Bullen 185

CJSA/4065/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons given in paragraph 4 of my reference of a request for a preliminary ruling to the European Court of Justice, the decision of the Leeds appeal tribunal dated 18 February 1999 is erroneous in point of law and I set it aside. It is expedient for me to substitute a decision on the claimant's appeal against the adjudication officer's decision dated 1 July 1998, having made the necessary findings of fact (Social Security Act 1998, section 14(8)(a)(ii)). My findings of fact are set out in paragraphs 9 to 11 of the reference. My decision is that the claimant's appeal is disallowed and that he is not entitled to jobseeker's allowance from and including 8 June 1998.

2. To save repetition, a copy of my reference to the European Court of Justice (ECJ) is attached to the present decision as Appendix 1 and I also assume that any reader has available the judgment and ruling of the ECJ in *Collins v Secretary of State for Work and Pensions* (Case C-138/02) issued on 23 March 2004. Following that judgment, I issued a direction for further written submissions on the effect on the outcome of the claimant's case, which produced differences of view as between his representatives (in the submission dated 10 May 2004 jointly prepared by Mr Richard Drabble QC and Mr Paul Eden) and the Secretary of State (in the submission dated 30 July 2004 prepared by Miss Eleanor Sharpston QC). Accordingly, I granted the requests of both parties for an oral hearing, which unfortunately could not, because of the other commitments of counsel, be held until 19 November 2004.

3. The claimant attended the hearing. Oral submissions were made by Mr Drabble and by Miss Sharpston. I am grateful for their clarity, although I fear that they did not make the questions that I have to answer any easier. I directed further written submissions on the significance of the French text of the ECJ's judgment, which were completed early in February 2005.

A. The issues remaining to be determined

4. A brief recap of the current state of the case may be helpful. Like the appeal tribunal, by virtue of paragraph 3(1) of Schedule 6 to the Social Security Act 1998, I am restricted to taking into account the circumstances obtaining from the date of his claim for jobseeker's allowance (JSA), 8 June 1998, down to the date of the decision under appeal, 1 July 1998, the claimant having arrived in the United Kingdom on 31 May 1998. As he plainly did not satisfy the contribution conditions for contribution-based jobseeker's allowance (JSA), only income-based JSA was in issue. The decision made on 1 July 1998 was that the claimant was not entitled to JSA from and including 8 June 1998 because he was not habitually resident in the UK and therefore had an applicable amount of nil. That was because he fell within the additional definition of "person from abroad" in regulation 85(4) of the Jobseeker's Allowance Regulations 1996 (the JSA Regulations).

5. In the reference to the ECJ I decided that the appeal tribunal's decision of 18 February 1999 was to be set aside as erroneous in point of law and that I would substitute a decision on the appeal against the decision of 1 July 1998 having made the necessary findings of fact. I also

decided that the claimant was not habitually resident in the UK at any date from 8 June 1998 to 1 July 1998 under the domestic law test (paragraph 12(i)) and was not resident in the UK at any of those dates for the purposes of Article 10a of Council Regulation (EEC) No 1408/71 (paragraph 12(ii)). For the latter purpose, the somewhat broader principles approved by the ECJ in *Swaddling v Adjudication Officer* (Case C-90/97) [1999] ECR I-1075, R(IS) 6/99, taking account of length of residence merely as one factor, were applied. In paragraph 53 of his Opinion in the present case, Advocate General Colomer indicated his agreement on the latter point, so that if the claimant was within the personal scope of Regulation 1408/71, he was not assisted by Article 10a. As it turns out, I do not need to resolve the doubts expressed by the Advocate General (in paragraph 54 of his Opinion) and the ECJ (paragraph 52 of its judgment) about whether the claimant was within the personal scope of Regulation 1408/71.

6. Accordingly, the claimant's only chances of success depended on whether he fell into any of the categories of person specified in the additional definition in regulation 85(4) as deemed to be habitually resident in the UK or on whether there was some principle of Community law that required his entitlement to income-based JSA to be determined without the application of a residence test at all. The only potentially relevant categories in regulation 85(4) were those in head (a):

> "a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No 68/360/EEC or No 73/148/EEC;"

Regulation 1251/70 and Directive 73/148 were not relevant to the claimant, as he was not seeking to become established in the UK as a self-employed person.

7. In relation to the question of whether the claimant was a worker for the purposes of Regulation 1612/68, I had already decided in paragraph 11 of R(IS) 3/97 (and see R(IS) 12/98) that:

> "It is absolutely plain from the terms used by the ECJ [in *Centre public d'aide sociale de Courcelles v Lebon* (Case 316/85 [1987] ECR 2811] that not all those to whom some provision of Regulation 1612/68 [applies] are workers and that if all that can be said in favour of a person is that the person has moved from one Member State to another in order genuinely to seek employment in the second Member State the person is not a worker for the purposes of Regulation 1612/68."

The person would not, on that approach, become a worker until he or she had undertaken some occupational activities in the second Member State. In the present case, although the claimant had done some part-time and casual work in the UK in 1980 and 1981, he had not worked or looked for work anywhere within the European Community between then and 1998 (having worked in the USA and Africa), so did not retain the status of worker under the principles discussed in R(IS) 12/98. What was argued for the claimant was that the judgment of the ECJ in *Martínez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691 had expanded the concept of worker for the purposes of Regulation 1612/68, so that any national of a Member State (and

the claimant had acquired dual Irish nationality together with his citizenship of the USA) genuinely seeking work in another Member State was to be classified as a worker. I was in doubt about whether that argument was to be accepted or rejected and therefore referred the first question to the ECJ: whether a person in the circumstances of the claimant was a worker for the purposes of Regulation 1612/68.

8. The ECJ's answer was against the argument for the claimant. It first confirmed that no link could be established between the claimant's previous work in the UK and his search for a job in 1998, so that he had to be compared with any national of a Member State looking for his first job in another Member State. The ECJ then reiterated that only such nationals who are working or have worked, but despite no longer being in an employment relationship remain workers, in the Member State concerned may claim the same social and tax advantages as national workers on the basis of Article 7(2) of Regulation 1612/68. Member State nationals who move in search of work benefit from the principle of equal treatment only as regards access to employment (see Title I of Part I). However, the judgment continued:

> "32. The concept of `worker' is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the regulation [which includes Article 7] this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of `worker' must be understood in a broader sense.
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> 33. Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term `worker' as referred to by the national legislation at issue is to be understood in that sense."

9. The question identified in the last sentence of paragraph 33 of the judgment thus remains to be decided, as the parties differ on the answer.

10. I referred a second question asking whether a person in the circumstances of the claimant had a right to reside in the UK pursuant to Directive 68/360. The ECJ's answer was that the claimant's right of residence did not derive from Directive 68/360. It is agreed that the claimant therefore cannot be deemed to be habitually resident in the UK under that part of the definition in regulation 85(4) of the JSA Regulations.

11. I finally referred a third question asking whether any principles of Community law required the payment of income-based JSA to someone in the claimant's circumstances even though the domestic test of habitual residence was not passed. On this question, the claimant had in particular relied on the decision of the ECJ in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* (Case C-184/99) [2001] ECR I-6193 and the ruling that in accordance with Articles 6 and 8 of the EC Treaty (now Articles 12 and 17) citizens of the Union lawfully resident in another Member State are entitled not to be discriminated against on the ground of nationality in the provision of social and tax advantages whether or not the person comes within the scope of Regulation 1612/68. It was argued that there was discrimination here

because the habitual residence test could be satisfied more easily by UK nationals than by nationals of other Member States.

12. The ECJ has accepted the application of that principle in the present case, in combination with the right to equal treatment enjoyed under Article 48(2) (now Article 39(2)) of the EC Treaty by nationals of Member States seeking employment in another Member State. It has also accepted that the habitual residence test in the JSA Regulations places nationals of other Member States who have exercised their right of movement in order to seek employment here at a disadvantage, but subject to the possibility of justification of the discriminatory effect. The issue of whether the Secretary of State can show justification therefore remains to decided. In the absence of justification, the claimant cannot be found to be disentitled to income-based JSA under the habitual residence rule.

B. Worker for the purposes of Regulation No 1612/68

13. The ECJ's precise answer to my first question does not, with respect, tell anyone anything that they did not already know. No-one has suggested that the claimant was a worker for the purposes of Title II of Part I of Regulation 1612/68. The difficulty is that the words used in regulation 85(4) of the JSA Regulations in defining a category of persons to be treated as satisfying the habitual residence test are "worker for the purposes of [Regulation 1612/68]", ie for the purposes of the Regulation in general, not just Title II of Part I. The meaning of those words has been left to me to determine. Indeed the ECJ has arguably made matters more problematic by the suggestion, not I think expressly made in any previous judgment, that a person who can claim the benefit of other parts of the Regulation, although they have not entered into any employment relationship in the Member State concerned, could be understood to be "workers" in a broader sense.

14. For the claimant, Mr Drabble submitted that the claimant was a person entitled to benefit from other parts of Regulation 1612/68, as a national of a Member State seeking employment in the UK. It was also submitted that in Part II of the Regulation the label "worker" was used in situations where mere work-seekers were covered. The argument then at its broadest was that regulation 85(4) of the JSA Regulations had to be taken as referring to anyone exercising the right of free movement for workers, including for the purpose of seeking work, as that was the width of meaning allowed by the ECJ. The intention was to adopt the EC concept and, if the understanding of the scope of that concept shifted, so did the meaning of regulation 85(4). Alternatively, if regulation 85(4) was taken to give deemed habitual residence to those who had rights in relation to JSA under Regulation 1612/68 apart from under Title II of Part I, the claimant could rely on Article 5 (equal treatment in assistance afforded by employment offices) as a person seeking employment. In later written submissions, there was reliance on *McKiernon v Secretary of State for Social Security*, *The Times*, 1 November 1989, as approved by the House of Lords in *R v Secretary of State for Social Security, ex parte Britnell* [1991] 1 WLR 198 at 204f, but I find neither of those decisions of any assistance.

15. For the Secretary of State, Miss Sharpston submitted that the intention of regulation 85(4) in deeming certain categories of person to be habitually resident was to identify those categories to whom JSA would have to be awarded regardless of habitual residence because of

the UK's Community obligations, and that the obligations having that effect under Regulation 1612/68 were limited to those imposed in Title II of Part I. Assistance afforded by employment offices under Article 5 did not include payment of JSA. She also submitted that in 1996, when the JSA Regulations were drafted, the understanding was that only those who could benefit from Title II of Part I were workers. It was not until the judgment in *Collins* that there was any suggestion that "worker" could have a wider meaning under Regulation 1612/68.

16. My view is a relatively simple one. I do not need to decide whether the intention when making the JSA Regulations was merely to identify the category of persons to whom the UK owed Community obligations to award JSA or whether the intention was to refer to a Community concept of worker in a way that would involve a shift of meaning as the Community concept evolved. In my judgment, the reference in regulation 85(4) of the JSA Regulations to a "worker for the purposes of [Regulation 1612/68]" must have been intended to have a narrower effect than a reference to a person within the scope of application of the Regulation as a whole. By "worker" is meant a person who falls within the Community concept of worker in relation to the parts of Regulation 1612/68 that expressly confer entitlements on people in their capacity as workers, rather than in their capacity as nationals of a Member State. That restricts the meaning of the reference in the JSA Regulations to persons who are workers for the purposes of Title II of Part I of Regulation 1612/68. The meaning does not extend to persons who are entitled to assistance under Title I of Part I (in particular Article 5) or who fall only within the broader sense of "worker" mentioned to in paragraph 32 of the ECJ's judgment. In some Articles in Part II (clearance of vacancies and applications for employment), "worker" is used in a way that might include all applicants and potential applicants for employment, but that is in the context of the establishment of a machinery for co-operation between Member States rather than the conferring of entitlements on individuals in their capacity as a worker.

17. I therefore conclude that the JSA Regulations refer to a person within the concept of "worker" as set out in paragraphs 30 and 31 of the ECJ's judgment. The ECJ ruled in paragraph 29 that the claimant did not come within that concept and had to be compared with any national of a Member State looking for a first job in another Member State. Accordingly, he is not to be treated as habitually resident under the definition of "person from abroad" in regulation 85(4) of the JSA Regulations.

C. Justification of the discrimination on the ground of nationality

18. All of paragraphs 51 to 73 of the ECJ's judgment on the third question referred needs to be read carefully and as a whole, but for convenience I set out here the part about justification:

> "66. A residence requirement of that kind [ie the habitual residence test] 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).
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> 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, [Case C-224/98 *D'Hoop* [2002] ECR I-6191], 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.

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 the labour 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."

(i) Consideration of the French text of the judgment

19. In the direction dated 30 November 2004, I asked the parties whether it was proper for me to take into account the French text of the judgment, French being the working language of the ECJ, and, if so, whether any of the language used in that text threw any light on the difficulties of interpretation of the English judgment. In the end I have concluded that I can reach a decision without any significant reference to the French text. But as I received learned and interesting submissions on the question, I set out my views in Appendix 2 to this decision.

(ii) The test to be applied on justification

20. The difference between the parties is essentially over the meaning to be given to paragraph 72 of the ECJ's judgment and in particular the last sentence of that paragraph. Does it mean that there can be no justification for the imposition of an additional condition of habitual residence for weeks in which it is accepted that a claimant was seeking suitable work and in which the other conditions of entitlement to income-based JSA are met?

21. The basis of Mr Drabble's submission was that the effect of paragraph 72 was that the sole legitimate question to which a habitual residence test could be relevant, and the sole legitimate aim of the national provisions by reference to which justification could be considered, was whether the national authorities were satisfied that the claimant was genuinely seeking work. At the oral hearing he refined his consequential submissions into three alternative propositions:

(1) the answer to that sole legitimate question was in fact provided by the satisfaction of the other conditions of entitlement to JSA, so that there was no justifiable role left for a habitual residence test;

(2) if (1) was not accepted, the habitual residence test did not satisfy the conditions set out in paragraph 72, in particular the condition that the application of a residence test must rest on clear criteria known in advance, so that it could not be justified; and

(3) if the application of a habitual residence test was not precluded by (1) or (2), it could only be applied in a way that acknowledged the overall context of paragraph 72, by disregarding factors that did not help to answer the sole legitimate question, ie was the claimant's search for work genuine.

22. Miss Sharpston argued against Mr Drabble's propositions (1) and (2). On proposition (1), she submitted that the ECJ had known of the conditions of entitlement to income-based JSA in terms of actively seeking work and availability for work (see paragraph 68 of the judgment). It could not possibly have talked in paragraph 72 in terms of a residence requirement being in principle appropriate and have sent the issue of justification back to the national tribunal if the true principle to be derived from its judgment was that there was no justifiable role for the habitual residence test within income-based JSA in cases subject to the EC principle of non-discrimination on grounds of nationality. On proposition (2), she submitted that there were clear criteria (derived from case-law and administrative guidance identifying relevant factors) and the possibility of a means of redress of a judicial nature in the right of appeal to an appeal tribunal and beyond. On proposition (3), she accepted that in circumstances where the habitual residence test fell foul of the non-discrimination principle identified in paragraph 65 of the ECJ's judgment and had to be justified, it had to be applied in a way that allowed it be used as a means of satisfying the relevant authority that the claimant was genuinely seeking work and that the relevance of various factors would be coloured by that context. However, Miss Sharpston had also taken issue with the basis of Mr Drabble's submissions. She submitted that the words of paragraph 72 of the ECJ's judgment had to be looked at in the context of the preceding paragraphs, from which it was clear that a test could be justified although it involved a requirement that residence continue for a period during which the claimant was genuinely seeking work.

(iii) The meaning of the ECJ's judgment in general

23. I accept the substance of that last submission for the Secretary of State. I reject Mr Drabble's submission for the claimant, which I consider takes a wrong and too narrow view of the legitimate aims of the national provisions.

24. It seems to me that the structure of paragraphs 66 to 73 of the ECJ's authentic judgment is as follows.

25. Paragraph 66 merely sets out the well-established general principle on possible objective justification of a residence requirement that is discriminatory on nationality grounds, referring to the legitimate aim of the national provisions.

26. Paragraph 67 adopts the principle in *D'Hoop v Office national de l'emploi* (Case C-224/98) [2002] ECR I-6191 that it is legitimate for a national legislature to wish to ensure that there is a genuine link between a claimant and the geographic employment market in question. I note the use of the word "ensure". I do not need to explore the exact meaning of the French phrase used in *D'Hoop* ("lien réel") and translated to "genuine link", but note that in his Opinion in *R (on the application of Bidar) v London Borough of Ealing* (Case C-209/03), delivered on 11 November 2004, and with English as the original language, Advocate General Geelhoed used the phrase "real link" in several places in describing one of the principles for which *D'Hoop* and *Collins* stand.

27. Paragraph 68 merely sets out some of the conditions of entitlement to income-based JSA.

28. Paragraph 69 accepts that the legitimate aim accepted in *D'Hoop* could also be a legitimate aim in relation to a benefit like income-based JSA. I note the use of the terminology of only granting an allowance "after it has been possible to establish" that a genuine link exists.

29. Paragraph 70 then states, it appears only by way of an example, that such a link may be determined by establishing that a person has for a reasonable period in fact genuinely sought work in the relevant Member State. Its particular significance is in indicating that showing a genuine search for work (at least for a reasonable period) is a sufficient way of proving a genuine link with the geographic employment market, although other ways could also be acceptable.

30. That is shown by paragraph 71, which expresses the more general principle that the UK is able to require a connection between claimants of income-based JSA and the UK employment market. It does not matter that the word "connection" is a rather vague one. The UK could if it chose require a lesser degree of connection than allowed by Community law. What matters is that it cannot require a greater degree of connection than is allowed in terms of connection with a legitimate aim and proportionality, in accordance with paragraphs 67 and 69.

31. Then comes the significant leap in paragraph 72. The first and most important statement

of principle is that a residence requirement is in principle appropriate for the purpose of ensuring such a connection, ie a connection of up to but not beyond the degree allowable in accordance with paragraphs 67 and 69. That is significant in endorsing the potential efficacy of a residence requirement in a context like that of *Collins*. But it also necessarily entails that a residence test can be allowed, within limits, to act as a proxy for the test of whether or not there is a genuine or real link to the geographical employment market. It allows a different test than simply asking "is there a genuine link". As Advocate General Geelhoed put it in paragraph 61 of his Opinion in *Bidar*:

> "Obviously a Member State must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance [the social benefit in issue there] and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. ... It may be inferred from [the conditions laid down in *Collins*] that the Court recognises that a residence requirement may be imposed as a starting point of the assessment of the situation of an individual applicant. The fact that it states that the period must not exceed what is necessary for the purpose of enabling the national authorities to satisfy themselves that a person is genuinely seeking work in the domestic employment market indicates, however, that other factors must be able to be taken into account in that assessment. This is further borne out by its consideration in *D'Hoop* that the single condition applied by the national authorities in that case was too general and exclusive and that no account could be taken of other representative factors. Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a person, who can demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, the result would be contrary to the principle of proportionality."

32. I leave aside for the moment what was said in paragraph 72 of the ECJ's judgment about proportionality, clear criteria and means of redress. The crucial sentence is then this:

> "In any event, if compliance with the [residence] 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."

33. First, I have no doubt that that sentence does not have the effect that the sole legitimate question to be asked is whether the claimant was genuinely seeking work on any particular day, in the sense merely of taking active and appropriate steps to seek suitable work. The relevant legitimate aim in making the JSA legislation, as identified by the ECJ, is the wish to ensure that there is a genuine link (or in other words a real link) between the claimant and the UK employment market. That is the aim in relation to which proportionality must be tested.

34. Then, paragraph 69 of the judgment spells out that in pursuance of that aim it is legitimate to award benefit only after it has been possible to establish that such a link exists. And it is plainly accepted in paragraphs 69 and 70 that it is legitimate only to accept that there is

such a link at any particular date if there has previously been some sufficiently concrete expression of a connection with the UK employment market. It also seems to me that the notion of a genuine link or a real link carries with it a sense that the link has to have some concrete expression. In that context, I conclude that the pivotal part of the final sentence of paragraph 72 is the reference to what period of residence is necessary for the national authorities to be able to satisfy themselves that the claimant is genuinely seeking work. To be consistent with what has been said earlier, it must be legitimate for the national authorities to say that they are not able to satisfy themselves about the genuineness of a search for work until a proper search has continued for some period. A person may actually take steps to search for work on a particular day and actually have on that day an intention to continue to search diligently for suitable vacancies, but national authorities can legitimately say that they have not been satisfied that the search is genuine until they have seen that the search has been sustained, and in a sufficiently diligent and well-directed form, for some period. The condition of proportionality laid down by the final sentence of paragraph 72 is thus that a residence requirement, in principle appropriate, cannot be applied to deny entitlement to benefit beyond the date at which the relevant national authority has become satisfied of the genuineness of the claimant's search for work.

(iv) The claimant's proposition (1)

35. Accordingly, Mr Drabble's first proposition in paragraph 21 above cannot stand. It is not the case that any claimant for income-based JSA who satisfies the conditions of availability for and actively seeking work on a day must be accepted as having satisfied the national authorities about a genuine link with the UK employment market and must (if within the protection of the EC principle of non-discrimination on the ground of nationality) be awarded benefit. The UK authorities may not as at that day be satisfied the claimant has a genuine or real link with the UK employment and, if so, can legitimately deny benefit if it is considered that the claimant is not habitually resident in the UK. On that basis, there is no difficulty in seeing why the ECJ did not itself express the conclusion that the use of the habitual residence test in income-based JSA could not be objectively justified and left that issue to the national tribunal.

(v) The claimant's proposition (2)

36. Mr Drabble's second proposition can only stand if the application of the habitual residence test does not rest on clear criteria known in advance or if there is no provision for a means of judicial redress. Taking the second point first, I have no doubt that the right of appeal to an appeal tribunal, an independent and impartial tribunal able to consider afresh all issues of fact and law, against a decision of an adjudication officer (now the Secretary of State) disallowing entitlement to income-based JSA for any period for failure of the habitual residence test constitutes adequate provision for a means of judicial redress. That is so even though section 12(8)(b) of the Social Security Act 1998 prevents the appeal tribunal from taking into account circumstances obtaining after the date of the decision under appeal. There is a further remedy in the claimant's hands in the making of a new claim or claims after a disallowing decision. And it may be possible for an appeal tribunal, as the Secretary of State could have done, to make an advance award of income-based JSA under regulation 13 of the Social Security (Claims and Payments) Regulations 1987 beginning on some date after the date of the decision, if satisfied that all the requirements of entitlement will be satisfied on the later date if circumstances do not change (see Commissioner's decision CIS/3280/2003 and others in the

particular context of the habitual residence test and paragraph 50 below).

37. On the second point, Mr Drabble submitted that the result of the application of the habitual residence test in any particular case was inherently uncertain. It involved the weighing up of a number of factors that, because all the circumstances of individual cases had to be considered, could not be precisely identified in advance. It also involved the application of an individual judgment, in particular on the question of whether there had been a sufficient period of residence to indicate that the residence had acquired the quality of habitual residence. I do not need to set out the decisions relied on, from the House of Lords down to the Commissioner, for the flexibility of the test, the influence of the context in which the test is applied and the range of possible outcomes that could be regarded as a reasonable product of individual judgment. Mr Drabble did not flinch from applying his submission to circumstances in which the Community concept of residence, ie habitual residence, under Article 10a of Regulation 1408/71 was in issue.

38. Two of Miss Sharpston's submissions to the contrary seem to me to be particularly persuasive. The first was that there is a difference between having clear criteria known in advance and being able to predict the outcome of the application of the test. That seems to me to be right. The essential criteria under the domestic habitual residence test were authoritatively established by the House of Lords in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, R(IS) 2/00. The person concerned must have a settled purpose, voluntarily adopted, of residing in the UK (including the common travel area) for the time being and have actually resided here for some period that shows that the residence has become habitual. Lord Slynn said this (omitting references):

> "It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, `durable ties' with the country of residence or intended residence, and many other factors have to be taken into account.
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> The requisite period is not a fixed period. It may be longer where there are doubts. It may be short (... `A month can be ... an appreciable period of time).
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> There may indeed be special cases where the person concerned is not coming here for the first time, but is resuming an habitual residence previously had ... ."

39. If the test to be applied in the present case is that under Article 10a of Regulation 1408/71, the essential criteria have been authoritatively established by the ECJ in *Swaddling*:

> "29. The phrase `the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons that have led him to move; the length and continuity of his residence; the fact (where this is the case)

that he is in stable employment; and his intention as it appears from all the circumstances (see, *mutatis mutandis*, concerning Article 71(1)(b)(ii) of Regulation No 1408/71, Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23).

30. For the purposes of that assessment, however, the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation No 1408/71."

40. Both those tests leave a good deal of room for the application of a judgment to all the circumstances and all the factors pointing in opposing directions, leaving open the prospect of different results reasonably being reached by different authorities in very similar circumstances. But, in my judgment, the criteria meet the requirements set by the ECJ in paragraph 72 of its judgment in *Collins*.

41. It is instructive to look in more detail at the ECJ's decision in *D'Hoop*. The claimant there was a Belgian national who had completed her secondary education in France in 1991. After university studies in Belgium, where her parents were resident, she applied in 1996 for a tideover allowance paid under Belgian legislation to young people who had just completed their studies and were seeking their first employment. Her claim was disallowed for failure to satisfy the statutory condition of having completed her secondary education in Belgium. The ECJ held that the application of that condition put at a disadvantage Belgian nationals who had exercised their freedom to move to pursue education in another Member State, contrary to the principles underpinning the status of citizen of the European Union. Application of the condition was therefore precluded unless objectively justified. The judgment (in the English translation) continued, after noting the neither the Belgian government nor the relevant social security institution had submitted any observations on the point:

"38. The tideover allowance provided for by Belgian legislation, which gives its recipients access to special employment programmes, aims to facilitate for young people the transition from education to the employment market. In such a context it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned.

39. However, a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued."

42. *D'Hoop* was a case where the condition under which benefit was disallowed did not even get to the status of in principle appropriate. But it is significant that the single criterion adopted in the Belgian legislation, which could not have been more clear and known in

advance, was unacceptable because it did not allow a true evaluation of the real and effective degree of connection with the Belgian employment market. It was too general and exclusive. It seems to me to follow that, if a residence requirement is to be acceptable as a proxy for a direct finding of genuine or real link with the geographic employment market (as the ECJ has accepted in principle in *Collins*), it must allow sufficient flexibility not to fall foul of being too general and exclusive. Thus, the necessity for clear criteria known in advance cannot be taken to require a hard-edged rule that produces an absolutely predictable result or a Member State will be deprived of the freedom of action that the ECJ has ruled is open to it.

43. The other particularly persuasive submission for the Secretary of State is linked. It is that a test in terms of residence, meaning habitual residence, is common in Community legislation. It is used throughout Regulation 1408/71 and in particular in Article 10a in defining those to whom Member States are required to pay special non-contributory benefits. The nature of the criteria laid down by the ECJ in *Swaddling* in such cases, building on earlier case-law, are no more clear and ascertainable in advance than those of the UK's domestic habitual residence test. Indeed, the Community test arguably leaves the outcome in any particular case less predictable by virtue of the principle that the length of residence is not an intrinsic or necessarily relevant factor. It would be extraordinary, if the ECJ in Collins had intended to indicate that a test involving the criteria of a similar kind to those laid down in Swaddling would not meet the conditions of proportionality, for it not to have spelled out that conclusion in the clearest possible terms. The ECJ's failure to do so strengthens my conclusion against Mr Drabble's second proposition in paragraph 21 above.

(vi) The claimant's proposition (3)

44. I look at this first as a general proposition before considering the submissions about the application of the habitual residence test to the findings of fact already made in the present case. Here, there appeared to be a measure of agreement between Mr Drabble and Mrs Sharpston at the oral hearing, as noted in paragraph 22 above. However, the agreement was only on the surface. There was some agreement that factors relating particularly to links to the UK employment market had to be given primacy, but, in the light of my conclusions in paragraphs 32 to 34 above, that does not have the dramatic consequences argued for by Mr Drabble. He submitted that, as my findings of fact indicated that the claimant was genuinely seeking work at the date of claim, he had to be found to be habitually resident in the UK from that date. But that only follows from asking the wrong question. However, I prefer a slightly different approach.

45. In my judgment, the condition in the final sentence of paragraph 72 of the ECJ's judgment should not be given effect by taking certain factors out of the equation when operating either the domestic UK or the Community habitual residence test, on the ground that they are not relevant to the genuineness of a link to the UK employment market. First, I have some difficulty in working out exactly what factors would be excluded, when it is a link to a particular geographical employment market that is in issue. Second, and more important, it seems to me that there is a risk of making the test itself rather incoherent if too many versions of it are to be operated in different legal circumstances. I would prefer to operate the condition in a somewhat more literal way, in line with Advocate General Geelhoed's approach in his Opinion in *Bidar* (see paragraph 31 above). When he talks there of taking other factors into account in an

assessment, in addition to a residence requirement, he is talking of the assessment of the result ultimately reached on the entitlements of the person concerned. In the present context, the appropriate habitual residence test should be applied in the ordinary way. But, if the result on any day is against the claimant, there should then be a check against the answer to the question "has the point been reached on that day that the relevant national authority has become satisfied of the genuineness of the claimant's search for work (as explained in paragraph 34 above)?" If the answer to that question is yes, then the result of the ordinary application of the habitual residence test cannot be applied against a claimant within the scope of the Community principle of non-discrimination on the ground of nationality. Similarly, if for some other reason such a claimant has a genuine or real link to the UK employment market, that result cannot be applied (although it is hard to envisage how such a link could exist if the claimant is not currently genuinely seeking work). If the answer is no, then the result can be applied.

46. I add as a small footnote that the Secretary of State rightly did not seek to argue that the habitual test does not require a "period of residence", merely that a claimant's residence has attained the particular quality of habitualness. There is no doubt that the principle adopted by the ECJ in the final sentence of paragraph 72 of its judgment is to be applied to any rule that can in substance take into account of length of residence, of whatever quality, as a factor.

(vii) The conclusion on justification

47. The result of my rejection of Mr Drabble's propositions (1) and (2) is that I hold that the application of the residence requirement embodied in the habitual residence test in the JSA legislation and in Article 10a of Regulation 1408/71 is, subject to the proviso mentioned below, justified by objective considerations independent of the nationality of the claimant and proportionate to the legitimate aim in the making of the JSA legislation. The requirement meets the conditions as to proportionality set out in paragraph 72 of the ECJ's judgment in relation to the legitimate aim of establishing that a real or genuine link exists between a claimant and the UK employment market, such as by being satisfied of the genuineness of the claimant's search for work in that employment market. The proviso is that for the application of the requirement for any day to be proportionate in any particular case, the question mentioned at the end of paragraph 45 above must be answered in the negative.

D. The application of the law to the facts of the case

47. The conclusions I expressed in the order for reference to the ECJ were that, on my findings of fact, the claimant was not either habitually resident in the UK or resident here for the purposes of Article 10a of Regulation 1408/71 on any day from 8 June 1998, the date of his claim for JSA, down to 1 July 1998, the date of the adjudication officer's decision disallowing the claim. The claimant is not in a category of persons who are deemed to be habitually resident (see paragraph 17 above). Leaving aside the question of a possible advance award, there is nothing in EC law to prevent the application of that result in the period from 8 June 1998 to 1 July 1998 if the question mentioned at the end of paragraph 45 above is answered in the negative.

48. I do answer that question in the negative in the light of the findings of fact in paragraph 11 of the reference to the ECJ (Appendix 1). By 1 July 1998 the claimant had been taking steps

in actively seeking work for no more than a month. The work that he was seeking was suitable to his experience and qualifications and he was being reasonably diligent in the intensity of his search for work. I am prepared to accept that he would have satisfied the conditions of entitlement of being available for and actively seeking employment (as stated in paragraph 5 of the UK's written observations to the ECJ, although at the oral hearing on 19 November 2004 Miss Sharpston did not wish to make any concession on behalf of the Secretary of State). However, the claimant had not been in the UK prior to 31 May 1998 for more than 17 years. He had not made any arrangements about seeking employment or made more than the most general enquiries before arriving in the UK. The reasons for not doing so make sense in relation to the kind of work he was seeking, but nevertheless the fact is that he had not made any real prior enquiries. He was still staying with a friend. He was single and with no dependants. He had not made any accommodation or other arrangements or commitments that could not have been easily unscrambled. If he had decided to return to the United States he could have done so. He had close family and a bank account there, plus a return air ticket (although I accept that a return ticket was bought because it was cheaper than a single). He had a place to go to if Leeds or the UK had not worked out. In all those circumstances I conclude that one could not on 1 July 1998 be satisfied of the genuineness of the claimant's search for work in the UK employment market or that he thereby had a real or genuine link with that employment market. A further period of search for work would have been necessary before that conclusion could have been reached.

49. In paragraph 48 of its judgment, the ECJ recorded the view of the European Commission in its observations that it was not disputed that the claimant was genuinely seeking work in the UK during the two months after his arrival here. That has caused some misunderstanding in academic and other comments on the ECJ's decision, with suggestions that it was in consequence inevitable that the application of the habitual residence test to the claimant would be found disproportionate to any legitimate aim of the JSA legislation. A misunderstanding was involved, first, because the ECJ was not necessarily endorsing the view of the Commission and, second, because such a suggestion was based on what I have found to be a wrong reading of what the final sentence of paragraph 72 of the ECJ's judgment means. There may also have been some misunderstanding over why the appeal tribunal of 18 February 1999 and I did not say when the claimant might satisfy the habitual residence test after 1 July 1998. That was because of the prohibition in section 12(8)(b) of the Social Security Act 1998 (at the relevant time the provision giving effect to the principle was paragraph 3(1) of Schedule 6 to that Act) on an appeal tribunal taking into account any circumstances not obtaining at the time when the decision under appeal was made (ie in the present case 1 July 1998).

50. Until Mr Commissioner Rowland gave his decision in CIS/3280/2003 and others, little thought had been given to the question of whether the Secretary of State, an appeal tribunal or a Commissioner giving a substituted decision in habitual residence cases should consider whether, if the test was not met at the date of the Secretary of State's decision because a sufficient period of residence had not then occurred, to make an advance award of benefit from the date on which the period of residence would be sufficient (regulation 13 of the Social Security (Claims and Payments) Regulations 1987). It is not yet known whether the decision in CIS/3280/2003 will be followed or not (and I am not going to lengthen the present decision by going into the issue). For completeness, I briefly record that if I have the power to make an

award from a date after 1 July 1998, I decline to do so. Regulation 13 only gives a power and does not impose a duty. The evidence is that the claimant started work, albeit temporary and I think not in the sector he was particularly interested in, in early August 1998. The work was not described as part-time, so would appear to preclude entitlement to income-based JSA. In reality, the only advance period within which an award of income-based JSA could be made would run from 1 to 31 July 1998. I am satisfied that, in the light of my assessment of all the factors mentioned in paragraph 48 above, an additional month of residence and work-seeking would not have altered my conclusions as to the claimant not being habitually resident in the UK on the domestic or the EC test and as to not being satisfied that his search for work was genuine.

51. Accordingly, my substituted decision on the claimant's appeal against the adjudication officer's decision of 1 July 1998 is to disallow the appeal and to confirm the decision that he is not entitled to JSA from and including 8 June 1998.

(Signed) J Mesher
Commissioner

Date: 4 March 2005

APPENDIX 1

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's file no: CJSA/4065/1999

ARTICLE 177 OF THE TREATY OF ROME

REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES BY MR COMMISSIONER MESHER

IN THE MATTER OF A CLAIM FOR JOBSEEKER'S ALLOWANCE

APPELLANT: BRIAN FRANCIS COLLINS
RESPONDENT: SECRETARY OF STATE FOR WORK AND PENSIONS

1. This request for a preliminary ruling is made in the course of proceedings before the Social Security Commissioner on an appeal by the claimant from the decision of the Leeds social security appeal tribunal dated 18 February 1999. The issues in the case are whether the claimant satisfies the condition of habitual residence in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man, so as to be entitled to an award of income-based jobseeker's allowance and, if not, whether European Community law requires that condition not to be applied to the claimant.

A. Outline of the national proceedings

2. The case arises from the claim for jobseeker's allowance ("JSA") made on 8 June 1998. The claimant had arrived in the United Kingdom from the United States of America on 31 May 1998. The claimant holds dual nationality, from the USA and from the Republic of Ireland. Following investigations including an interview with the claimant, an adjudication officer on 1 July 1998 decided that the claimant was not entitled to JSA from 8 June 1998 because he was not habitually resident in the UK. The claimant appealed to a social security appeal tribunal. In accordance with paragraph 3(1) of Schedule 6 to the Social Security Act 1998, as the appeal was made after the date of the passing of that Act (21 May 1998), the tribunal was prevented from taking into account any circumstances not obtaining on 1 July 1998. Thus it was considering the questions of whether or not the claimant was habitually resident in the UK for all or any of the period from 8 June 1998 to 1 July 1998 and how that affected his entitlement to JSA in that period.

3. The tribunal dismissed the claimant's appeal. It decided that he was not habitually resident in the UK at 1 July 1998, applying a test of habitual residence including the concept of the need for residence to have continued for an appreciable time. It also decided that he was not under the relevant regulations to be treated as habitually resident, as he was not a "worker" for the purposes of Council Regulation (EEC) No 1612/68, nor did he have a right to reside in the

UK pursuant to Council Directive No 68/360/EEC.

4. The claimant appealed to the Social Security Commissioner with the leave of the chairman of the tribunal. There were detailed written submissions, both before and after an oral hearing on 23 January 2001. In the course of those submissions, the representative of the Secretary of State (who has taken over the functions of adjudication officers) submitted that the tribunal had erred in law in failing to deal adequately with some aspects of European law. I agree. The appeal tribunal failed to explain properly why it rejected the claimant's case that he was a worker for the purpose of Regulation 1612/68 and failed to deal with his case that he had a right to reside in the UK pursuant to Council Directive No 73/148/EEC. In addition, although it could not have known of the judgment of the Court in *Swaddling v Adjudication Officer* (Case C-90/97) [1999] ECR I-1075 (given on 25 February 1999), the tribunal erred in law in not applying the approach to the concept of residence laid down there in relation to cases under Article 10a of Council Regulation (EEC) No 1408/71. For those reasons, I am satisfied that the tribunal's decision of 18 February 1999 should be set aside.

5. The claimant's appeal against the adjudication officer's decision of 1 July 1998 must therefore be decided afresh. The parties are agreed that it is expedient for me, under the power in section 14(8)(a)(ii) of the Social Security Act 1998, to decide that appeal, having made the necessary findings of fact. The claimant attended the oral hearing on 23 January 2001 and gave evidence. To decide the appeal it is necessary to resolve a question or questions of Community law, to which in my judgment the answer is not clearly provided by the Court's jurisprudence. Accordingly, I have referred to the Court the questions set out at the end of this Order.

B. The national legislation

6. Jobseeker's allowance is a social security benefit provided under the Jobseekers Act 1995, operative from 7 October 1996. It is a replacement for unemployment benefit (a contributory benefit) and income support (a means-tested benefit) for the unemployed. There are two routes to entitlement, through contribution-based conditions and through income-based conditions. In the present case, the income-based conditions are those which are relevant, as the claimant had made no contributions that would qualify him for contribution-based JSA. As well as satisfying the conditions of being available for and actively seeking employment, of having entered into a jobseeker's agreement, not being engaged in remunerative work etc, a claimant's income must not exceed the applicable amount and his capital must not exceed a specified amount. These conditions are very similar to those in the income support scheme. The benefit payable is to be the applicable amount, if the claimant has no income, or otherwise the amount by which the applicable amount exceeds the claimant's income (section 4(3)). The only condition related to residence in the Jobseekers Act 1995 is that the claimant "is in Great Britain" (section 1(2)(i)).

7. However, the Act requires regulations to prescribe how applicable amounts are to be determined (section 4(5)). Regulation 85(1) of the Jobseeker's Allowance Regulations 1996 ("the JSA Regulations") provides that in circumstances specified in column (1) of Schedule 5 to the JSA Regulations the applicable amount is to be the amount prescribed in column (2). Paragraph 14(a) of Schedule 5 prescribes an applicable amount of nil for a person from abroad

who is a single claimant. In regulation 85(4) an additional definition of "person from abroad" is, as in force at the relevant time:

> "a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is--
>
> (a) a worker for the purposes of Council Regulation (EEC) No. 1612/68 or (EEC) No. 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC or No. 73/148/EEC; or
>
> (b) 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; or
>
> (c) a person who has been granted exceptional leave to enter the United Kingdom by an immigration officer within the meaning of the Immigration Act 1971, or to remain in the United Kingdom by the Secretary of State."

8. The effect is thus that a claimant who is not habitually resident in the UK or in one of the other prescribed territories cannot qualify for the payment of any income-based JSA. The rule is the same as that prescribed in the case of income support and considered by the Court in *Swaddling*.

C. The facts

9. These are my findings of relevant facts. They are based on the interview with the claimant on 30 June 1998, supplemented by what the claimant said in his letter of appeal to the tribunal, in evidence to the tribunal and in evidence to me. The claimant was born in 1957 in the USA. He was brought up and educated there, graduating from college in 1980. As part of his college course, he spent a semester in the UK in 1978. In 1980 and 1981 he spent about 10 months in the UK, living in rented accommodation in London and doing part-time and casual work in pubs, bars and in sales. By this time he had been granted Irish citizenship in addition to his American citizenship. In 1981 the claimant returned to the USA. I accept his evidence that he would have stayed in the UK longer if the economic downturn had not made it more difficult for him to find work after becoming involuntarily unemployed and having to claim benefits.

10. The claimant stayed in the USA until 1985, in employment. Then he joined the Peace Corps as an aid worker in central Africa for two years. He spent about six months back in the USA in 1987. In 1988 he moved to South Africa. He studied history and then worked as a teacher there. He had to leave South Africa in 1997 because the Ministry of Internal Affairs would not grant him the right of permanent residence. He returned to the USA and lived with his mother. He worked then for six months part-time in sales and for six months as a history teacher. He was also thinking about where he wished to settle and decided on the UK. He took steps to obtain a new Irish passport, which was issued on 9 February 1998.

11. The claimant arrived in the UK on 31 May 1998. He had bought a return air ticket as it was cheaper than a single ticket. He brought his personal possessions with him. He retained a

bank account in the USA. His family, ie his mother, two brothers and a sister, remained in the USA. He had not made any enquiries about specific job vacancies or possibilities, beyond asking about economic prospects generally in Leeds, when speaking to the friend with whom he arranged to stay when he arrived. However, I accept that his intention was to work in the social services sector as a care worker, where personal applications and interviews would be important. I also accept that his intention was to live and work in the UK for some significant length of time. He claimed JSA on 8 June 1998. I accept that he had by that time started looking for work by registering with employment agencies, particularly those specialising in the social services and care sectors, looking in local newspapers and visiting the Jobcentre, although I am not sure just what steps had been taken in that time or in the succeeding weeks. The claimant was not concerned whether he entered any employment relationship as an employee or as a self-employed person, but was looking in substance for jobs where he would be working for some organisation in the same way as an employee would. He did not advertise any services directly to the public or within the social services or care sectors. The claimant found a temporary job in early August 1998 (working in a public house), having had interviews with a few of the agencies. As already noted, the decision disallowing his claim for JSA was made on 1 July 1998. He moved to rented accommodation on 1 July 1998

D. Application of national law to the facts

12. This section briefly sets out my conclusions, omitting much of the underlying reasoning and the detailed citation of authority.

(i) Actual habitual residence

13. First, applying the test approved by the House of Lords in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, I conclude that on no day within the period from 8 June 1998 to 1 July 1998 was the claimant habitually resident in the UK or in another prescribed territory. Although little weight is to be given to his remaining ties to the USA, which were quite consistent with a change of habitual residence to the UK, there had not been an appreciable period of residence since 31 May 1998 sufficient to indicate that the quality of the claimant's residence had become habitual. In particular, the claimant's past history of living and working in a number of countries, the fact that he had not found work by the end of the period in issue and the fact that he had no independent accommodation, point towards that conclusion. I do not need to decide whether or not the claimant had been habitually resident in the UK in 1980/81, because in view of the lapse of time and the lack of connection with the UK in the intervening period, the claimant was not in any sort of special situation where he could be said to be resuming a habitual residence previously had so that no period of residence was necessary.

(ii) Residence under Article 10a of Regulation 1408/71

14. Second, applying the test approved by the Court in *Swaddling*, I conclude that on no day within the period from 8 June 1998 to 1 July 1998 was the claimant resident in the UK for the purposes of Regulation 1408/71 and in particular Article 10a. Although the length of residence in the Member State concerned is not an intrinsic or necessarily relevant factor in every case, I consider that it is relevant in the present case. The combination with the other factors mentioned in *Swaddling* and with the factors mentioned in paragraph 13 above leads me to my conclusion on residence. The circumstances of the present case are a very long way away

from those in *Swaddling*, where there had been strong connections with the UK during Mr Swaddling's absence from the UK working within the European Community. Therefore, although the claimant in the present case probably comes within the personal scope of Regulation 1408/71 and there is a sufficient Community element in his Irish nationality, Article 10a does not require the payment of income-based JSA to him.

(iii) Worker for the purpose of Regulation 1612/68

14. Third, is the claimant to be treated as habitually resident in the UK under one of heads (a) to (c) of the definition in regulation 85(4) of the JSA Regulations? Only head (a) is relevant. The strongest argument made for the claimant was that he was a worker for the purposes of Regulation 1612/68. There was particular reliance on the decision of the Court in *Martínez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, where it was said in paragraph 32:

> "In the context of Article 48 of the Treaty and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (see, in that connection, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, case 39/86 *Lair* [1988] ECR 3161, paragraphs 31 to 36, and Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 12 and 13)."

That paragraph, including the statement that a person who is genuinely seeking work, has been approved in a number of cases, including in 2001 *Rundgren* (Case C-389/99) 10 May 2001 and *Leclere and Deaconescu v Caisse Nationale des Prestations Familiales* (Case C-43/99) 31 May 2001.

15. The claimant's representative also relied on paragraph 34 of the judgment in *Martínez Sala*:

> "In the present case, the referring court has not furnished sufficient information to enable the Court to determine whether, having regard to the foregoing considerations, a person in the position of the appellant in the main proceedings is a worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68, by reason, for example, of the fact that she is seeking employment. It is for the national court to undertake that investigation."

He has pointed out that the national court had noted Mrs Martinez Sala's periods of employment in Germany between 1976 and 1986 and from September to October 1989 and her subsequent receipt of social assistance. The Court apparently regarded the missing element of fact as being whether or not Mrs Martinez Sala was currently seeking work in January 1993 when she claimed child-raising allowance. The claimant's representative has argued that it follows that a national of another Member State who has worked in the host State and is currently genuinely seeking work in the host State is a worker, regardless of the fact that the person has not been in

the labour market in the interim and that there had been a gap of some years since the person had last worked. He submitted that the claimant in the present case came within that principle. He also submitted that, if it was necessary for the claimant to have been in the labour market in the interim, his work activities outside the boundaries of the European Community should be taken into account.

16. The representative of the Secretary of State has submitted that *Martínez Sala* cannot be taken to have undermined the basic proposition in *Centre Public d'Aide Sociale de Courcelles v Lebon* (Case 316/85) [1987] ECR 2811 that mere work-seekers are not workers for the purposes of Regulation 1612/68 and cannot rely on Article 7(2). She then submitted that, as a person can only have that status by virtue of having worked in the Member State concerned, and if the person is currently not in employment, but genuinely seeking work, there must be some connection between the previous work and the person's current attachment to the labour market. That was, she said, consistent with the decisions relied on in paragraph 32 of the judgment in *Martínez Sala*. In the present case, she pointed to the gap of 17 years between the claimant's work in the UK and his next entry into the labour market in the UK, to the ending of that work having been a matter of choice (even if it was prompted by poor economic prospects here), and to his absence from any part of the European Community in the interim. Her conclusion was that the claimant had lost the status of worker in 1981 and did not acquire that status merely by becoming a work-seeker in 1998. There was no real dispute that the claimant's work in the UK in 1980 and 1981 was genuine and effective work, and not on such a small scale as to be regarded as purely marginal and ancillary. As the claimant apparently supported himself from his earnings during that time, I have no doubt in adopting that view.

17. Neither representative was in favour of a reference to the Court on this point. However, I am left in doubt about the Community meaning of "worker" for the purposes of Regulation 1612/68. There is doubt as to whether the broad statement in *Martínez Sala* applies in circumstances like those of the present case. It is necessary for me to decide the question, as I am not able to decide the case in the favour of the claimant on any other ground. Although the need to do so is in the context of applying a rule of national law which incorporates the Community meaning of "worker", that does not prevent the reference of the question to the Court. Accordingly, I refer the first question set out below.

18. No issue was raised on Regulation 1251/70.

(iv) Right to reside in the UK pursuant to Directive 68/360 or 73/148

19. The claimant's representative submitted that, if the claimant was not a worker for the purposes of Regulation 1612/68 (and so deemed to be habitually resident), he had a right to reside in the UK pursuant to both Directives. On Council Directive No 68/360/EEC, he submitted that since the claimant had rights under Articles 1 to 3 as national of another Member State to enter the UK as a work-seeker, he had a right of residence. The Secretary of State's representative submitted that while those Articles gave a right to enter the UK, it was only Article 4 which gave a right to residence and that, if a national of another Member State seeking work had a right of residence in another Member State, that derived from old Article 48 of the Treaty of Rome, not from the Directive. She relied on *Antonissen* and on my decision in

CIS/4521/1995, reported as R(IS) 3/97. She also submitted that the claimant's right to enter the UK derived from his nationality of the Republic of Ireland, part of the Common Travel Area, so that his Community rights were not engaged.

20. I do not accept that last point. In my judgment, because the claimant did not travel to the UK from another part of the Common Travel Area, he derived no particular rights from his nationality of a country within that Area. I would be inclined to reject the submissions for the claimant, as they do not persuade me that my decision in R(IS) 3/97 was wrong in concluding that a mere work-seeker does not have a right of residence pursuant to Directive 68/360. However, since I have already decided that I should refer to the Court the question relating to the Community meaning of "worker", I ought also to refer the question of whether a person in the claimant's circumstances has a right to reside in the UK pursuant to Directive 68/360, if the answer to the first question does not suffice to determine the case.

21. In relation to Directive 73/148, the claimant's representative submitted that the claimant was a person who wished to establish himself in order to pursue activities as a self-employed person in the UK (Article 1(1)) and who therefore had a right of residence when he took steps to establish himself. The Secretary of State's representative accepted, on the basis of my decision in CIS/3559/1997, reported as R(IS) 6/00, that a person who has not yet become established as a self-employed person has a right of residence once he has taken steps towards offering services to the public or otherwise setting up as a self-employed person. She accepted that the tribunal had erred in law by failing to consider this point, which had been raised before them, but left it to the Commissioner to find the relevant facts.

22. In my judgment, the factual basis for the application of the principle in R(IS) 6/00 has not been established. The claimant's lack of concern whether he became an employee or a self-employed person under some arrangement with an employment agency and its client is insufficient to show that he wished to establish himself in the UK in order to pursue activities as a self-employed person. As I have found, his intention in substance was to find work in which he would be employed under the direction and control of another person. This indicates a search for work as an employed person and not a wish to become established as a self-employed person. Therefore, I am satisfied that the claimant had no right of residence pursuant to Directive 73/148 and that there is no need to refer a specific question on this point to the Court. If the claimant's representative wants to pursue the point, it seems to me that submissions can be made within the ambit of the third question referred.

E. Does any provision of Community law require payment of benefit to the claimant?

23. The claimant's representative submitted that income-based JSA was "assistance" within Article 5 of Regulation 1612/68, so that even if he were to be classified as a mere work-seeker, Article 5 would require the claimant to be paid the benefit on the same conditions as UK nationals seeking employment. I would tend to agree with the Secretary of State's representative that Article 5 does not apply to assistance in the form of social security benefits, but to practical assistance from another person. Article 5 specifically refers to assistance from employment offices. Admittedly, the conditions of entitlement to income-based JSA require claimants to undertake activities designed to aid them in finding work (eg in entering a jobseeker's

agreement with an employment officer and in actively seeking work), so that the issue is not entirely clear-cut. However, even if Article 5 did apply, the claimant would have to show some discrimination against him as compared with work-seekers of UK nationality. The Secretary of State submitted that the habitual residence test is in accordance with the legislation applied equally to UK nationals and to nationals of other countries. The claimant's representative disagreed and submitted that there was indirect discrimination in that the habitual residence test is more easily satisfied by UK nationals.

24. That connects with the more general submission made for the claimant based on his status as a citizen of the European Union and the principles laid down by the Court in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* (Case C-184/99), 20 September 2001, building on the earlier statements in *Martínez Sala*. It was ruled in *Grzelczyk* that:

> "Articles 6 and 8 of the EC Treaty (now, after amendment, Articles 12EC and 17EC) preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 of the Council of 15 October 1968 on the freedom of movement of workers within the Community when no such condition applies to nationals of the host Member State."

The claimant's representative submitted that in the present case the claimant was to be regarded as lawfully resident in the UK and was therefore entitled to the protection of old Article 6 of the EC Treaty in a situation falling within the scope of Community law. He said that the situation fell within the scope of Community law because it concerned the exercise of the right to move and reside freely in another Member State in accordance with Article 8a of the EC Treaty and a social advantage within Article 7 of Regulation 1612/68. He submitted that the claimant was not accorded the same treatment in law as a national of the UK, contrary to Article 6 of the EC Treaty. In this respect he relied on a statement made in the House of Commons by the Secretary of State for Social Security on 14 June 1999, which reported purported instructions to adjudication officers to apply the test in *Swaddling* to people returning from any overseas country and re-establishing their ties here. I do not think that the statement advances the claimant's case, as first it may not represent actual practice after its date, any instruction to adjudication officers to disregard established legal principles being unconstitutional and of no legal force (see paragraph 18 of R(IS) 6/00). And second, the period in issue in the present case falls well before the date of the statement.

25. The representative of the Secretary of State submitted that the situation did not fall within the scope of Community law because the claimant had not exercised any right of free movement from another State within the Community to move to the UK and that the claimant was not at the relevant dates within the scope of Regulation 1612/68 because he was not a worker for the purposes of that Regulation. More fundamentally it was submitted that there was no inequality of treatment, for the same reason as put forward in paragraph 23 above. The habitual residence test was applied to all claimants, whatever their nationality, subject to the exceptions prescribed in the definition in regulation 85(4) of the JSA Regulations in favour of

those with certain EC rights, and it was denied that UK nationals were any more likely to satisfy the test than nationals of other Member States.

26. I have concluded that there is doubt about the application of the principles of EC law to circumstances like those of the present case. Apart from the points made for the Secretary of State, it may be relevant that both *Martínez Sala* and *Grzelczyk* involved rules which directly discriminated on their face against non-nationals of the host Member State. The application of the principles to indirect discrimination might not be identical. In addition, in the light of my findings of fact, it may be that at the relevant dates the claimant was not "resident" in the UK. Therefore a further question ought to be referred to the Court, if the answers to the earlier questions have not sufficed to determine the outcome of the case as a whole. As this is a particularly difficult area, I have concluded that I should not attempt to specify all the relevant principles of EC law or ask a series of specific questions. I might omit some question which ought to have been asked or incorporate some misunderstanding of the legal situation in the questions. Therefore I have formulated the question in very general terms.

QUESTIONS REFERRED FOR PRELIMINARY RULING

1. Is a person in the circumstances of the claimant in the present case a worker for the purposes of Regulation No 1612/68 of the Council of 15 October 1968?

2. If the answer to question 1 is not in the affirmative, does a person in the circumstances of the claimant in the present case have a right to reside in the United Kingdom pursuant to Directive No 68/360 of the Council of [15 October 1968]?

3. If the answers to both questions 1 and 2 are not in the affirmative, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case?

Referred to the Court on 28 March 2002
Corrected on 29 April 2002

APPENDIX 2

REFERENCE TO THE FRENCH TEXT OF THE ECJ JUDGMENT

1. It is common ground between the parties that there is a significant distinction from cases in which the meaning of Community legislation is in issue. There, all the different language versions are equally authentic, so that in cases of ambiguity, reference to other language versions is legitimate. In relation to judgments of the ECJ, Article 31 of the Rules of Procedure of the ECJ provides that the texts of documents drawn up in the language of the case (or in another language expressly authorised by the ECJ under Article 29 for use in the proceedings) is to be authentic. There was no alternative authorisation under Article 29 in the present case, so that the language of the case was English, as the language of the national tribunal making the reference (Article 29(2)). The certified copy of the judgment served on the parties under Article 64 and returned to me was the judgment in English as the language of the case.

2. There was then a divergence between the parties in their written submissions in reply to the direction on this issue. Miss Sharpston for the Secretary of State noted that the informal working language of the ECJ is French and that judgments were therefore drafted in that language and then translated into the language of the case. It was submitted that in the present case the French text would most accurately convey the original intention of the ECJ, as that would have been the text discussed and finalised by the judges in deliberation, so that it should be looked at as an aid, while bearing in mind that it is not the authentic version. Mr Drabble and Mr Eden for the claimant cited statements from learned commentators that English was sometimes used in discussion among the judges and that, given the use of English in all the written and oral submissions to the ECJ, might well have been used in discussion in the present case. As the deliberations of the Court are secret, it could not be assumed that French had been used. It was submitted that there was no justification for taking into account the French text of a judgment, when the language of the case was different. Where the interpretation of an ECJ judgment gave rise to difficulties, consideration should, by analogy with the principles of interpretation of Community legislation, be given to the purpose and general scheme of the judgment.

3. I do not attempt to give any exhaustive answers, because as the main part of the decision, I have reached a conclusion in the present case without needing to use the contents of the French text of the ECJ's judgment as part of the reasoning. But I should give some general response to the detailed submissions I have received, even though I have resisted the temptation to explore all the fascinating byways of the French language presented in those submissions.

4. Miss Sharpston mentioned that in the case of *Bobezes v Secretary of State for Work and Pensions*, on appeal from Commissioner's decision CIS/825/2001, the Court of Appeal (including in its membership Lord Slynn of Hadley) had called for the French text of two key ECJ cases under consideration and invited submissions on that text. One of those cases was *O'Flynn v Adjudication Officer* (Case C-297/94) [1996] ECR I-2617, where the language of the case was English. Mr Drabble and Mr Eden submitted that the Court of Appeal had proceeded without supporting authority in taking that course. The judgments in *Bobezes* were

handed down on 16 February 2005. Buxton LJ at [41] expressly referred to the expression used in the French text of the judgment in *O'Flynn* ("susceptible par sa nature même") at the point where the English text used the expression "intrinsically liable". The context was whether a provision was intrinsically liable to have a discriminatory effect. In a nice twist, at [24] Lord Slynn did not use the French expression, but its sense in English, in saying that it was:

> "enough in cases of discrimination based on nationality that the effect of the provision is `essentially' `intrinsically' `susceptible by its very nature' `by its own nature' liable to be discriminatory."

5. I do not accept the submission for the claimant that it is always improper to take into account the French text of an ECJ judgment when the language of the case is different (as I think that Mr Drabble and Mr Eden in practice recognised later in their submission). That is to some extent because the Court of Appeal in *Bobezes*, constituted as it was, thought it proper to do so in relation to the judgment in *O'Flynn* without the need to set out any authority. But it does not seems that either party in *Bobezes* raised any objection and the use made of the French text was extremely limited, so that I do not think that it can be regarded as anything near the last word on the issue.

6. The main factor is one that arises from the ECJ's characteristic method of setting out its reasoning against a background of judgments in previous cases where a variety of languages has been the language of the case. The Court tends to adopt statements of principle from earlier cases by adopting them word for word from the judgment. For example, in *Collins* there is reliance in paragraph 67 of the judgment on the principle stated in paragraph 38 of the judgment in *D'Hoop*, where the language of the case was French. In *Collins*, what appeared in the English text of *D'Hoop* was repeated. However, it could be that in the event of some ambiguity, the authentic French text of *D'Hoop*, as the language of the case, should be consulted. Concerns of that kind are shown in the Opinion of Advocate General Warner in *R v Bouchereau* (Case 30/77) [1977] ECR 1999 at 2023 and 2024, cited in Mr Drabble's and Mr Eden's submission. He was concerned that, if the Court in that case (where the language of the case was English) adopted statements from earlier cases in which the language of the case was not English, it should not adopt what he saw as inappropriate translations in the English text of the earlier cases. Thus, given the complex histories of statements of principle in ECJ judgment, where forms of words are repeated, but sometimes subtly altered and developed, reference to the texts in other languages may sometimes be helpful. And I think it is proper to take account of what appears to be common knowledge, even if the final deliberations of the Court are secret and take place without translators being present. This is that the final form of the judgment agreed on in deliberations is in French, while it is the translation (if necessary) into the language of the case that is signed as the authentic text and delivered to the parties (see Hartley, Foundations of European Community Law (5th ed 2003) pp 75 - 6 and Anderson and Demetriou, References to the European Court (2nd ed 2002), paragraph 9-061).

7. On the other hand, I do not accept the submission on behalf of the Secretary of State, if it was intended to be that the French text of a judgment could be used as a routine aid. It seems

to me that the primacy to be given to the authentic judgment in the language of the case requires that there be reference to the text in other languages only where some special circumstances exist. I do not attempt to define what might be special circumstances, but they might include cases where there is some real ambiguity or apparent inconsistency of language in the authentic judgment or where the factor mentioned in the previous paragraph comes into play. Those sort of circumstances might come within the scope of considering the purpose and general scheme of a judgment, as submitted for the claimant.