes was a material consideration for determining whether AM remained a jobseeker. The First-tier Tribunal set out the second part of what *Antonissen* decided, but made no reference at all to what the case decided in relation to the six month period. If it had done so, this would have been liable to affect consideration of whether, despite the passage of time, AM still had a genuine chance of being engaged. It follows that I agree with Ms Smyth's point at [110b] in the result, though not with how she got there. The point is not that the tribunal ignored the requirement for "compelling evidence" (indeed it expressly makes a finding by reference to it in paragraph 4 of its statement of reasons) but that it applied it against an incomplete self-direction as to the legal issues involved. Had it directed itself correctly on that issue, it could and should then have applied the normal civil standard of proof (as to which I agree with the tribunal judge's point at [109d]).

115. I agree with Ms Smyth that the First-tier Tribunal erred in law in relation to the training, though not for the reason she submits. It seems to me that the tribunal's findings of fact going to AM's chances were inadequate. As set out at [46]–[48], I consider that being on the point of completing a course may provide evidence going to whether a person has a genuine chance of being engaged. But the tribunal made no findings as to how secure, as at the date of the decision under appeal, AM's place on the SIA course was, his chances of successfully completing it or indeed the likely effect on his employment chances if he were to complete it.

116. Whilst not a point taken in argument (so I do not rely on it as constituting an error of law), but certainly relevant to the tribunal to which this case is being remitted, I also consider that the tribunal failed to make sufficient findings of fact in relation to the courses AM had completed. These are set out at [107f] and on the face of it suggest a high degree of duplication between the 2012 and 2014 English courses and the 2013 and 2015 qualifications in employability/work skills. There is also the question of whether and how completion of these qualifications, of an essentially generic and low-level nature, flows through into AM's chances of being engaged: I am not intending to decry the qualifications, but to point out that any course or other qualification is only relevant insofar as it bears on the *Antonissen t*est, a question which (as in this case) may require further findings of fact to answer.

117. In the respects set out in [115] and [116], further findings of fact need to be made. I set the tribunal's decision aside for the reasons in [113]–[115] and remit the case to the First-tier Tribunal in accordance with this decision.

VA

118. VA is a French national, born in 1984. He came to the UK on a date variously stated as in February or December 2013 and worked for part of Barclays as a business analyst under a contract for services from 30 July to 10 October 2014. On 29 October 2014 he claimed IBJSA. By a decision dated 20 November 2014 he was awarded JSA for a fixed term, from 29 October 2014 to 28 April 2015. His Claimant Commitment recorded that he would be available for all types of work: however, the accompanying "Jobseeker Profile" contained an acknowledgment that "the types of work I am most likely to get" were " I.T. support in bank/financial institutions, research, teaching".

119. On 28 April 2015 he attended a GPOW interview. He said that he had not been offered a job and had made no arrangements to start a business. He had passed CFA (Chartered Financial Analyst) Level 1 exams in December 2014 and was due to take Level 2 in June 2015. In March 2015 he had passed one of three Investment Advice Diploma exams – regulation and

professional integrity – and had an interview in the next two weeks (of which no further details were given nor evidence provided). He said that he was about to move from East London to West London or to Edinburgh to improve his prospects (though it was not explained why such a move would have such an effect).

120. On 30 April he wrote explaining that he was in the process of changing his career from IT engineer to investment analyst. He indicated he would be sitting the second of his CFA exams in June which he said would considerably augment his chances of finding employment. He also said that having passed one of the three IAD exams he should receive the diploma in June 2015. In support he provided:

> (a) an exam admission ticket for (it appears) CFA Level 2 for 6 June 2015;
>
> (b) what appears to be a screen print from the website of the Chartered Institute for Securities & Investment (CISI) showing the unit of the IAD exam he had passed but also exam dates booked in June 2015 for the two remaining units;
>
> (c) his CV showing *(inter alia*) fluent or bilingual knowledge of three languages and details of his IT and financial knowledge, qualifications and experience; and
>
> (d) an email from a Mr E, an analyst at BlackRock, saying that (a) the financial crisis had left many qualified financial professionals on the market and it was very competitive and (b) that while VA had an interesting set of skills, obtaining professional qualifications such as CFA would strengthen his profile, especially as he was reaching Level 2 which was a "true differentiator".

121. On 7 May 2015 the Secretary of State decided that VA had not demonstrated a Genuine Prospect of Work and that his IBJSA would end as of 28 April 2015.

122. VA appealed with the assistance of his local law centre. They pointed out *inter alia* that he was due to sit his final exams in August 2015 for CFA Level 2 and for the IAD. As regards the CFA that was probably wrong, as in July VA had emailed to say he was awaiting the results. As regards the IAD, he had evidently passed a second unit and was due to sit the third in August, which he duly did, successfully. At least some of the courses had, it appeared, been funded by the jobcentre. In October 2015 he obtained an unpaid internship with a financial services company.

123. He told the First-tier Tribunal he had had seven to ten interviews, the majority while he was on IBJSA but two afterwards.

124. The tribunal judge correctly noted that the tribunal was not bound by the Guidance. The judge concluded that:

> "…[H]e did not at the time of his interview have genuine prospects of work. In fact, despite completing his exams on 6/6/15 he still [did] not get an internship (which is not an offer of work but unpaid training) until the end of October 2015, almost 5 months later.
>
> I specifically find that the fact he was due to complete his exams about 6 weeks after his interview, this did not provide evidence of his job prospects at the time of the interview

and could not amount to a change of circumstances that would assist him in meeting the statutory criteria."

125. Mr Spencer submits that:

(a) the tribunal erred by applying the compelling evidence requirement rather than the *Antonissen* test; and

(b) the tribunal failed to consider VA's chances of finding work in the round; specifically (i) it failed to take into account the wide range of jobs for which the Claimant Commitment required him to be available; and (ii) it wrongly limited itself to considering whether VA had an offer of a specific paid job or there had been a change of circumstances that would assist him in meeting the statutory criteria.

126. Ms Smyth submits that:

(a) the tribunal did not err by applying the compelling evidence requirement, but was bound to do so;

(b) the tribunal correctly decided that the fact that VA was due to sit exams in the future could not establish that he had a genuine chance of being engaged in the present; and

(c) the tribunal did not fail to consider VA's circumstances in the round but took into account all the circumstances, including his unsuccessful interviews, his own acceptance that he needed to retrain and obtain further qualifications (which he had not yet done) and the fact that as at the date of the tribunal hearing (more than 13 months after the date of VA's claim for JSA) he had still not managed to find paid work.

127. I consider that the tribunal did err in law. Although it said it was not applying the Guidance, it wrongly applied against VA the requirement for a change of circumstances which is derived from the Guidance.

128. I also consider that it erred by ruling that the fact that VA was due to complete exams some six weeks after the GPOW interview did not provide evidence of his job prospects at the time of the interview. The tribunal appears to have been making a ruling on a point of legal principle, but for the reasons at [46]–[48] I do not accept that being due to complete qualifications in the future can never be relevant.

129. If however the tribunal's remarks were intended not as a statement of law but as an evaluation of the evidence in this case, then in my view it erred in law by failing to give reasons why that was its view, despite, in particular, the evidence from Mr E about the value of the CFA Level 2 qualification.

130. I do not accept Mr Spencer's oral submission that the tribunal erred by failing to take into account what VA could in principle be required to be available for under his Claimant Commitment. The tribunal was required to conduct a practical assessment, in the real world, of this claimant's prospects and the evidence suggested that VA was not looking for jobs such as barman or cleaner suggested in argument by Mr Spencer, but for jobs in the finance sector.

131. However, the tribunal's position on the matters at [128] and [129] calls into question whether it did indeed consider the matter in the round and I am persuaded that it did not.

MB – alternative ground

132. Mr Spencer submits that MB was, at the date of the decision terminating her JSA (12 November 2014) the "dependent direct relative in the ascending line" of her daughter, SA, and thus was within the scope of the Directive and had rights of residence thereunder: see Articles 2(2)(d), 3(1) and 7(1). The argument before me has proceeded on a tacit assumption that SA is, like her mother, a Netherlands national, though it does not seem to be in evidence. He relies in particular on the judgment in *Centre Public D'Aide Sociale de Courcelles v Lebon*, C-316/85, EU:C:1987:302, [1987] ECR 2811, paragraph 20 of which states:

> "It must be pointed out, in the first place, that a claim for the grant of the minimex submitted by a member of a migrant worker's family who is dependent on the worker cannot affect the claimant's status as a dependent member of the worker's family. To decide otherwise would amount to accepting that the grant of the minimex could result in the claimant forfeiting the status of dependent member of the family and consequently justify either the withdrawal of the minimex itself or even the loss of the right of residence. Such a solution would in practice preclude a dependent member of a worker's family from claiming the minimex and would, for that reason, undermine the equal treatment accorded to the migrant worker. The status of dependent member of a worker#s family should therefore be considered independently of the grant of the minimex."

("Minimex" refers to a Belgian subsistence benefit).

133. I find as fact that SA came to the UK in August 2010, aged 16. She studied for one year in sixth form and then for four years at college, finishing in May 2015. In October 2013 she started working part time as a waitress in Nandos, earning on average about £120 per week. SA lived with MB in 36 P… Street. The rent was paid by housing benefit. MB was at the time on JSA. During the period October 2013 to July 2014 SA would put money on the top-up key for gas and electricity (frequency and amounts were not in evidence). SA would give her mother £5 for food if asked. In July 2014 SA moved out to live independently. SA's rent was funded by housing benefit. She had to defray expenses such as food, clothing, travel and her mobile phone out of her wages. SA would visit MB roughly twice a week and would also see her at church. MB remained on JSA and housing benefit. If MB ran out of money she would ask SA, who would give her about £10 cash every other week, which MB would use to pay for gas and electricity. Once MB's JSA was stopped, SA moved back in in December 2014 with a view to supporting her and paid for gas, electricity, food and phone for herself and her mother.

134. Ms Smyth submits that there has to have been dependency in fact and as at the date of decision in November 2014 there was not anything amounting to dependency. The situation may have changed in December 2014 once SA moved back in, but that was post-decision and a claim would need to be made on that basis. She submits that paragraph 20 of *Lebon*, relied upon by Mr Spencer, does not obviate the need for there to have been dependency in fact. She relies upon dicta in *Jia v Migrationsverket*, C-1/05, EU:C:2007:1. At paragraph 35 the CJEU indicates that:

> "According to the case-law of the Court, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family

> member is provided by the Community national who has exercised his right of free movement or by his spouse."

and at paragraph 42, where, in discussing the provision of evidence, the court refers to whether material "establish[es] the existence of the family members' situation of real dependence." In *Reyes*, C-423/12, EU:C:2014:16 the CJEU reiterated the need for a factual situation characterised by the provision of material support, the reasons for which were irrelevant. At a time when MB's needs were essentially being met through JSA and housing benefit, the payment of £10 every two weeks, while it may have been helpful, was not sufficient to amount to material support.

135. Mr Spencer invited me to conclude that there was dependency in fact. The money was, on the evidence, used for essential living needs (the payment of utility bills). SA was at least some £50 per week better off than MB and so in a position to help her out. *Lebon* makes clear that receipt of a subsistence benefit does not preclude the possibility that support from other sources may give rise to a situation of dependency. It is necessary to avoid a situation of circularity whereby dependency can only be established by loss of a subsistence benefit.

136. I accept, on the authority of *Lebon*, that a submission of dependency is not doomed to fail merely because the claimed dependent is in receipt of a subsistence benefit. But that does not alter the need for dependency in fact to be established. In *Lebon*, the submissions (see paragraph 33 of Advocate General's Opinion EU:C:1987:4) demonstrated that under Belgian law:

> "the minimex consists, normally, of small sums of money which accordingly are often no more than supplementary payments which do not remove the necessity for substantial contributions from relatives who provide support".

137. The question is, accordingly, one of evidence. A person who has a roof over their head, funded by housing benefit, is less likely to be dependent on others for their accommodation needs than someone who does not. The same applies in relation to other costs of a person in receipt of subsistence benefit compared with someone who is not. I accept that the rates of JSA are such that being in receipt of it, especially for a prolonged period, is liable to result in a degree of financial pressure and it is unsurprising that MB might have benefitted from and welcomed the contribution from SA of approximately £10 fortnightly to help with utility costs, which I accept are among the basic necessities of life.

138. What is envisaged by the European authorities is a "situation of real dependence" (*Jia*, paragraph 42). The same can be seen in *Reyes* at paragraph 24:

> "The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen."

In *Reyes* there was evidence of the long term nature of financial support, the "comfortable" resources available to provide it and of the circumstances which made the payments necessary. *Lebon*, as noted, proceeded on an assumption that, despite the minimex, substantial contributions from relatives were often necessary.

139. In the present case, there is a lack of evidence suggesting need over and above what is inherent in the situation in which MB, as a person in receipt of JSA and HB, found herself. When much of MB's basic needs were being defrayed through those benefits, I consider that the evidence does not make out a situation of "real dependence" at the relevant time, helpful to MB though the contributions made by SA may have been.

AB – first alternative ground

140. Ms Shone submits that if the Upper Tribunal's decision in *TG v Secretary of State for Work and Pensions (PC)* [2015] UKUT 50 (AAC) is correct, AB's mother had worker status from 1 May 2009 to 9 August 2013, which she then retained by virtue of being in receipt of JSA from 24 September 2013 until 16 February 2015, a period of five years, 89 months and 16 days, sufficient to give her a right of permanent residence. As throughout the period AB was under the age of 21 she was a "family member" of her mother and thus she too had a permanent right of residence. A very substantial, though not comprehensive, selection of payslips was provided in support.

141. Ms Smyth does not take any point based on the gaps in the payslips and for present purposes accepts the above dates. She does not seek to argue that there was undue delay in claiming JSA so as to call into question AB's mother's retention of worker status: see *Secretary of State for Work and Pensions v MK (IS)* [2013] UKUT 163 (AAC).

142. Consequently, it is common ground between the representatives that this ground stands or falls on the correctness of *TG*, which is to be considered (as *Secretary of State for Work and Pensions v Gubeladze*) by the Court of Appeal in February 2017, hence the form of the interim decision above.

AB – second alternative ground

143. Ms Shone seeks to argue that AB had *Saint Prix* rights. However she faces several difficulties in doing so and in any event the argument does not appear to assist her.

144. AB was working for a month or so until 20 March 2014. She claimed JSA on 1 May 2014. There is no evidence what she was doing in the meantime.

145 Her JSA ended on 31 October 2014. Ms Shone seeks to assert a *Saint Prix* right from 1 November. However, that was 11 weeks plus a further eight days before the beginning of the expected week of confinement. There is no evidence that the circumstances of AB's pregnancy were such as to displace the working assumption that the right begins 11 weeks before the beginning of the expected week of confinement: see *Secretary of State for Work and Pensions v SSF* [2015] UKUT 502 (AAC); [2016] AACR 16 at [26]. Ms Shone's submission that there might be unspecified health and safety risks associated with the jobs in AB's jobseeker's agreement is speculative and in any event, it needed to be AB's case that she had a genuine chance of being engaged if she was to claim JSA at that point.

146. Ms Smyth makes the further point that, having only worked for one month, AB could only retain worker status for a maximum of six months under regulation 6(2A) of the 2006 Regulations and so at the time she needed to assert a *Saint Prix* right could only be a jobseeker rather than a person with retained worker status. Whether a jobseeker could have *Saint Prix* rights was expressly reserved in *Secretary of State for Work and Pensions v SFF*. In the

equivalent case in the Immigration and Asylum Chamber, however, *Weldemichael and another (St Prix [2014] EUECJ C-507/12; effect)* [2015] UKUT 540 (IAC) Ms Smyth (who was counsel in that case) told me she is recorded as having made an apparent concession on behalf of the Secretary of State that a *Saint Prix* right could apply to jobseekers. She tells me that no such concession was made. I regret I am unable to find the passage to which she refers and merely note her position on behalf of the Secretary of State as, irrespective of this point, AB is not assisted by *Saint Prix* in the present appeal for the reasons I have given.

Application for permission to appeal

147. Because it is desirable to continue to make every effort to move these cases forward bearing in mind the other cases stayed behind them, I abridge the time limit for applying for permission to appeal in rule 44(3) of the Upper Tribunal's rules from three months to six weeks. That is not intended to prejudice a party's ability to apply for the time limit to be extended again if good reason to do so can be shown but in the absence of exceptional circumstances any such application must be made before the abridged time limit expires.