IN THE UPPER TRIBUNAL **Case No** CH/708/2019
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Cardiff on 11 September 2018 under reference SC188/17/04580 involved the making of an error of law and is set aside.

Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision in the following terms:

> The claimant's appeal against the local authority's decision notified on 25 or 26 May 2017 that he no longer qualified for housing benefit with effect from 2 April 2017 as he lacked the right to reside for such purpose is dismissed.

REASONS FOR DECISION

1. The claimant is a Dutch national. The local authority refused to continue his claim for housing benefit after 2 April 2017 on the grounds that:

> (a) his activity at that point as a self-employed person was not genuine and effective; and
>
> (b) he had not already obtained a permanent right of residence because he had not been (lawfully) resident for a continuous period of five years.

2. Although he has a number of children, including some in school in the UK, it is not claimed that at the material time he was able to derive any rights from them. His partner is British and thus there is no possibility of his having had rights under Directive 2004/38 as a "family member" of hers.

3. It is not necessary to set out the full history of the claimant's time in the UK. The First-tier Tribunal ("FtT") concluded that he had a permanent right of residence under Article 16 of Directive 2004/38 ("the Directive") and regulation 15 of the Immigration (European Economic Area) Regulations 2006/1003 ("the 2006 Regulations") by virtue of the period "April 2012 to 2 April 2017" *(sic)*. It arrived at this conclusion by inferring that for the periods 5 April 2012 to 1 June 2012 and 5 July 2012 to 18 September 2012, though not registered with the jobcentre, he had a genuine chance of seeking work and so in the FtT's view was a jobseeker within the test in C-393/96 *Antonissen.* In respect of the rest of the period relied upon, the FtT indicated that the local authority had accepted that the claimant had a right to reside by reason of self-employment.

4. Though I cannot see why it needed it if what it had earlier said was correct, the FtT also sought to rely on *OB v SSWP (ESA)* [2017] UKUT 0255 (AAC) in which Judge Rowland had held (at [30]):

> "I am satisfied that Article 16 and regulation 15 should be interpreted as requiring continuity of residence, but not necessarily continuity of residence in accordance with the Directive or as a qualified person. However, where a person's right of permanent residence under regulation 15 depends on his or her having resided in the United Kingdom as a qualified person, the aggregate of any periods of residence as a qualified person must amount to at least five years."

5. The local authority appeals with my permission, arguing, in summary:

> a. the FtT erred by giving inadequate reasons for not accepting the local authority's position in relation to self-employment (I observed when giving permission to appeal that I had been unable to locate the "concession" to which the FtT had referred); and
>
> b. that the FtT's reliance on *OB* was inconsistent with the earlier decision of the Court of Appeal in *Secretary of State for the Home Department v Ojo* [2015] EWCA Civ 1301.

6. To that I added a further observation, which I indicated the appeal would be treated as encompassing. This was that whilst I accepted that under the 2006 Regulations it was not a requirement for jobseeker status (unlike for retaining "worker" status) to have registered as a jobseeker, there appeared to be no finding of fact that the claimant was seeking employment at the time, nor had I found any evidence that he was or, if so, that he had a genuine chance of being engaged.

7. A written response on the appeal and caselaw authorities have been received from Citizens Advice on behalf of the claimant and a reply on behalf of the local authority. Neither invites me to hold an oral hearing and I am satisfied that is not necessary to do in order to decide this case.

8. The submission on behalf of the claimant is (in summary) as set out below.

<u>The periods in 2012</u>

9. Firstly, the claimant:

> "thinks that he moved back in with his wife. She may have been working or she may have been claiming benefits- he does not remember. The Upper Tribunal may think that it prudent to obtain further evidence of any joint benefit claims which could indicate the appellant continued to be registered as a jobseeker."

10. Secondly, although the claimant did not have any private medical

insurance, self-sufficiency in the gaps should be considered. Any failure to meet the requirements of the self-sufficiency test should be ignored on the basis that it would be disproportionate to enforce them strictly against the claimant. C-413/99 *Baumbast* is cited as authority for this approach.

OB

11. As to this, Citizens Advice continue to rely on *OB* and the cases cited in it. The submission does not engage with *Ojo* at all. They also cite *AP v SSWP (IS)* [2018] UKUT 307 but that does not address *Ojo* either and in its reliance on *OB* is obiter, so does not take matters further.

The local authority's reply

12. The submission explains that an earlier FtT had adjourned for further information about the possibility of obtaining rights via the claimant's wife (now known not to be possible for reasons stated at [2]) and to find out more details about the claimant's income. It was established (and put before the FtT) that in the period 13 March 2012 to 5 April 2012 his income consisted of contributory ESA, child tax credit and child benefit; for the period from 6 April 2012 to 31 May 2012 of child tax credit and child benefit only; and from 1 June 2012 to 1 July 2012 of income-based jobseekers allowance, child tax credit and child benefit.

13. It further submits that:

a. in the period 6 July 2012 to 31 August 2012 the claimant had no income at all apart from housing benefit and council tax benefit;

b. irrespective of the adequacy or otherwise of the claimant's means, he lacked comprehensive sickness insurance which is also an essential requirement for being found to be self-sufficient;

c. *Baumbast* is not relevant to the present case; and

d. the claimant's submission does not address *Ojo*, which is a binding precedent and the claimant cannot meet the conditions of the Directive, which *Ojo* requires to be fulfilled.

Conclusions

14. As regards self-employed status, there is indeed no evidence I can find of such a concession by the local authority. Page 261 makes clear that the local authority, while accepting the genuineness of the self-employment, continued to maintain its ineffectiveness. To have made the concession suggested by the FtT's Reasons would have been wholly inconsistent with the local authority's position in the rest of the case papers (e.g. pp252-254). The claimant's representative has not sought to argue that such a concession was made. I conclude that none was and the explanation provided was in error of

law for inadequate reasons (and possibly other grounds) on the self-employment issue.

15. *Ojo* holds (para 20) that “The acquisition of a permanent right of residence depends on continuous residence in a qualifying status”. There is no indication that *Ojo* was cited to Judge Rowland in *OB* (a decision given on the papers) and if it had been, his decision would be likely to have been different. Nor does *Ojo* appear to have been cited in *AP*. I conclude that both cases were decided *per incuriam*. The claimant’s representative does not seek to argue that there is any reasoned basis for upholding *OB* in the face of *Ojo.* To the extent that the FtT did rely on *OB* to get its decision home (which is debatable) it was therefore further in error of law.

16. I realise that *Ojo* was not cited in the FtT. That point was relied upon in the FtT when refusing permission to appeal. However, *Ojo* is binding on the FtT, whether or not cited before it.

17. The submission for the claimant does not seek to argue that the FtT’s decision, as regards the period when it considered that the claimant had been a jobseeker although not registered at the jobcentre, should be upheld. It is not suggested that there were findings, or evidence, sufficient to justify that conclusion.

18. The submission indicates that the Upper Tribunal might “find it prudent” to obtain details of potential joint claims. That falls short of an application for the Upper Tribunal to make a direction or order to secure that evidence. It is reasonable to expect Citizens Advice to apply for a direction or order if that is what they want. In any event, if I were nonetheless to treat it as an application, I should refuse it as it is clear that the question of what benefits the claimant was on and what steps he took to find work in 2012 has already been looked into (see Directions of 27 June 2018 at p271) and it provides no indication that he was a jobseeker during the “gaps”. In finding that he was a jobseeker when there was no evidence he was seeking work, the FtT was further in error of law.

19. Turning to remaking the decision, the submission by Citizens Advice to the FtT (p196) did not raise self-sufficiency or proportionality. I am doubtful about even permitting the points, which have the flavour of a last throw of the dice, to be run. In any event, as held in *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988, the requirement for comprehensive sickness insurance must be strictly complied with, while the claimant’s only resources in the periods in question were derived from state income maintenance benefits. He was not self-sufficient. As to proportionality, the gulf was too far to be bridged by the application of proportionality. Mr Baumbast only fell short of the requirements for self-sufficiency in one particular, which is not the claimant’s situation. It is very clear following the decision in *Mirga v SSWP* [2016] UKSC1 that if indeed proportionality can be relied upon in an individual case at all, it would be a very exceptional one, which this is not. The claimant’s position is more akin to that of Ms Mirga, in

being simply unable to meet, to the requisite extent, the requirements set down by Directive 2004/38.

20. Consequently I remake the decision in the terms at the head of this decision.

CG Ward
Judge of the Upper Tribunal
3 September 2019