

S.S. LAW P.A.

THE SOCIAL SECURITY LAW PRACTITIONERS' ASSOCIATION

Social Security Law Practitioners 'Association Minutes of meeting held on 6TH July 2006

Present.

Desmond Rutledge	Garden Court Chambers (Chair)
Stephen Knafler	Garden Court Chambers (Speaker)
Keith Venables	Leicester Law Centre (Speaker)
Finola O'Neill	Wandsworth and Merton Law Centre
Joanna Newth	Mary Ward Legal Centre
Emma Baldwin	FRU
Nadine Clarkson	Ole Hansen & Partners
Alban Hawksworth	Age Concern England
Jeffrey Thomson	FRU
Jo Silcox	Hertfordshire Money Advice
Sue Willman	Pierce Glynn Solicitors
Polly Glynn	Pierce Glynn Solicitors
Kate Smith	Citizens Advice
Fiona Seymour	Citizens Advice
Simon Cocklean	The Commissioners' Office
Arnold James	The Commissioners' Office
Dave Ohlsan	Southwark Law Centre
Natasha Cade	Ole Hansen & Partners
Tom Kulick	Wandsworth and Merton Law Centre
Reza Chouhry	Mary Ward Legal Centre
Adam Hundt	Pierce Glynn
Alan Lean	Thurrock Council
Helena Sheizon	Kadmas Consultants
Martin Williams	LASA
Rose White	LASA
Jeanie Wilkinson	Camden Law Centre
Jayne O'Kicke	Duncan Lewis Solicitors
Judith Lass	Hodge Jones & Allen

Apologies

Sarah Clarke	CPAG
Adrian Berry	Garden Court Chambers

Guest Speaker (1): Keith Venables Subject: The Right to Reside Test and the Recent Tribunal of Commissioners' Decisions

The speaker distributed a handout at the meeting entitled "The Right to Reside Test and the Recent Tribunal of Commissioners' Decision" in which he describes the five linked cases¹ in which the claimants were economically inactive at the

¹ CIS/3573/2005 CPC/2920/2005; CH/2484/2005; CIS/2559/2005 and CIS/2680/2005.

time they claimed benefit. A summary of the arguments discussed at the talk is set out below.

Domestic law and the “right to reside”

The speaker described the main submission put to the Tribunal of Commissioners in the case CIS/3573/2005 in the following terms. Since there was no definition of a right to reside in the legislation, the term should be given its ordinary meaning. In the immigration context, EEA nationals cannot be refused entry to the UK and they can only be required to leave in very limited circumstances. In practice the Home Office has no policy of removing EEA nationals on the grounds that they are economically inactive. Accordingly, if someone can stay indefinitely in the UK, how is that different from having a right to reside?

The Commissioners accepted the submission that it is “very difficult” to remove EEA nationals but rejected the submission that a de facto presence in the UK was the same as a right to reside. But the Commissioners gave no real explanation as to why the right to stay somewhere was different to a right to reside somewhere.

It was also argued that refusing benefit would bring the UK in breach of ECSMA though this argument depended on there being some ambiguity in UK legislation. The Commissioners said the term ‘right to reside’ was not ambiguous though the guest speaker noted that it took some five days of legal argument before they came to that conclusion.

EU right to reside

The speaker explained that the main point in relation to EU law was that the limitation on the right to reside contained in the Directives should not be seen in traditional domestic law terms as “exclusion clauses” but rather, taking the broader approach adopted in EU law, the Directives authorise Member States to terminate or restrict the exercise of an EU citizens’ right to reside by taking steps to remove that person from the Member State but this should only be done when it is proportionate to do so. If this analysis was correct then this is a step to be taken by the immigration authorities and not the DWP.

The Commissioners’ Decisions contained little or no discussion of the ECJ case law. It was not looked at in any detail. It is therefore hard to explain why the Commissioners decided that if someone is not economically active then any right to reside must be derived solely from Directive 90/364 on self-sufficiency.

The Commissioners accepted that the right to reside test was indirectly discriminatory but accepted the Secretary of State’s assertion that it was objectively justified to protect UK tax payers from a potentially limitless financial

burden. No empirical evidence was called to justify this. The guest speaker suggested that there was uncertainty about the size of the alleged problem or whether this was a problem at all. There was no discussion of whether the application of the rule was proportionate in every case. The overall impression given by the Commissioners' decision is that economically inactive claimants will never have a right to reside and should therefore be refused any means-tested benefits.

The 'treated as' argument

This argument was based on the way the phrase "treated as" is used to graft the 'right to reside' test onto the existing 'habitual residence test. The argument was rejected because if the claimants were correct it would render the right to reside test totally ineffective.

The claimants in CIS/3573/2005, CH/2484/2005 and CPC/2920/2005 were refused leave by the Commissioners but intend to apply to the Court of Appeal for leave.²

Other case law on the right to reside

After dealing with the Tribunal of Commissioners' decision the speaker referred to a number of other cases in this area.

R (H and D) v Secretary of State for Work and Pensions [2004] EWHC 1097 (Admin)

This case arose out of the decision to remove NASS support from A8 nationals who had outstanding claims for asylum. The court rejected a submission, based on *Collins v Secretary of State for Work and Pensions* (Case C-138/02), that a work-seeker should be regarded as being in the same position as a worker and could not therefore be discriminated against. While individuals should not be discriminated against in their access to the labour market, Mr Justice Collins said it was not clear that the meaning of the word "worker" extends in all circumstances to cover someone who is seeking work. Even if that were the case, the court held that the annex to the Accession Treaty 2003 permits discrimination against access to the labour market in the UK and "that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out". It was a permissible means of avoiding benefit tourism and therefore proportionate (para 28). Mr Justice Collins added that Article 7.2 of Directive 1612/68 would only come into play if employment is achieved and there must be no discrimination once a person is in the labour market (para 29). Permission to renew was refused by the Court of Appeal in [2004] EWCA Civ 1468.

² Leave has granted in CIS/3573/2005 (Abdirahman v SSWP).

R (on the application of Conde) v London Borough of Lambeth [2005] EWHC 62 (Admin)

This case concerned an application for accommodation under the Children Act 1989 but also considered the rights of EU work-seekers. The claimant was a Spanish national who arrived in the UK in July 2004 with two small children aged five and three. She was fleeing domestic violence and decided to come to the UK to seek work. She had claimed JSA but this had been refused. In September 2004 she made representations to social services seeking assistance; including accommodation under s 17 of the Children Act 1989. This was refused on the basis that as an EU national she was excluded from such assistance (para. 5 of Schedule. 3 of the Nationality Immigration and Asylum Act 2002). The claimant argued that she was a work-seeker and had a right to remain in the UK for a reasonable period in order to enable her to obtain employment. The refusal to provide her and her family with accommodation was an unlawful obstacle to the exercise of those rights. It was also discriminatory as between UK nationals and other Community nationals and was disproportionate. The claimant relied on *Collins v Secretary of State for Work and Pensions* C-138/02 and the observations of Advocate General Geelhoed in *Bidar v London Borough of Ealing* C-209/03, November 11, 2004.

Collins J. ruled that the ruling in *Collins* was concerned with a benefit that was linked to the facilitating of access to employment. The provision of support under the Children Act had nothing directly to do with that or the social advantages referred to in Article 7(2). In any event, the rights under Article 7(2) were confined to workers and did not extend to work-seekers. Nor could citizenship justify opening up these benefits to any person who runs into difficulty. The local authority was therefore correct to take the view that the provision of support under the Children Act 1989 was not something to which the claimant was entitled as a job-seeker. Collins J. added that the situation was different for a worker who has for whatever reason, lost his or her job and thus needs to fall back on some sort of benefit as Article 7(2) of 1612/68 explicitly refers to that possible situation.

Ali v Secretary of State for the Home Department [2006] EWCA Civ 484

The appellant was a Somali national who had been refused asylum in the United Kingdom. His wife was a Dutch national and they had a son who was receiving education in the United Kingdom. The principal argument before the Court was that his son, who was a Dutch national, had a right to reside in the United Kingdom in order to be educated here by virtue of Article 18 of the Treaty and that he, the appellant, was entitled to accompany his son while the latter was a minor. It was submitted that any child who is a citizen of the European Union is entitled to reside in any member state for the purpose of receiving primary or secondary education and that his parents, if providing care, are entitled to

accompany him so as to prevent any inhibition on the exercise of his right to "move and reside freely" under Article 18.

The Court disagreed. None of the ECJ's decisions recognise such an unfettered right of residence, and several of them clearly imply that there is no such right merely because of Article 18. In *Baumbast v. Secretary of State for the Home Department* [2002] ECR I – 7091, paras 51-52, the ECJ upheld the right of residence of a child who was a European Union citizen who was receiving primary education, but it did so on the basis that the child's parent was a citizen of the Union entitled to freedom of movement as a worker under Article 39. To deny the child the right of residence would inhibit the parent from exercising his Article 39 right. It was a persistent theme in the Directives and the jurisprudence of the Luxembourg Court, that the right of residence under Article 18 was not unfettered. It was subject to the principle that the exercise of that right should not place an unreasonable burden on the public finances of the host State. It followed that the appellant himself could not obtain any derivative right as the father of that child. The Court observed that there was no evidence that the appellant was the primary carer of his son, which was the basis of the derivative right (*Chen* [2004] ECR I – 9925). The Court noted that a similar argument had been raised and rejected in *R v. Secretary of State for the Home Department, ex parte Vitale* [1996] All ER (EC) 461.

R (on the application of Mohamed) v London Borough of Harrow [2005] EWHC 3194 (Admin),

This was another application for accommodation where the claimant relied on their status as a work-seeker or as a citizen of the union. The claimant was a Dutch national, who had come to the UK from the Netherlands in July 2003. She worked part-time until 2004 when she was made redundant and she registered as unemployed at the JobCentre Plus. Around this time she was joined by her children and moved into a flat. HB only covered 80% of the rent and by September 2005 she was facing eviction proceedings for rent arrears. Her application for housing assistance under section 188(3) of the Housing 1996 Act was refused on the basis that she was not exercising EC Treaty rights. Dismissing her application for judicial review, Jackson J held that the claimant was not a worker because (i) none of the conditions for retaining the status of a worker, some 15 months after she had ceased working, applied, (ii) she did not have a sufficiently close connection with the United Kingdom employment market and (iii) it could not be said that she was a work-seeker. Jackson J also rejected a submission that she had a right to reside as a citizen of the Union. The right to reside under EU legislation was subject to the qualification that the individual should not be an unreasonable burden on the social assistance system. Under UK domestic legislation the claimant was no longer a "qualified person" under Reg.5 of the Immigration (EEA) Regulations 2000 (SI 2000/2326). Accordingly, the claimant no longer had a right of residence in the UK under Regulation 14(1) and 21(3)(a)(i). The fact that the Home Office had not taken steps to remove the

claimant does not confer legality upon her presence in the United Kingdom; *Chief Adjudication Officer v Wolke* (1997) 1 WLR 1640 (*R(IS) 13/98*) could be distinguished. Jackson J said his conclusion was also consistent with the reasoning of the ECJ in *Bidar v London Borough of Ealing* (2005) Case C-209/03 and the reasoning of Collins J R (*Conde*) v *The London Borough of Lambeth* [2005] EWHC 62 (Admin). Jackson J added that the decision in *Trojani v CPAS* (2004) Case C-456/02 should be distinguished, since Mr Trojani (unlike the claimant in the present case) had a residence permit (para 37).

Putans v London Borough of Tower Hamlets [2006] EWHC 1634 (Ch)

This is the leading case on A8 nationals in the housing context. The matter was in the Chancery Division because it concerned an injunction requiring the local authority to accommodate the appellant pending his homelessness appeal which the local authority had set aside. This was the appellant's appeal against that decision.

The appellant was a national of Latvia who obtained registered employment in the UK in September 2004. This ceased in May 2005 due to ill health. He was admitted into hospital in July 2005. He then applied to Tower Hamlets as homeless in September 2005. Tower Hamlets decided that he was ineligible for housing assistance. The hearing had to decide whether to restore the injunction requiring the local authority to accommodate the appellant pending his homelessness appeal. The appellant argued that the provisions of the Accession State Worker Registration Scheme and the loss of his right to remain in the UK was an unjustified derogation from Article 39 of the EC Treaty on the freedom of movement for workers.

The Court held that the loss of the right to remain, on involuntarily ceasing employment was within the scope of the derogation and was authorised by the European Union (Accessions) Act 2003. The discrimination between A8 nationals and EEA and UK nationals was justified by member States' concern over the economic impact of the potential increase in their labour markets from persons from states recently acceded to the EU. Even if the provisions of the Accession State Worker Registration Scheme were incompatible with EU law, the appellant would still be unable to claim that he needed to be accommodated to avoid breach of his EU rights. The High Court in *R (on the application of Mohamed) v London Borough of Harrow* [2005] EWHC 3194 (Admin) and *R (on the application of Conde) v the London Borough of Lambeth* [2005] EWHC 62 (Admin) have ruled that work-seekers have no EU rights to be accommodated and the applicants in both those cases were nationals of existing EU states with full guarantees under Art. 39. Mr Putans' appeal was therefore dismissed.

CIS/3890/2005

This decision deals with the retention of worker status due to "temporary incapacity". The claimant, a German citizen, had come to the United Kingdom in April 2004. She commenced full-time employment in August 2004 but became incapable of work after two months, due to a back problem. She was then awarded IS on the ground that she was incapable of work. Six months later, in April 2005, the Secretary of State superseded the award on the basis that she had ceased to be a "worker." By the time of the hearing the claimant had in fact returned to work. The Tribunal confirmed the decision on the basis that the back condition was "permanent" rather than temporary. The Commissioner allowed the appeal stating that while the claimant's back condition was a permanent one, it did not follow that her incapacity was not temporary. The fact that the claimant had returned to work was sufficient to show that the condition was not one that would permanently incapacitate her in respect of all work

Postscript –

Decisions Issued Since the Meeting in July 2006

C6/05-06(IS) (Northern Ireland)

The claimant was a Polish national who travelled to Northern Ireland in July 2004. She was in employment from July 2004 until January 2005 which was registered with the Home Office under the Worker Registration Scheme ("WRS"). Then she changed jobs but her new employment was not registered under the WRS. She worked until July 2005 when she entered a women's refuge with her daughter after being subject to domestic violence. She claimed IS on behalf of herself and her daughter. This was refused on the basis that as she had not been covered under the Worker Registration Scheme for a whole year so she had no right to reside.

A tribunal allowed her appeal. It concluded that Art. 7 of Regulation EEC/1612/68 was unaffected by the derogation and continued to apply (relying on the *Lopes da Veiga v Staatsecretaris van Justitie* (Case C-9/88) and the *Hellenic Republic* cases (Case C-305/87)). It concluded that IS was a social advantage and covered by Regulation 1408/71. The effect of the 2004 Regulations was to discriminate directly against Accession State nationals on grounds of nationality and Art. 7 prohibited such an outcome. The Accession Treaty did not permit derogation from Art. 7. The claimant was a worker when she was employed by an unauthorised employer. It concluded further (relying on decision *R(IS)12/98*) that the claimant, having continued to seek work after her registered (and unregistered) employment ended, was still in the labour market and she therefore remained a worker for the purposes of Art. 7(2) of Reg. 1612/68. The Secretary of State appealed.

The Commissioner held that no derogation from Art. 7 was permitted by the Act of Accession but doubted whether the claimant was covered by Art. 7(2) once she ceased her registered employment. The Commissioner said that while *R(IS)12/98* was authority for the proposition that a person who has acquired the status of worker for purposes of Regulation 1612/68 can retain that status while unemployed and seeking work, it did not have relevance to the scope and implications of the permitted derogations.

The Commissioner agreed with the reasoning in the case of *"D" v Secretary of State for Work and Pensions* [2004] EWCA Civ 1468 that the term "worker" did not necessarily extend to a work-seeker and this included those who had worked and subsequently became unemployed and sought out-of-work benefits. However, even if the claimant could be considered a worker, the Commissioner, like the Court in *"D"*, considered that in any event the Annex to the Act of Accession Treaty permitted discrimination in access to the labour market of the United Kingdom and "that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out" (para. 15). The Commissioner also said that the arguments accepted by the ECJ in *Grzelczyk* (Case C-314/99) *Baumbast*, (Case C-413/99) *Trojani* (Case C-456/02), were not appropriate to the circumstances of this case. In all of those cases the applicants had been granted a residence permit and the ECJ referred to the limitations on the right to reside. The Commissioner therefore concluded that the right to reside test was within the permitted derogation from what is, in any event, a conditional right to reside. The Commissioner also ruled that restrictions imposed on A8 nationals' right to reside by the registered workers scheme were within the permitted restrictions on access to the labour market contained in paragraph 2 of Annex XII (on Poland) to the Accession Treaty. The Commissioner commented that it was unfortunate that because the claimant did not register her employment she ended up in a very disadvantageous position compared to what her situation would have been had she complied, but that did not affect the legality of the Scheme. Leave to appeal was granted by the Commissioner to the Court of Appeal of Northern Ireland.

CIS/3182/2005

The claimant was a Dutch national who came to the UK in April 2004. She obtained work for a period of two months but then gave up work because she was pregnant. She gave birth to her son prematurely in October 2004. He remained in a delicate condition and she had not returned to work by December 2004 when her claim for IS was disallowed. The claimant made two main submissions.

- First, that as she had been an employed person in Holland she was entitled to IS by virtue of Regulation (EEC) 1408/71. Furthermore, Article. 3 of Regulation 1408/71 outlawed discrimination on the ground of nationality. The justification accepted in *C/S/3573/2005* of "benefit tourism" did not apply as

the claimant had been economically active and had been forced to cease work through no fault of her own.

- Secondly, she was temporarily incapable of work by reason of her child's illness so she should not cease to be a qualified person under the terms of reg. 5(2)(a) of the Immigration (EEA) Regulations 2000 (SI 2000/2326). Reliance was placed on the approach taken in *Drake v. Chief Adjudication Officer* (Case 150/85) [1987] Q.B. 166.

The Commissioner dismissed the claimant's appeal. He held that Regulation 1408/71 only confers a right to benefit "in accordance with the legislation of that State", and this includes the "right to reside test" imposed by reg. 21(3G) of the 1987 Regulations. The claimant could not rely on reg. 5(2)(a) because the incapacity had to be due to an illness or accident suffered by the person who claimed to be a worker. The Commissioner rejected the argument that it should extend to cover those who temporarily cease to be economically active because they need to look after children.

The Commissioner said it was clear from the reference to the policy statement mentioned at para. 26 of *CIS/3573/2005* that it was aimed at restricting long-term access to income-related benefits payable out of general taxation to people who decide to live indefinitely in the UK without being economically active. The application of the "right to reside test" was therefore justified in cases where the claimant has been economically active for a short period (here two months) and no longer has a right of residence because they have ceased to be in the job market or are temporarily incapable of work. The Commissioner accepted that it was not the claimant's fault that her child was ill and that it might not have been possible for her to travel to Holland while the child was ill in hospital. But she had known she was pregnant and would have known that she would be without any support if she was unable to work when the child was born. Therefore she had sufficient opportunity to return to Holland prior to the baby's birth. The Commissioner did however acknowledge that the justification accepted in *CIS/3573/2005* might not apply to people who have been economically active in the past or who have been established in the UK for many years but for some reason or other have not acquired a permanent right of residence (para. 14).

CIS/3875/2005

The case concerned a French national who had never worked in the UK and was diagnosed as suffering from paranoid schizophrenia. At the time he claimed IS he was living in a hostel run by St Mungo's and received support from caseworkers and had been put in touch with mental health services. A tribunal found that the claimant had a right to reside in the United Kingdom under reg. 5(1)(d) of the Immigration (EEA) Regulations 2000 (SI 2000/2326) because he was a recipient of services within the terms of Art. 50 of the EC Treaty. The Secretary of State appealed.

The Commissioner held that the provision of accommodation, social services and medical services were capable of falling within the scope of Art. 50 but this was subject to two limiting factors. Firstly, that those services are provided for remuneration. Secondly, that while a person has the freedom to go to another Member State in order to receive social services or medical services for a temporary period, Art. 49 did not guarantee someone the freedom to move their principal home to another Member State for the purposes of receiving such services for an indefinite period. The Commissioner said that the case of a person who travelled on business or as a tourist could be distinguished from that of a person whose movement from one Member State to another has no commercial motive at all (*Cowan v. Trésor public* (Case 186/87)). As there was no evidence before the tribunal that the claimant had come to the UK for the purpose of receiving services this was fatal to his claim to be a qualified person under reg. 5(1)(d) of the 2000 Regulations.

The claimant also argued that while Community law recognises that a Member State is entitled to restrict the right to reside, it is unlawful to impose a blanket policy without regard to the question whether it is proportionate in any particular case. The Commissioner said that the facts of this case could not be distinguished from those of *CIS/3573/2005*. Although the claimant might be regarded as having been particularly vulnerable when his claim for IS was determined, it was always open to him to return to France.

CH/3314/2005 and CIS/3315/2005

The claimant had been awarded IS for some 2 months until she obtained work in July 2004. The work lasted for some 3 months and she made a new claim for IS in October 2004. The claim was refused on the grounds that she failed the right to reside test. The claimant submitted that she remained a "worker" and therefore a "qualified person" according to EC case law as summarised in R(IS) 12/98. Even if she ceased to be in the labour market for full-time employment because of her childcare responsibilities she nevertheless remained in the labour market for part-time employment. The claimant was seeking work as a cleaner for 2 hours a week to fit in with her childcare responsibilities.

Counsel for the Secretary of State conceded that a person could be a work-seeker notwithstanding that he or she was claiming IS rather than JSA. As the DWP had no system of enabling claimants of IS to register the fact that they were work-seekers, the Commissioner was prepared to take a liberal approach to evidence of availability to work. But a mere assertion that someone was a work-seeker was not enough.

The Commissioner went on to consider what is the test for determining whether the work being sought is "effective and genuine" in terms of EU law. The Commissioner held that the judgment in *Kempf* (Case C-139/85) did not preclude a national court from considering whether work is "effective" by reference to the

extent to which the claimant has recourse to social assistance. Having regard to the need to be self-sufficient referred to in Regs 5 and 14 of the EEA Regs and Directives 68/360/EEC and 90/364/EEC, the Commissioner concluded that a person should be regarded as a burden on the social assistance scheme of the UK if the employment they are seeking would be insufficient to remove entitlement to IS/JSA and pay for those housing costs that would be covered by Housing Benefit. In other words, the claimant could only be regarded as retaining the status of a worker while unemployed if they were seeking work that, with working tax credit, would produce an income equivalent to their applicable amount for IS/JSA purposes, plus their rent (para 28). The Commissioner also held that if a claimant put substantial restrictions on the hours they are prepared to work, e.g. due to caring responsibilities and if the range of work being sought was very narrow, then the claimant would not be regarded as having a reasonable prospect of securing "effective" employment (paras 30/31).

Guest Speaker (2): Stephen Knafler

Subject: The New Citizens' Directive and the EEA Regulations 2006 and the Persons from Abroad Regulations 2006

The Speaker produced a handout (attached) in which he describes the concept of the 'right to reside' as set out in the new Directive 2004/38 and how this impacts on entitlement to welfare benefits (social assistance) by reference to the Social Security (Persons from Abroad) Amendment Regulations 2006 (SI 2006/1026). The handout contains a list of "those who can claim benefits" and "those who are excluded." These minutes can only give a brief summary of the issues covered in the talk.

The new Directive 2004/38 consolidates the existing EC legislation relating to the right to reside (Preamble (3)) and codifies some of the principles established in citizen of the Union case law (Preamble (16)). It introduces some new developments, including (i) inclusion of civil partners as family members of EU nationals (Article 2/3); (ii) the introduction of an initial right of residence of 3 months (Article 6); (iii) the introduction of a permanent right of residence after 5 years' residence (Article 16-18) and retention of a right to reside by family members in the event of divorce, annulment or termination of a registered partnership (Article 13).

Article 6 confers a new right to reside for the first 3 months of an EU citizen's stay in the UK but it is subject to them not becoming an unreasonable burden (14(1)). A Member State can refuse to provide any social assistance to EC nationals during those first 3 months (Article 24(2)).

Article 7 provides that the right of residence can extend beyond 3 months where the EU citizen is a worker; a student, or is self-sufficient (see Article 8(4)). The

circumstances in which a citizen retains the right to reside upon becoming involuntarily unemployed are set out in Article 7(3)(a)-(d)).

The Direction has been implemented into UK law by two sets of regulations. The Home Office introduced the Immigration (EEA) Regulations 2006 (SI 2006/1003) and the DWP introduced the Social Security (Persons from Abroad) Amendment Regulations 2006 (SI 2006/1026).

The relevant provisions in the EEA Regulations include: the initial right to reside for three months (Reg 13); the extended right of residence (Reg 14) and permanent residence (Reg 15); definitions of a worker, self-sufficient person and student (Reg 3) qualified persons and when a person who is no longer working shall continue to be treated as a worker (Reg 6).

The policy behind the Persons from Abroad Regulations was to remove any entitlement to means-tested benefit during the initial three months where the sole basis for the right to reside was that conferred by Article 6, with the exception of JSA, which in turn passports them to HB/CTB. The definition of a person from abroad for JSA is therefore different, in that in contrast to the other means-tested benefits, (IS, PC, HB and CTB) the definition for JSA does not exclude a right to reside based on being a worker or a work-seeker. Note that if someone is awarded JSA this will passport them to HB/CTB so the claimant effectively side-steps the definition of a person from abroad in those benefits as well.

Official guidance explains how the provision is supposed to work in the following terms: The DWP guidance to local authorities in Circular 'HB/CTB A9/2006' April 2006 provides:

"Work-seekers have a right to reside under *Article 39 of the EC Treaty*, under the new Directive and the *Home Office 2006 EEA Regulations*. Work seekers are able to claim JSA(IB). They cannot claim IS or State Pension Credit on the basis of a right to reside under *Article 39 of the EC Treaty*, Article 6 of the new Directive or the equivalent provisions in the *Home Office 2006 EEA Regulations*. In claiming JSA(IB) they must also satisfy the second part of the HRT, ie actual habitual residence. Their right to reside is for an initial period of six months unless they can show that they are genuinely seeking work and have a reasonable chance of being engaged, (para 44).

Work-seekers on JSA(IB) will be passported through the HRT for HB and CTB. Work seekers who are not on JSA(IB) will not be passported through the HRT for HB and CTB. Their right to reside as a work seeker is a non-qualifying right to reside when claiming HB or CTB only," (para 45)."

The Official Guidance issued to DWP decision-makers in 'Memo DMG Vol 2 02/06' provides: -

"Work seekers who have registered with Jobcentre Plus and have claimed JSA will have a right to reside for an initial period of six months, and for longer if they are genuinely seeking work, and have a reasonable chance of being engaged [1]. A person who has a right to reside as a workseeker (or a family member of such a workseeker) will not satisfy

the right to reside aspect of the habitual residence test for IS and SPC[2]. Such a right to reside will satisfy the test for JSA(IB),"[3] (para 5).

[1] Directive 2004/38/EC Art 14(4)(b); Case C-292/89, Antonissen; Immigration (EEA) Regs 2006, reg 6(1)(a), reg 6(4) and reg 14;

[2] IS (Gen) Regs, reg 21AA(3); SPC Regs 2002, reg 2(3):

[3] JSA Regs, reg 85A(3)

Minutes prepared by
Desmond Rutledge
Monday, 04 December 2006

Next Meeting: Overpayments and Benefit Fraud – 30 January 2007.