THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CJSA/1053/2019
[2020] UKUT 146 (AAC)

CL

V

SECRETARY OF STATE FOR WORK AND PENSIONS

Decided following an oral hearing on 18 December 2019 with subsequent written submissions

Representatives

Claimant	Tom Royston of counsel, instructed by the Child Poverty Action Group, both acting pro bono
Secretary of State	Julia Smyth of counsel, instructed by the Government Legal Department

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	SC201/18/00436
Decision date:	29 November 2018
Venue:	Havant

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. The key issue in this case is whether the requirement that a claimant must have been living in the United Kingdom for three months as a condition for entitlement to a jobseeker's allowance was valid in EU law. I have decided that it is.

A. History and background

2. The claimant, who is British, lived and worked abroad before returning to the United Kingdom from the Netherlands on 23 January 2018. He made a claim for a jobseeker's allowance on 23 April 2018 and an award was made from that date on 4 May 2018. The claimant challenged the three months requirement in his request for a mandatory reconsideration on 8 May 2018 and the Secretary of State has accepted that the claimant made a claim for the period from 23 January 2018 in a telephone call on 17 May 2018. That call was made during the mandatory reconsideration process. As it was after the date on which the claim was decided, this could only take effect as a new claim for that past period. It is difficult to find a decision on that claim, as opposed to a decision on the original claim as part of the mandatory reconsideration process. Be that as it may, if there has been a decision, it will have said that the claimant was not entitled to a jobseeker's allowance until he had been living in the United Kingdom for three months. The case proceeded to the First-tier Tribunal, and then to the Upper Tribunal, on the basis that two issues arose:

- whether time could be extended to include the period from 23 January 2018 in the claim; and
- if so, whether the three months requirement was valid under EU law.

3. The First-tier Tribunal dismissed the claimant's appeal on 29 November 2018. It decided that the conditions for extending time were not met. The judge explained that the claimant:

> … believed that under the legal rules he could not be treated as habitually resident in the UK until he had resided in the country for 3 months, but that he was not given any information by the Department or by an officer of the Department or written advice by an advice agency about applying or about whether a claim would succeed. Although he said to the Tribunal 'I was deterred in good faith from making a claim before three months' the deterrent was the legal rule of which he was aware and not information or advice which he was given by the Department or by an agency.

In those circumstances, the validity of the three months requirement did not arise.

B. Legislation – entitlement to a jobseeker's allowance

4. Jobseeker's allowance was established by the Jobseekers Act 1995.

5. Section 3(1) allows for entitlement to an income-based jobseeker's allowance if the claimant:

> '(a) has an income which does not exceed the applicable amount (determined in accordance with regulations under section 4) or has no income'.

6. Section 4 provides:

> '(5) The applicable amount shall be such amount or the aggregate of such amounts as may be determined in accordance with regulations.
>
> …
>
> '(12) Regulations under subsection (5) may provide that, in prescribed cases, an applicable amount is to be nil.'

7. The Jobseeker's Allowance Regulations 1996 (SI No 207) are made, in part, under that authority. Paragraph 14 of Schedule 5 to those Regulations prescribes that the applicable amount for a 'person from abroad' is nil. 'Person from abroad' is defined by regulation 85A:

> **85A Special cases: supplemental - persons not in Great Britain**
>
> (1) 'Person from abroad' means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (2) No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless-
>
> (a) subject to the exceptions in paragraph (2A), the claimant has been living in any of those places for the past three months; and
>
> (b) the claimant has a right to reside in any of those places, other than a right to reside which falls within paragraph (3) or (3A).
>
> …
>
> (3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—
>
> (a) regulation 13 of the Immigration (European Economic Area) Regulations 2016;
>
> (aa) regulation 16 of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in paragraph (5) of that regulation;
>
> (b) Article 6 of Council Directive No. 2004/38/EC; or
>
> (c) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).
>
> …

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

(za) a qualified person for the purposes of regulation 6 of the Immigration (European Economic Area) Regulations 2016 as a worker or a self-employed person;

(zb) a family member of a person referred to in sub-paragraph (za) within the meaning of regulation 7(1)(a), (b) or (c) of those Regulations;

(zc) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of those Regulations;

…

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

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

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

(ii) leave to remain under the Destitution Domestic Violence concession; or

(iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005;

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

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

8. Paragraph (2) was substituted by the Jobseeker's Allowance (Habitual Residence) (Amendment) Regulations 2013 (SI No 3196). Here are the relevant paragraphs from the Explanatory Memorandum for those Regulations:

2. Purpose of the instrument

This instrument introduces a three-month residence qualification to be served by people who have recently arrived in the UK, seek to claim Jobseeker's Allowance and are not classed as European Economic Area (EEA) workers. The new provisions clarify and strengthen the existing provisions relating to persons from abroad.

…

4. Legislative Context

The Jobseeker's Allowance Regulations 1996 … contain a general rule that claimants must have a right to reside in the UK, the Channel

> Islands, Isle of Man or the Republic of Ireland (the Common Travel Area) and must be habitually resident to qualify for income related benefits. This is known as the Habitual Residence Test. This instrument adds a specific residence provision to that test.
>
> …
>
> **7. Policy background**
>
> • **What is being done and why**
>
> 7.1 Any claimant who does not have a right to reside in the Common Travel Area is defined as a 'person from abroad' and such a person is not able to receive income-related benefits.
>
> 7.2 Following this amendment a person entering the UK, who is not already habitually resident, will not be able to qualify for Jobseeker's Allowance as soon as they arrive in the UK. Instead, they will need to serve a three month period of residence in the UK or the rest of the Common Travel Area. In practical terms, the amendment means that a claimant cannot be treated as being habitually resident until they have lived in the UK or the Common Travel Area for three months.
>
> 7.3 This policy is being introduced to protect the benefit system and to discourage people who do not have any established connection with the UK, or any prospect of work, from migrating to the UK and seeking to claim Jobseeker's Allowance immediately. It strengthens and provides tighter definition for the existing Habitual Residence test which will simplify the application of the rule.

C. Legislation – claims for a jobseeker's allowance

9. Section 1 of the Social Security Administration Act 1992 makes it a condition for an award of benefit that the claimant has made a claim within the time allowed:

> **1 Entitlement to benefit dependent on claim**
>
> (1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied–
>
> (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or
>
> (b) he is treated by virtue of such regulations as making a claim for it.

10. The Social Security (Claims and Payments) Regulations 1987 (SI No 1968) are made in part under that authority. Regulation 19(1) and paragraph 1 of Schedule 4 provide that the prescribed time for making a claim for a jobseeker's allowance is 'The first day of the period in respect of which the claim is made.' And the claim is made when it is received: regulation 6.

11. Regulation 19(4) and (5) provide for circumstances in which time may be extended:

(4) Subject to paragraph (8), in the case of a claim for … jobseeker's allowance, … where the claim is not made within the time specified for that benefit in Schedule 4, the prescribed time for claiming the benefit shall be extended, subject to a maximum extension of three months, to the date on which the claim is made, where—

(a) any one or more of the circumstances specified in paragraph (5) applies or has applied to the claimant; and

(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(5) The circumstances referred to in paragraph (4) are—

…

(d) the claimant was given information by an officer of the Department for Work and Pensions … which led the claimant to believe that a claim for benefit would not succeed; …

D. Treaty on the Functioning of the European Union

12. Article 45 provides:

TITLE IV

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 45 (ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

E. There is no error of law in the tribunal's decision refusing to extend time for the claim

13. Regulation 19(4)(a) and (b) are cumulative; both have to be satisfied in order for time to be extended.

Head (a)

14. There is a difference of view in the Upper Tribunal's caselaw on the nature of 'information' in regulation 19(5)(d). See the decision of Upper Tribunal Judge Wikeley in *SK-G v Secretary of State for Work and Pensions* [2014] UKUT 430 (AAC) and that of Upper Tribunal Judge Wright in *Secretary of State for Work and Pensions v PG* [2015] UKUT 616 (AAC). I do not find it necessary to decide which of those decisions should be followed.

15. In this case, the information is said to be the prohibition on entitlement for the first three months that the claimant is living in the United Kingdom. I accept that that is capable of being information within head (a). It is a clear rule that admits of no exceptions or qualifications, which can be stated in absolute terms, and whose effect is that a claim cannot succeed for those three months. The only scope for doubt is the factual issue of what amounts to 'living in', but that will be straightforward in the overwhelming majority of cases. I deal with this in more detail in [36].

16. I have personal experience of working with the Departmental and Government Digital Services on the material that is put on a website. They exercise considerable control over what is allowed to be included and the language that may be used. There is, no doubt, a rational policy underlying that degree of control. But the effect is that there is scope for the message to be distorted either by selection of material or by its expression. I am, though, satisfied that officials of the Department for Work and Pensions would have had sufficient control to prevent an express and absolute bar on entitlement being misrepresented.

17. But that is not the end of the matter. Just because something is on a web site, it does not mean that the claimant was aware of it and that it led him to believe that his claim would not succeed. The biggest obstacle to the claimant on those matters is that the First-tier Tribunal found that he did not satisfy them. I have quoted the key passage from the judge's reasoning. He took a different view from me on what could amount to information, but he also dealt with the causation question: why did the claimant not make a claim? And his answer was that it was the rule that led him not to claim. It may seem a fine distinction between being aware of the rule and being influenced by what the official said about the claim, but the judge clearly had it in mind and made his findings accordingly. Moreover, his conclusion was supported by the points made by Ms Smyth:

- The claimant was aware of the three months requirement on his return. The tribunal so found and this was consistent with the fact that he had been subject to the rule on an earlier claim in 2015.

- The claimant's grounds of appeal were vague on where he had found his information on the web. He was not specific about the pages that contained the information.
- From the sequence of events, it seems that the claimant did not undertake his research until he had made his claim.

Mr Royston had no answer to those points. I can find no error of law in the tribunal's finding and that finding was fatal to his appeal.

Head (b)

18. As head (a) was not satisfied, head (b) does not arise. If it had, I would have accepted that it was satisfied. It is a personal test with an objective element. It is personal to the claimant but depends on what could reasonably be expected of that claimant. There may be claimants who could reasonably be expected to make a claim that would be a challenge to the absolute prohibition, but they would be rare. Challenging the validity of legislation and doing so by reliance on EU law is not something that most claimants would feel confident to do, and would reasonably want to obtain advice and assistance in doing so. That all takes time, and I am satisfied that being ready to launch a legal challenge by making a claim on the first day of returning to this country is not something that could reasonably be expected of this claimant.

F. Why I am dealing with the validity issue

19. The First-tier Tribunal declined to make a decision on what the judge called 'a hypothetical case'. I make no criticism of him for that. But I have taken a different approach, because: (a) the issue is important; (b) it has been fully argued before me by specialist and experienced counsel, with the support of the Department for Work and Pensions and the Child Poverty Action Group; and (c) the nature and deterrent effect of the requirement, makes it difficult for a claimant to make a claim in time to raise the issue during the period when it would operate to bar entitlement.

G. The EU caselaw

20. The starting point is the decision of the European Court of Justice in *Collins v Secretary of State for Work and Pensions* (Case C-138/02 EU:C:2004:172) [2005] QB 145. Mr Commissioner Mesher referred three questions to the Court, the last of which concerned the validity of the habitual residence test for entitlement to a jobseeker's allowance. This is the Court's reasoning – the italicised headings are my insertions.

> 58. As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that

regulation (*Lebon*, paragraph 26, and Case C-278/94 *Commission* v *Belgium*, cited above, paragraphs 39 and 40).

59. Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment, while Article 5 of the regulation relates to the assistance afforded by employment offices.

60. It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty.

61. As the Court has held on a number of occasions, citizens of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, *Grzelczyk*, cited above, paragraphs 31 and 32, and Case C-148/02 *Garcia Avello* [2003] ECR I-0000, paragraphs 22 and 23).

62. It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance ('minimex'), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (*Grzelczyk*, paragraph 46).

63. In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.

64. The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in *Lebon* and in Case C-278/94 *Commission* v *Belgium*.

The habitual residence test involved a difference of treatment

65. The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State's

own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 18, and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraphs 13 and 14).

66. A residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27).

A link between the claimant and the employment market is in principle legitimate

67. The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question (see, in the context of the grant of tideover allowances to young persons seeking their first job, *D'Hoop*, cited above, paragraph 38).

68. The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.

69. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.

The link must be proportionate

70. The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.

71. The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.

72. However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy

> themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.
>
> 73. The answer to the third question must therefore be that the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

21. The Court referred the case back to the Commissioner, whose decision on the domestic issues was the subject of an appeal to the Court of Appeal in *Collins v Secretary of State for Work and Pensions* [2006] 1 WLR 2391. The Court decided that the European Court had not imposed a requirement that the claimant had to show a link with the United Kingdom employment market by seeking work:

> 66. I have no difficulty in agreeing with the Commissioner that the proper interpretation of the ECJ's judgment, read as a whole, is that a requirement that there should be a 'genuine link between an applicant for an allowance in the nature of a social advantage … and the geographic market in question' (see *ibid.* paragraph 67) is not synonymous with a requirement that the applicant should be actively (i.e. genuinely) seeking work in that market at the material time; and that in the context of an application for such an allowance a 'genuine link' requirement may (subject always to questions of justification and proportionality) be legitimately imposed by a member state *in addition to* an 'actively seeking work' requirement. Indeed, notwithstanding the last sentence of paragraph 72 (which I consider below), I find it impossible to read the judgment in any other way.
>
> …
>
> 76. Paragraph 72 is concerned with the legitimacy of a residence requirement as the means of ensuring a 'genuine link' ('for the purpose of ensuring such a connection'). Taking the last sentence of the paragraph in isolation, I accept that it supports Mr Drabble's first proposition. However, in the context of the earlier paragraphs to which I have referred, I find it impossible to read the reference in that sentence to 'genuinely seeking work in the employment market of the host member state' as referring merely to the genuineness of the claimant's search for work as opposed to the need for a genuine link between the claimant and the employment market of the host member state. ….

The Commissioner had decided that a proviso to the terms of the legislation was required in order to make the habitual residence test compliant with EU law. The Court rejected that part of his decision:

> 86. The effect of the Commissioner's proviso, as I understand it, is that although the habitual residence test is to be applied in the ordinary way, it cannot be justified as laying down the sole test for establishing the existence of the requisite 'genuine link' between an applicant for JSA and the UK

> market; so that if the decision-maker can be satisfied on other grounds that such a link has been established, then the habitual residence requirement must fall away.
>
> 87. With respect to the Commissioner, I cannot see any basis in Community law for the introduction of such a proviso. Certainly, as I read the ECJ's judgments in this case and in *Swaddling*, there is nothing in those judgments which suggests the need for such a proviso. In my judgment the correct analysis is that under Community law it is a matter for the national legislature whether to require the existence of a 'genuine link' and (if so) to prescribe how that link may be established; and that the prescription of a habitual residence test for that purpose is both legitimate and justified. Had the ECJ taken a contrary view, I would have expected it to say so: the more so because, as I have already pointed out (see paragraph 81 above), the discussion which follows paragraph 66 of its judgment is clearly directed specifically at the habitual residence requirement prescribed by regulation 85(4), rather at the general concept of a residence requirement.
>
> 88. Accordingly I respectfully conclude that the Commissioner was in error in concluding that in order to render the habitual residence requirement compatible with Community law it was necessary to introduce the proviso in question; and that on the proper interpretation of the ECJ's judgment in this case a habitual residence test *simpliciter* as a means of establishing the requisite 'genuine link' between an applicant for JSA and the UK employment market is fully compatible with Community law.

22. I am, of course, bound by the Court of Appeal's decision on habitual residence. This case is not about that test, but its analysis of *Collins* is of wider relevance. I have not relied on it too much in my reasoning because it was not cited by the parties.

H. AEKM v Department for Communities [2016] NICom 80

23. This is a decision of the Social Security Commissioner *for Northern Ireland*. Those italicised words are important, as I will explain later. Generally, when the Commissioners interpret legislation that is identical to the British equivalent, the Upper Tribunal follows their decisions in the same way that it follows its own decisions (*R(SB) 1/90* at [15] and *EC v Secretary of State for Work and Pensions* [2015] UKUT 618 (AAC)). For that reason, there was a discussion at the hearing about which elements of the Commissioner's reasoning were necessary to the decision. I have not had to resolve that issue, because there are good reasons not to follow parts of the Commissioner's reasoning, as I will explain.

24. The claimant held Irish-Moroccan citizenship. She had come to live in the United Kingdom in 2008, but left for New Zealand in November 2013, returning in January 2014. Her claim for a jobseeker's allowance was made in February 2014. So the issue was whether the claimant had still been living in the common travel area while she was abroad.

25. The Commissioner divided his reasoning into two parts: the domestic law dimension and the EU law dimension.

The domestic law dimension

26. This, in outline, was the Commissioner's reasoning. The starting point was the ordinary meaning of the words of the legislation. The language here – 'living in' was not defined and an element of ambiguity arose in applying the expression; that was not in dispute. In view of the ambiguity, the Commissioner was entitled to look at the Explanatory Memorandum to the amending legislation, in this case the Jobseeker's Allowance (Habitual Residence) (Amendment) (Northern Ireland) Regulations 2013 (SR No 308). Here are the relevant paragraphs from the Memorandum that was before the Commissioner. He relied on paragraphs 2.1 and 3.5.

> **2. Purpose**
>
> 2.1 The purpose of the regulations is to make amendments to the Jobseeker's Allowance Regulations (Northern Ireland) 1996 in relation to the definition of 'person from abroad' with the effect that a person claiming a jobseeker's allowance who has entered the United Kingdom or the Common Travel Area (the Channel Islands, the Isle of Man or the Republic of Ireland) within the three months before making a claim, can only be treated as habitually resident in those places if they had already been habitually resident and were returning after a temporary absence.
>
> **3. Background**
>
> 3.1 Currently, All migrants including British citizens, who have been absent from the UK for more than a temporary period, are subject to the Habitual Residence Test to assess their right of residence and whether they are factually habitually resident.
>
> - EEA Nationals who are in work or self-employed satisfy the right to reside element and are deemed to be factually habitually resident.
> - EEA nationals with job seeker status can satisfy the right to reside element of the test by demonstrating that they are actively seeking work and have a genuine prospect of work. UK nationals can satisfy the right to reside element of the test where they are a British citizen with a right of abode.
> - If the EEA jobseeker or returning UK national are unable to demonstrate they are factually habitually resident (the second element) they are treated as a 'person from abroad' and have an applicable amount of nil.
>
> 3.2 From 1 January 2014 there will be a new requirement to have been living in the UK or the Common Travel Area for a period of 3 months before an EEA national job seeker or a UK national who has lived or worked abroad can be treated as habitually resident.
>
> 3.3 The rationale for introducing this as a requirement of factual habitual residence is that EEA nationals (and their family members) who are

workers/self employed (or who retain this status), are deemed to be factually habitually resident and so would not be caught by the new 3 month residence requirement.

3.4 The three months residence requirement does not apply to EEA nationals who make a claim to income-related JSA because they have become involuntarily unemployed having worked in the UK or Common Travel Area and satisfy the Habitual Residence Test because they have the right to reside as a retained worker.

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

27. The Commissioner went on:

> 38. … The requirement of living in the UK for three months seems to me to simplify the 'appreciable time' requirement [in the habitual residence test] and bring certainty. It clarifies the position of persons arriving in the UK for the first time without any prior connection to the CTA [common travel area]. Nevertheless, the position of persons who have been living in the CTA and who return following a temporary absence is less clear.

That final sentence picks up on the final sentence of paragraph 2.1 in the Memorandum. The Commissioner then referred to my analysis of habitual residence issues in *CIS/4474/2003* at [5]-[11]. He identified the case before him as one in which the claimant had been living in the common travel area but had then been absent before returning. It was possible that she might have remained living here despite being abroad. The test was not one of presence and all factors showing a connection to the common travel area were relevant. The tribunal had failed to take account of those other factors, so its decision was set aside.

The EU law dimension

28. The Commissioner applied *Collins* and concluded:

> 61. I consider that a fixed three month presence condition which would not allow other factors to be taken into account would potentially fall foul of the requirements of EU law. However, the jurisprudence of the CJEU reinforces my view that the expression 'living in' can and should be afforded a broad construction which is capable of admitting and assessing evidence of the connection of the claimant with the CTA. …

I. TC v Secretary of State for Work and Pensions [2017] UKUT 222 (AAC)

29. This is a British decision, in which the Upper Tribunal Judge applied the approach in *AEKM* and re-made the First-tier Tribunal's decision to decide that the claimant had continued living in the United Kingdom despite being absent

for 15 months. That outcome depended of course on the particular circumstances and submissions in that case.

J. Why the three months requirement is valid under EU law

30. There is no secret that the three months requirement is a way of limiting access to jobseeker's allowance for those exercising their freedom of movement as EU citizens to look for work in this country. All countries need to limit the scope of their social security legislation. For member States of the EU, that has to be done in a manner that complies with Union law. For jobseeker's allowance, it is achieved through regulation 85A. The control is exercised using the concept of a person from abroad, for whom the applicable amount is nil, effectively barring entitlement.

31. Some claimants are not persons from abroad. They are listed in paragraph (4). Habitual residence and the three months requirement are irrelevant for these claimants. As an example, family members of a worker do not have to show either that they are habitually resident or that they have been living here for three months. They can qualify for a jobseeker's allowance immediately on arrival.

32. Everyone else is a person from abroad unless they satisfy three requirements: be habitually resident, have lived here for three months, and have a right to reside. These are cumulative conditions. In most circumstances, a claimant will have established habitual residence within three months. There will, though, be cases in which that does not happen. Those people will have to establish habitual residence even after living here for three months.

Habitual residence

33. The generally accepted definition of habitual residence is that it refers 'to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration' (*Shah v Barnet London Borough Council* [1983] 2 AC 309 at 343) and that this usually requires residence for an 'appreciable period' (*Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937 at 1942-1943). As a rule of thumb, experience showed that this could be established for someone coming to this country for the first time in between one and three months (*CJSA/1223 and 1224/2006* at [34]).

34. Conceptually, although not always in practice, habitual residence and the three months requirement are separate. It would be possible to treat the three months requirement as a modification of the basic habitual residence requirement but it does not match the language, concepts and purpose of habitual residence. The latter refers to a person's abode, rather than just living here. It refers to an appreciable period, rather than a specific period of three months. It looks to the future, requiring settlement for the time being, whereas the three months look only to the past. Finally, habitual residence is a concept that is employed widely in law as a requirement for the courts of a country to have jurisdiction. The three months requirement, in contrast, is not about a link to a country but about a link to the geographical employment market.

AEKM

35. The starting point is the ordinary meaning of the words of the legislation, as the Commissioner said in *AEKM*. 'Living in' is not a term of art and should be interpreted accordingly, in the context of the legislation.

36. I do not agree with *AEKM* that there is an 'element of ambiguity … in applying' the legislation. I would classify what the Commissioner called ambiguity as a penumbra question. Words often have a clear core of meaning, but the boundaries can be uncertain. Take the word 'car'. It can still be called a car if someone has stolen its wheels and left it propped up on bricks. It will certainly not be called a car if it has been stripped of all removable parts and the bodyshell dumped by the side of the road. And between these two, the more that is removed, the greater becomes the difficulty of deciding whether 'car' is still a proper term to use. At some point, some qualifying words will be introduced, like 'what remains of the car'. The same is true for 'living in'.

37. If I had agreed with the Commissioner that there was an ambiguity, I could not simply have followed his reasoning. The difficulty in doing so lies in the Explanatory Memorandum to which he referred. The Commissioner had to interpret the Northern Ireland legislation and relied on the Memorandum for that legislation. The legislation for Great Britain is the same, but the Memorandum for that legislation is significantly different. In particular, it has no equivalent to paragraph 2.1, which was particularly relevant to the issue that the Commissioner had to decide and may have influenced his thinking generally. This point was not picked up in *TC*. It may be that there is less difference in substance than the different language might suggest. But the Commissioner picked up on the specific wording of paragraph 2.1 (see [27] above), which is unique to the Memorandum on his legislation.

38. Despite this, I am sure that the Commissioner came to the right decision that the tribunal had misdirected itself on the importance of physical presence and that its reasoning was confused. I do, though, have concerns about some of the things the Commissioner said about applying the test.

39. I agree with the Commissioner that the test is not one of physical presence. There were precedents available in social security legislation to make provision for such a test and they were not followed. And, as a matter of language, 'living in' is consistent with absence. A person can properly be described as living in this country when they are on holiday in Venice or on a business trip to New York. I have no difficulty with taking account of a range of factors relevant to the proper use of the language of the legislation. I am concerned, though, that the examples given by the Commissioner come close to aligning 'living in' with the factors used in habitual residence. As I have said, the two tests are, structurally and conceptually, separate in the legislation and they should be accepted and applied as such, even if the evidence and some of the considerations may be the same for both. They are better analysed in the context of the natural meaning of the language than by importing approaches or solutions from, or drawing analogies with, the habitual residence caselaw.

Discrimination – Article 45

40. Applying the approach in *Collins*, the three months requirement can result in different treatment between United Kingdom citizens and those of other member States. The most obvious contrast will be between someone who has never left this country to work or look for work and someone who has come from their home State to do so for the first time. The former will have been here for three months already and be entitled to jobseeker's allowance without any difficulty; the latter will not be entitled for three months. Another contrast will be between a United Kingdom citizen who has returned from abroad and someone from another State who is coming here for the first time. The former may still have a slight advantage over the latter by being able to show that they did begin living here again on their return and not merely visiting temporarily in the hope of finding work.

41. But a difference of treatment is not of itself discrimination. *Collins* decided that EU law permits conditions that show whether a genuine link exists between the person seeking work and the employment market of that State. And a residence requirement is permissible as a way of demonstrating that link, provided that it is independent of nationality and is proportionate to the legitimate aim of showing the necessary link.

42. The Court must have known that seeking work is not a requirement for habitual residence, although it may be relevant as a matter of evidence. If that meant that the habitual residence test was not legitimate under EU law, the Court could have said so, but it did not. All it said was that the link may 'in particular' be shown by genuinely seeking employment for a reasonable period. But that is just an example. It is not a requirement. *Collins* has been regularly cited by the Court, but I am not aware of any decision in which it has decided that that is the test. I accept that the Advocate General did say just that in *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* (Case C-299/14 EU:C:2016:144) [2016] 1 WLR 3089 at [88], but in view of the way that the Court dealt with the case, it did not need to rely on that analysis and did not refer to it.

43. In the United Kingdom, a previous history of actively seeking work has never been a pre-condition for an award. Being available for and seeking employment is a condition for an award, but it has to be satisfied at the time of claim, not before it. A claimant may have spent the three months before the claim lying in bed, drinking beer, and watching back-to-back box sets of The Crown, Grey's Anatomy and Gavin and Stacey for all the difference it will make to their entitlement from the date of their claim, provided they can show that they satisfy the conditions for an award from that date.

44. What has to be shown was set out in *Collins* at [72]. The Court set out four conditions:

- 'if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective';
- 'its application … must rest on clear criteria known in advance';
- there must be 'a means of redress of a judicial nature'; and

- the period of residence must be no longer than necessary to show that the claimant 'is genuinely seeking work in the employment market of the host member state.'

45. The second and third are easy to deal with. For the second, a period of three months is known in advance and is as clear as anything in legislation could ever be, certainly clearer than the habitual residence test that the Court of Appeal found met this requirement. It brings clarity and certainty, free of the evidential difficulties for the potential claimants to prove their jobseeking activities and of the associated need for the decision-makers involved to have to make (sometimes complex) judgments. And, for the third, this appeal shows that there is a means of judicial redress.

46. The first and fourth are effectively the same point. It is for the Secretary of State to show that these conditions are satisfied. I accept that she has done so. What follows is largely, but not entirely, based on Ms Smyth's argument. Mr Royston's approach to the appeal did not require him to deal with this specifically.

47. Once the three months begin to run, it applies to everyone regardless of nationality, which is what Article 45 requires (a point made by the Commissioner in *AEKM* at [57]), and whether they have any previous experience of the United Kingdom employment market or not. It allows them the chance to become familiar with that market from within this country rather than at a distance and to apply for jobs, including those that are only advertised locally, before taking advantage of social security entitlement.

48. And for that purpose, it is a relatively short period. It is, though, one that is sufficient to satisfy the fourth condition. The present tense in that condition – *is* seeking – must refer to the time when the claimants have to show that they are seeking work, which is the time when entitlement can begin under regulation 85A. The period provides a sufficient connection such that the claimant may fairly be said to be seeking work in the employment market of this country. That is how I understand what the Court of Appeal said in *Collins* at [76] and [88].

49. A period of three months fits with other provisions of EU law. An EU citizen has an initial right to reside for three months under Article 6 of Citizenship Directive 2004/38/EC without any conditions or formalities, so is able to satisfy the three months requirement on arrival as a jobseeker. And Article 24(2) of that Directive exempts a State from any duty to provide social assistance – jobseeker's allowance is social security, not social assistance - during the same period. It also ties in with the default period for exporting a jobseeker's allowance under Article 64(1)(c) of the social security co-ordination Regulation (EC) 883/2004.

50. The period is also remarkably similar to what has been accepted as the period within which it will usually be possible to establish habitual residence, a test that was approved in principle by the European Court of Justice in *Collins*, and then found to be proportionate by the Court of Appeal in that case.

51. This analysis does admit of the possibility of someone satisfying the condition who makes no effort at all to establish a connection beyond mere presence, someone like the bed-bound, box set addict of my earlier example, but

EU law does not prohibit conditions that are capable of operating more leniently than could properly be imposed.

K. Written submissions after the hearing

52. At the end of the hearing, I allowed the parties time to make written submissions on two issues. One was whether EU law required the United Kingdom to make effective provision for the possibility of challenging the three months requirement while it was still running. Counsel both submitted that in the circumstances of this case there was no such requirement; I accept that. In the course of her submission on this issue, Ms Smyth managed to incorporate further arguments on regulation 19. Mr Royston objected that the Secretary of State had not been invited to make further submissions on that issue. I have not taken the additional arguments into account in making my decision.

53. The other issue was whether, if the three months requirement was invalid, the First-tier Tribunal could apply a real link test in its place. I do not have to decide that issue. If I had, I would have decided that EU did not allow me to add this requirement as a condition of entitlement to a jobseeker's allowance. The three months requirement would fall away, leaving the test of habitual residence, which has been found legitimate by the Court of Appeal in *Collins*.

Authorised for issue
on 28 April 2020

Edward Jacobs
Upper Tribunal Judge